

THE ELIMINATION OF CHILD LABOUR: APPLYING A RIGHTS-BASED APPROACH

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ABSTRACT

Child labour is a major obstacle to the development of many countries today. It is only recently that development is being conceptualised in terms of the progression of human rights. It is even more recent that dialogue and policies for the elimination of child labour are using a rights-based approach. In this thesis, the application of a right-based approach to child labour is explored. Child labour is inextricably linked to the realisation of education for all and to poverty reduction. Both of these are fundamental aims of EU development policy. Thus, this study is focused on analysing the role of the EU in eliminating child labour and how a rights-based approach to development cooperation should be applied to this problem. The example of Kenya is used to demonstrate how the elimination of child labour is being conducted in a Sub-Saharan African state which is part of the Cotonou Agreement with the EU. The use of the enhanced role of political dialogue in the revised version of the Cotonou Agreement is presented as one way for the EU to accelerate its efforts in this area. The adoption of a comprehensive policy for the elimination of child labour with an embedded rights-based approach is recommended for both the EU in its development cooperation and for Kenya.

PREFACE

My interest in the issue of child labour stems from working in transitional education centres in New Delhi, India. My experiences in these centres taught me about the challenges of systematic poverty and the desperation faced by many people in the developing world- not least the children. This thesis was written under the supervision of Professor Markku Suksi and co-supervision of Alessandra Lundström at the Department of Law and Institute for Human Rights of Åbo Akademi University, Finland, as a component of the European Master's Degree in Human Rights and Democratisation 2009-2010.

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ACRONYMS

ACP	Africa Caribbean Pacific
ACRWC	African Charter on the Rights and Welfare of the Child
ACHPR	African Charter on Human and Peoples Rights
AU	African Union
EIDHR	European Instrument
EFA	Education For All
EU	European Union
C138	Convention No. 138
C182	Convention No. 182
CCT	Conditional Cash Transfer
CEDAW	Convention for the Elimination of all forms of Discrimination Against Women
CRC	Convention on the Rights of the Child
CRIN	Children Rights Information Network
GDP	Gross Domestic Product
GSP	Generalised Systems of Preferences
HIV/AIDS	Human Immunodeficiency Virus/Acquired Immuno Deficiency Syndrome
HRBA	Human Right Based Approach
ICESCR	International Covenant on Economic Social and Cultural Rights
IHRN	International Human Rights Network
ILO	International Labour Organisation
IPEC	International Programme for the Elimination of Child Labour
MDG	Millennium Development Goals
MOU	Memorandum of Understanding
NGO	Non Government Organisation
PRSP	Poverty Reduction Strategy Paper
SCREAM	Supporting Children's Rights through Education, the Arts and the Media

SIMPOC	Statistical Information and Monitoring Programme on Child Labour
TACKLE	Tackling Child Labour through Education
TBP	Time Bound Programme
TNC	Trans National Corporation
UCW	Understanding Children Work
UDHR	Universal Declaration of Human Rights
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UN	United Nations
UNAIDS	United Nations Joint Programme on HIV/AIDS
UNICEF	United Nations Children's Fund
USA	United States of America

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1. Introduction

1.1 A study on European Union (EU) external action in eliminating Child Labour

Child labour affects approximately 218 million children globally today.¹ In terms of both cause and consequence, child labour is a multi-faceted issue which has been on the international agenda for many years. Ranging from children working in hazardous conditions, to children being denied access to education and their right to childhood, the fundamental rights of these children are being violated. As a result of international action, in the 1990s, the pursuit of eliminating child labour has risen to the forefront of the international agenda. Now, in addition, the global financial crisis, poses a serious threat to progress made in this area, as empirical evidence shows that past financial crises has led to an increase in child labour.² The International Programme for the Elimination of Child Labour (IPEC) have confirmed that there has been a global slow down in the progress made in eliminating child labour since 2006 resulting in a rise in the number of boys aged between 15-17 years involved in the worst forms of child labour in Sub-Saharan Africa.³ Although not explicitly expressed, the elimination of child labour is also intrinsic to the realisation of the Millennium Development Goals (MDGs), particularly to the provision of universal primary education and the eradication of extreme poverty.

The United Nations (UN) development of the Human Rights Based Approach (HRBA) is a key advance in human rights discourse and practice which encourages cooperation between development and the advancement of human rights. The HRBA recognises that at the root of poverty and marginalisation is the denial of human rights and that progress in development is intrinsically linked to the progression of human rights.⁴ The protection of children from child labour has been clearly outlined by various human

¹ IPEC, 2006 (a), p. xi.

² IPEC, 2009 (a), p. 17.

³ IPEC, 2010, p. ix.

⁴ Frankaits, 2005, p. 5.

rights treaties⁵ and this is filtering into the domestic laws of state parties.⁶ However, law reform is only one of the challenges in the elimination of child labour. Another main challenge is the implementation of this legislation into policies and strategic plans and is the aspect which this study will focus on. More specifically this study is focused on how the EU is contributing to the fight against child labour through its external action policies. The way in which the EU defines a rights-based approach to development cooperation is optional for the EU and is not determined by how the UN defines it in the Common Understanding. Consequently, a principal question to be answered in this study is whether a rights-based approach to development cooperation is being implemented by the EU in its external action policies to combat child labour? This study attempts to answer this question by examining the processes involved in implementing laws to protect children from labour with a particular focus on how these policies consider the best interests of the child as outlined in Article 3 of the Convention on the Rights of the Child (CRC).

There are multiple actors working towards eliminating child labour ranging from international organisations such as the International Labour Organisation (ILO) and the United Nations Children's Fund (UNICEF) to regional mechanisms such as the EU and the African Union (AU), governments, Non Government Organisations (NGOs) and grassroot organisations. In addition to these actors there also exists numerous approaches to the elimination of child labour. In light of the many actors and divergent approaches involved this study will focus on EU cooperation with the ILO in efforts to eliminate child labour. Consideration is given through the lens of the best interests of the child. How a rights-based approach to development cooperation is influencing the development policies of the EU is a focus of this study. The elimination of child labour is one of the main pillars of the ILO and the organisation has continuously provided an international platform for the issue.⁷ The EU is one of the main donors to the ILO's

⁵ Convention on the Rights of the Child, Article 32 and the International Covenant of Economic, Social and Cultural Rights (ICESCR) Article 10 para 3; more detail on the protection of children from child labour in international law in 3.3.

⁶ 197 States have ratified, all United Nations States, excluding Somalia and the United States of America.

⁷ Fyfe, 2007, p. 8.

IPEC and thus is an important actor to consider in the campaign to eliminate child labour.⁸

IPEC is the leading programme in the elimination of child labour. Governed by the ILO Conventions, IPEC operates a programme of technical support and financial assistance to partner states to assist them in their fight against child labour. In addition the EU is growing in importance on the world stage through its many bi-lateral and multi-lateral agreements.⁹ The relationship between the two organisations and more particularly consideration of the processes involved and the strategies employed to eliminate child labour are central to the focus of this study. By way of providing a practical example, an examination of the EU's strategies and cooperation with IPEC in Kenya will be outlined.

Kenya is a country in Sub-Saharan Africa, which is one of the areas of EU external action through its partnership with African, Caribbean and Pacific (ACP) states. Sub-Saharan Africa has been named a priority area for the ILO/IPEC. However research on child labour in this region has been less than in Asia or the Americas.¹⁰ The EU and Africa have a deep rooted history and the relationship between the two regions is evolving from the "painful colonial arrangements into a strong and equal partnership based on common interests, mutual recognition and accountability".¹¹ Kenya is part of the EU's Cotonou agreement¹² with the ACP states and is home to programmes operated by IPEC. IPEC prioritises Sub-Saharan Africa as the area where most work is required and it identified this region as the focus of the IPEC agenda for the World Conference on Child Labour in The Hague, May 2010. Despite Asia accounting for the largest number of child labourers in any one region, Sub-Saharan Africa has the highest percentage of child labourers in the world. Taking these considerations on board, this study will scrutinise the EU's actions in eliminating child labour in Kenya. In particular

⁸ EU Commission and the Member States; for more information see Chapter 3.

⁹ Olufemi, B., 2005, p.18.

¹⁰ Fyfe, 2007, p. 66.

¹¹ EU Commission, Brussels, 'EU Strategy for Africa: Towards a Euro-African pact to accelerate Africa's development, 2005.

¹² A trade and aid agreement between the EU and the ACP states, discussed in 4.1.2.

this study will focus on how a rights-based approach to development cooperation is being applied through EU and ILO actions to combat child labour.

As states are the primary 'duty-holders' in respect of fulfilling human rights as set out in international law it is important to recognise the centrality of the role they play. In addition a chief principle of African-EU relations is based on the principle of 'subsidiarity', whereby the EU should engage with Africa's three levels of governance- national regional and continental- on the basis that 'only matters which would be dealt with less effectively at a lower level should be reserved for a higher level of governance'.¹³ As such it is necessary to identify the role of the government of Kenya in eliminating child labour. For this, it is essential to identify how these states are progressing with children's rights, so examination of the Concluding Comments from the Committee on the Rights of the Child is essential. As a rights-based approach to development should be implemented at all levels, it is interesting to examine if and how it is being implemented into the domestic development policies of this Sub-Saharan State. Child labour is identified as a major area of concern in Kenya and the elimination of child labour is essential to meet its commitment to achieve the Millennium Development Goals (MDG). It is vital to ask how the national development plans are approaching the elimination of child labour and are they consistent with both the best interests of the child and a rights-based approach. To address this question an overview of the global situation of child labour will be provided and will examine; the root causes, expand on the definition and elaborate on where protection of children from child labour fits into the international human rights framework. The overarching question being looked at here is: how entrenched is a rights based approach in the strategies of the main actors involved in eliminating child labour? Additionally, the aim is to establish how best practice for the elimination of child labour is respecting the core principles of a rights-based approach to development.

In economic, social and cultural rights there is an obligation on all states to help each other and at the same time for states struggling to meet minimum standards to ask for

¹³ *EU Strategy for Africa: Towards a Euro-African pact to accelerate Africa's development*, p. 19.

support from the international community. The EU continues to grow in importance as a global actor, especially through its strategic partnership with the ACP states. It is important to critically appraise its efforts in supporting actions against child labour as the majority of child labourers are in developing countries. The fourth meeting of the European Forum on the Rights of the Child in 2009 focused on the issue of child labour looking particularly at the role of social protection. Reviewing the papers from this meeting is important to obtain a general understanding of the current position of the EU towards child labour. Evaluating the capacity of the EU as an actor in the elimination of child labour will be included here. Thus this study will examine the EU's role in the elimination of child labour and will draw attention to the strategies pursued and how rights-based approach principles to development cooperation are being utilised by the EU.

1.2 Method and materials

In order to approach this topic it is essential to first define the scope and the limitations of this piece of research. The author recognises the magnitude of the topic at hand and understands the importance of limiting the scope of the research. To focus this study, the substantive chapters will focus on ILO and EU external action and the relationship these organisations have with Kenya in respect to developments in eliminating child labour. The purpose of focusing on these is based on two key factors. Firstly, the EU is a key donor in the ILO-IPEC programme and there is a well established relationship of cooperation between the two organisations which makes it worthwhile to conduct research on both of them. Focusing on how the EU and the ILO interact with Kenya gives more specific insight into the partnership and how best practice and the rights-based approach is addressed by the EU. Secondly, in light of the magnitude of the topic there would be a serious risk of only superficially dealing with the issue if the scope of the research was not limited.

This study is also limited by time constraints and as such setting realistic boundaries to the study is essential. Analysis of written sources will provide the baseline for the research. It is beyond the capacity of this study to conduct quantitative research which

would be based on field study and interviews. It will not be a legal analysis of what should be included in child labour legislation but rather will focus on the strategies employed by the EU and the ILO in order to protect children and young people in the workplace in light of the legal framework. Another important consideration is whether we will measure best practice in terms of process or impact. In order to look at impact, it would be essential to examine indicators which show in quantity the effects of the strategy used (i.e. how many children have been successfully removed from child labour). However, because this study is examining the issue through the lens of the best interests of the child, it is more appropriate to examine the process by scrutinising the strategies used in order to understand how these practices affect children in different ways and to determine which are in the best interest of the child. The hypothesis is that the problem is much more complex than just removing the child from labour. Thus to get a more holistic view on what is the best practice in the elimination of child labour it is essential to assess the processes involved. The example of Kenya has been chosen because it is a former British colony and thus English is the main business language in this country. This makes it possible to understand the key documents.¹⁴

This study will take a qualitative approach as described by Landman “qualitative methods seek to identify and understand the attributes, characteristics, and traits of the objects of enquiry, as well as the meanings, processes and context”.¹⁵ In this respect the study will use written sources to identify and understand how a rights-based approach to eliminating child labour is being applied and furthermore to establish how it can be measured. This study will compare the recommendations for best practice as suggested by the CRC to the actions taken in response by the EU. The main aim of the thesis is to draw general conclusions on how a rights-based approach is being adapted to the elimination of child labour. The research for this thesis will mainly involve analysis of treaty bodies, EU and ILO reports. Despite the multitude of literature and research carried out on child labour there is inconsistency in the discourse in relation to the

¹⁴ Other considerations given to the choice of Kenya as the case study are outlined in 5.1.

¹⁵ Landman, 2006, p.72.

definition of the concept of child labour. This will be addressed by outlining the various definitions and providing a working understanding for this study.

2. Conceptualising a rights-based approach to eliminating child labour

2.1. The UN Common Understanding of the HRBA to development cooperation

A right-based approach to development cooperation strengthens a state's ability to its primary responsibility of ensuring human rights for all.¹⁶ The UN Common Understanding of the HRBA to development cooperation was born out of a need to refocus development cooperation efforts from aid and trade to one of rights and entitlements. Vital to the emergence of the HRBA to development cooperation is to understand that the concept of 'development' was traditionally seen in terms of industrialisation and economic growth only. A shift in the paradigm meant that 'development' was refined to encompass the realisation of all human rights. This shift meant that a visible link between development and human rights emerged and "donor countries started to use development cooperation funds for programmes and projects aimed at promoting human rights and democratisation".¹⁷ The need for the HRBA came about because the right to development evolved to include the "development of the human person" in the UN Declaration on the Right to Development 1986. However, the approach did not address the way in which these outcomes are brought about.¹⁸ The HRBA aims to fill the gap in order to "reflect the integration of human rights standards and principles, both in terms of the process and outcome of development programmes and policies".¹⁹ The UN Common Understanding of the HRBA 2003 identifies human rights as both the means and the goal of development cooperation. As identified in the Common Understanding development should; all programmes of development co-operation, policies and technical assistance should further the realisation of human rights as laid down in the Universal Declaration of Human Rights and other international human rights instruments.

Human rights standards contained in, and principles derived from, the Universal Declaration of Human Rights and other international human rights instruments guide all

¹⁶ IHRN, 2008, p. 15.

¹⁷ Nowak, 2005, p. 17.

¹⁸ Myntti, 2005, p. 228.

¹⁹ Ibid.

development cooperation and programming in all sectors and in all phases of the programming process. Development cooperation contributes to the development of the capacities of ‘duty-bearers’ to meet their obligations and/or of ‘rights-holders’ to claim their rights.²⁰

2.2. The best interests of the child

According to the International Human Rights Network (IHRN); “Policies that promote HRBA are a fundamental precondition for best practice in all phases of development programming, from identification, formulation, implementation through monitoring and evaluation”.²¹ Best practice when implementing policies to protect economic, social and cultural rights is varied. In the case of children’s rights the best interest of the child as determined by Article 3 of the CRC must be at the centre of all actions taken by all actors. Thus this study will consider best practice as that which respects the best interests of the child. When determining best practice the following should be assessed; the resources available, the likely effectiveness, cost/benefit analysis and the impact it has on the rights of the child.²² Applying children’s rights in a way which is consistent to the best interests of the child is an issue which receives attention from the Committee on the Rights of the Child. General Comment No. 5 the Committee outlines how “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”.²³ The importance of making this distinction lies with the elimination of child labour is viewed, by some, as “serving the ideological needs of the labour movement”, being a case and point for them to show that liberalised trade needs to be “limited by social clauses and government intervention”.²⁴ To this end many developing countries are apprehensive about the intentions of the actors in the elimination of child labour.

²⁰ The Human Rights Based Approach to Development Cooperation- Towards a Common Understanding Among UN Agencies, 2003.

²¹ IHRN, 2008, p. 5.

²² Smolin, p. 984.

²³ CRC, General Comment No. 5, para 1.

²⁴ Smolin, p. 957.

2.3. Why does the fight against child labour need a rights-based approach?

So what does a rights-based approach mean for the elimination of child labour? According to Frankovits; “a rights-based approach to development integrates the norms, standards, and principles of the international human rights framework into the plans, policies and processes of development”.²⁵ In other words, the HRBA to development cooperation means that the ultimate aim of every decision made at every level should have the advancement of human rights at its core. For the UN agencies such as ILO and UNICEF, the HRBA should be embedded into all its actions when implementing programmes to combat child labour. A right-based approach to eliminating child labour puts the “internationally recognised rights of children at the centre of child labour discourse and policy”.²⁶

As can be seen in the forthcoming chapter, there has been a lot of ambiguity surrounding what constitutes child labour. Indeed finding universal consensus is next to impossible given the varied cultural practices and levels of development in different regions and states. As such it is very important to identify that the issue of child labour is not something that can be excused by custom or levels of development. It is essentially a rights issue and as such must be dealt with in this way. By accepting the principles and standards of the CRC, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Universal Declaration of Human Rights (UDHR), and the ILO Conventions the elimination of all child labour is unambiguous. By accepting the principles and standards in these treaties the state is agreeing that child labour should be prohibited. Three core criteria to all UN actions are outlined in the UN Common Understanding on HRBA to development co-operation and programming, namely; that human rights progression is the fundamental *aim* of all development activities, that human rights standards and principles from the UDHR, and other international human rights instruments *guide* all development cooperation and that all programmes contribute to *enabling* duty-bearers to meet their obligations and rights-

²⁵ Frankovits, 2005, p. 3.

²⁶ Weston, 2005, p. 428.

holders to claim their rights.²⁷ For child labourers this essentially means that all development activities, be they legislative or policy, enacted by states or by other actors, should aim to protect their rights established in human rights treaties.

Before the introduction of the CRC into the international human rights framework, the protection of children from child labour was “seldom addressed as a human rights problem”.²⁸ It was addressed from the perspective of the ‘needs’ of a child and not as an entitlement that all children are born with. Furthermore, the omission of ‘rights’ in the campaign against child labour, fails to acknowledge the state as a duty-holder with obligations to meet.²⁹ The problem with not addressing child labour from a rights-based perspective is that efforts to eliminate it get confused with ‘charity’ and ‘favour[s]’, which can be taken away at the will of the donor.³⁰ Pursuing a rights-based approach to eliminating child labour provides recognition that this practice in society is fundamentally contradictory to the inherent rights of all children. Thus, it can be said that a “rights-based approach to child labor elevates the needs and interests of children”.³¹ Child labour is a violation of basic human rights as enshrined in UN treaties³². Thus, child labour is unequivocally a rights-based problem which needs to be tackled by such means. Therefore, essential to this study is to question how entrenched a rights-based approach is to the strategies designed to combat child labour?

Recognising that child labour is intrinsically a rights violation is important because there have been many attempts to eliminate it through charity rather than through recognition that shortcomings of legislation and policy have led to the existence of over 200 million child labourers. A charity based solution does not address the root causes and therefore is not sustainable. States have neglected to fulfil their duties and protect children’s fundamental rights. Key to understanding child labour and consequently to eliminating it is to identify and address its links with general human rights. Indeed all

²⁷ UN HRBA Portal.

²⁸ Weston, 2005, p. xv.

²⁹ Ibid.

³⁰ Idem, p.7.

³¹ Ibid.

³² See Section 3.2 for the protection mechanisms against child labour in international law.

children's rights need to be put in the context of general human rights and not read in isolation.³³ This reflects the interconnectedness and the interdependence within all human rights.

³³ Weston, p. 431.

3. A rights-based approach to eliminating child labour

3.1. Introductory remarks

As identified in the introduction eliminating child labour has been on the international agenda for decades. Now more than ever it is essential to reflect on the successes and failures of the campaign and remobilise in light of the new challenges posed by the global economic downturn.³⁴ Economic shock in developing countries can result in less children enrolling in school and an increase in children forced to work in dangerous environments.³⁵ At the root of child labour lays a complex combination of social, cultural and economic factors. This multi-faceted problem needs a multi-faceted solution. For that reason there needs to be cooperation at all levels of action. The emergence of the HRBA to development cooperation has contributed to a change in the approach to eliminating child labour. This chapter aims to examine the main developments in combating child labour by firstly exploring the protection of children from child labour in international human rights law. Secondly, the root causes of child labour will be scrutinised. The chapter will then look at the actions of the main actors and observe their different approaches to the elimination of child labour. The overarching aim of this chapter is to establish what the global situation of child labour is and how the main actors involved apply a rights-based approach through their strategies. Subsequently the role of EU external action in the elimination of child labour will be explored. First and foremost, there is a need to provide a definition of child labour.

3.2. Finding an appropriate definition of child labour

3.2.1. Defining child labour: the lack of consensus

Defining child labour is difficult because what represents a ‘child’ and what constitutes ‘labour’ changes from state to state and likewise between International Organisations

³⁴ IPEC, 2009 (a), p. 13.

³⁵ UNICEF, 2009, p.62.

and NGOs. This study will adopt the UN definition by defining a ‘child’ as a person under the age of 18 years and protected by the CRC. In the context of children ‘labour’ has “over time come to imply harm or exploitation” whereas ‘work’ would mean employment which is viewed as “beneficial or benign”.³⁶ Beneficial or benign work includes domestic chores outside the hours of compulsory education. As already stated, child labour has been defined in different terms by different authors and actors in the field. In general, it is accepted that children may obtain work after attaining the minimum standard of education. This refers to 15 years for most states however, developing countries are permitted by the ILO minimum age Convention No. 138 to set 14 years as the minimum age, while accepting that the age will be raised to 15 in time. This lowering of the age is representative of the assumed link between child labour and economic development. The ILO Declaration on Fundamental Principles and Rights at Work of 1998 defines child labourers as both “economically active children and unpaid domestic workers”.³⁷ In Article 32 of the CRC child labour is defined as “economic exploitation...which 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”.³⁸

The UNICEF report *Child Labour Today* highlights that “child labour has been redefined to refer to all young people engaged in harmful employment, whether they are of school age or not”.³⁹ This definition change is representative of the shift by the ILO from the total abolition of all forms of child labour to a model of prioritisation where the focus is on the worst forms of child labour.⁴⁰ The implications of this model are that it recognises that there is a scale of child labour in terms of how harmful the work is to the child. Another implication of defining child labour in terms of worst forms of child labour is that there are some forms of child labour which are permissible. The worst forms of child labour as outlined in ILO Convention No. 182 are; all forms of slavery or

³⁶ Cullen, 2007, p.138.

³⁷ IPEC, 2004, p.3.

³⁸ Article 32, CRC.

³⁹ UNICEF, 2005, p. 7.

⁴⁰ Smolin, 2000, p. 942.

practices similar to slavery, prostitution, pornography or pornographic performances, illicit activities such as drug production and trafficking, and hazardous work- any work which is likely to harm the health, safety or morals of children. This Convention applies to all children under the age of 18 years, not 15 (or 14 for developing states) years as determined by the minimum age Convention No. 138. Paragraph 3 of Recommendation 190 further outlines what constitutes hazardous work. In the ILO Convention concerning the Prohibition and Immediate Action for the Elimination of the worst forms of child labour there are no indications of what is permissible work while Convention No. 138 identifies 'light work' as tolerable but fails to clarify what is included or excluded by this.⁴¹ Ultimately both the ILO and UNICEF focus on the impact of child labour on the development of the child.⁴²

Stop Child Labour, an amalgamation of NGOs in Europe working towards the elimination of child labour, define child labour as "all forms of work done by children under 14 years of age, that prevents the child attending full-time formal education and/or that is harmful to the physical and mental health and development of the child".⁴³ Education has been used as the baseline in lieu of a universally accepted definition of what is 'harmful' child labour. As such education is used to distinguish between good and bad child labour. It is critical to distinguish 'child labour' from domestic work done outside the hours of school such as household chores and farm work which, if not beneficial to the development of the child, are at least benign. According to Smolin this means that there is a distinction between a child who works outside of his/her attendance to school and a child who does the same work but does not attend school.⁴⁴ However, Smolin argues that this is not a simple distinction as there is a lack of access to education in many rural areas of developing countries. Thus, if there are no options of education, is work then in the best interests of the child?⁴⁵

⁴¹ See 2.3 for more on the ILO child labour conventions.

⁴² Humbert, 2009, p.18.

⁴³ Stop Child Labour: www.stopchildlabour.com [consulted on 02/04/2010].

⁴⁴ Smolin, 2000, p. 954.

⁴⁵ Ibid.

3.2.2. *Exploring the most prevalent forms of child labour*

Humbert identifies 8 main forms of child labour; work in hazardous occupations and industries, domestic work, street children, child labour in the informal sector, debt bondage, prostitution, child soldiers and other illicit activities.⁴⁶ However, because child domestic workers and child agriculture constitutes a significant majority of child labourers in Sub-Saharan Africa (and other regions) it is necessary to expand on what is meant by these forms of child labour. Child domestic labourers are children who perform household tasks in the household of a third person (i.e. someone outside their immediate family).⁴⁷ In many circumstances these child labourers are children who are taken away from their own families to work for someone in their extended family or else orphans taking in to work in return for food and shelter. The possible reasons for moving from their own families to work as child domestic labourers are multiple and include poverty, socio-cultural, gender-based discrimination, rural-urban migration and the loss of parents due to conflict or disease.⁴⁸ It is the toughest form of child labour to both measure and eliminate because of its hidden and complex nature.⁴⁹ IPEC have identified some of the hazards of child domestic labourers as long and tiring working days, use of toxic chemicals, carrying heavy loads, handling dangerous items such as knives, axes and hot pans, insufficient or inadequate food and accommodation and humiliating or degrading treatment, including physical and verbal violence and sexual abuse.⁵⁰ Considering these hazardous implications of child domestic labourers it is consistent to interpret it as a worst form of child labour, as defined in Convention No. 182. IPEC have said that it is difficult to collate data on child domestic labourers but it believes that female children are more at risk of this form of child labour, mainly due to the socio-cultural factors associated with this form of work, usually considered to be women's work.⁵¹ Indeed the issue of the invisibility of girl children in child domestic

⁴⁶ Humbert, p. 32.

⁴⁷ IPEC, 2006 (b), p. xiii.

⁴⁸ Idem, p. 6.

⁴⁹ IPEC, <http://www.ilo.org/ipec/areas/Childdomesticlabour/lang--en/index.htm> [consulted on 20/06/2010], it is also important to clarify that CDL does not refer to domestic chores done by a child within their own household and outside of school hours.

⁵⁰ Idem.

⁵¹ IPEC, 2006 (b), p. 6.

labourers is deepened by the perception that girls are learning useful skills. As a type of child labour it enjoys a social tolerance which makes tackling it a tougher challenge.⁵²

Overall though boys continue to be more exposed to child labour, particularly its worst forms, than girls.⁵³ Indeed Agriculture is another category of child labour which receives this social tolerance. Agriculture is traditionally a family-based business, making it difficult to get acknowledgement that this form of child labour can be systematically damaging to a child.⁵⁴ This form of child labour is particularly complex and subsequently it is not conducive to gathering reliable data on as it occurs in the most remote parts of developing countries and because of the invisibility of the work. It is a form where the hazardous aspects may be more hidden than, for example, industrial work. In this sector child labour can begin at a very early age, estimated at 5-7 years.⁵⁵ The agricultural sector includes activities in farming, hunting, forestry and fishing. An issue which makes the protection of children difficult from this form of economic exploitation is that there is, similar to industries, a complicated supply-chain especially on farms which are contracted by Trans National Corporations (TNCs). Tracking TNCs appliance to core labour standards is difficult because of the many layers in the supply-chain. According to IPEC when a high percentage of a state's Gross Domestic Product (GDP) is from the agricultural sector the expectation is that child labour will be high in that state.⁵⁶

3.2.3. Defining child labour in the context of this study

Ultimately, the main issue is to find a definition of child labour which is in the best interests of the child and one which takes a rights-based perspective. Lack of a truly universal definition of child labour causes certain vagueness and ambiguity in any discussion on the issue. Furthermore, because of the lack of a comprehensive definition there is a certain level of confusion on how the HRBA is being adopted. The ILO

⁵² Idem, p. 42.

⁵³ IPEC, 2006 (a), p. 7.

⁵⁴ Idem, p. 38.

⁵⁵ Ibid.

⁵⁶ Idem, p. 10.

shifting from a policy of ‘abolition’ to ‘prioritisation’ results in some contradiction between the policy language and the legal language used in the CRC and the International Covenant of Economic, Social and Cultural Rights (ICESCR). The application of the human rights framework in all development policies is a fundamental principle of the HRBA and adherence to this principle should include the language being explicitly related to the articles of the UDHR and other UN human rights instruments.⁵⁷ For the purpose of this study it is necessary to use a definition which is from a human rights perspective. Using the best interests of the child as a guide this study takes child labour as any work (not just of an economic nature i.e. including domestic labour) which is harmful to a child’s overall physical or social development and work which subsequently inhibits their ability to exercise their rights fully. The reasons for adopting this have been presented in this section and due consideration has been given to the wide range of definitions that exist.

3.3. Protection of children from child labour in international law

3.3.1. ILO Conventions

Article 427 of the Versailles Treaty 1918, which established the ILO, named the abolition of child labour as one of the main aims of the ILO.⁵⁸ Protecting children from all different forms of child labour was unified with the ratification of a convention which merged the former minimum age conventions of the ILO with the adoption of the Minimum Age Convention No. 138 in 1973 and which came into force in 1976.⁵⁹ This convention advocated for the abolition of child labour which was perhaps too ambitious because it subsequently failed to attract sufficient ratifications. As mentioned in the section above, in the 1990s, the ILO made a strategic decision to shift from a policy of

⁵⁷ IHRN, 2008, p.18.

⁵⁸ Fyfe, p. 8.

⁵⁹ This Convention was based on previous Conventions which dealt with the Minimum Age in various occupations. Namely: the Minimum Age (Industry) Convention 1919 (No. 5), Revised in 1937 (No. 58); the Minimum Age (Trimmers and Stokers) Convention, 1921 (No. 15); Minimum Age (Sea) Convention (revised) 1936 (No. 58); Minimum Age (Fishermen) Convention 1959 (No. 112); Minimum Age (Underwork Work) Convention 1965 (No. 123).

abolition towards a model of prioritisation which focuses on removing children, most risk of harm, before addressing forms of child labour which cause less harm to the child. In 1999 the ILO adopted Convention No.182 (C182) on the worst forms of child labour which reinforced the new strategy and received much international attention with 172 ratifications from 2000 until today.⁶⁰ Unlike C138 which sets 15 years the minimum age to work, all worst forms of child labour are prohibited to all children less than 18 years.⁶¹ C182 ultimately aims to achieve the same goal as C138, the abolition of child labour, but the substantive means of achieving this goal are different.⁶² Notably the Conventions differ in respect to C182 being based around time-bound programmes. C138 is focused on the overall development of a states' national policy to ensure the rights of the child against economic exploitation.⁶³ On the other hand C182 focuses on certain forms of child labour which cannot be tolerated by member states (of the ILO) regardless of that states' level of development or national circumstance. Article 8 of the convention outlines the extra-territorial obligations "all countries must help each other to end child labour".

This is particularly important for developed countries and gives a basis for why the EU should be an actor in the elimination of child labour. Article 7 (2) (c) obliges states to improve access to education, however, a proposal at the drafting phase of the convention, that any work that interfered with a child's participation in or performance at school would be considered as a worst form of child labour was rejected.⁶⁴ This new convention has exposed the ILO and the anti-child labour campaign to new areas, such as prostitution and drug trafficking, which are arguably out of the organisations remit.⁶⁵ This could lead to implementation problems as C182 includes areas of criminal law which are beyond the capabilities of the ILO.⁶⁶ The ILO Declaration on Fundamental Principles and Rights at Work 1998 identifies the core labour standards as:

⁶⁰ 29 April, 2010.

⁶¹ Article 2, ILO Convention No. 182.

⁶² Rishikesh, 2008, p. 84.

⁶³ Idem.

⁶⁴ Cullen, p.149.

⁶⁵ Smolin, p. 947.

⁶⁶ Idem.

Freedom of association and the effective recognition of the right to collective bargaining; The elimination of all forms of forced or compulsory labour; The effective abolition of child labour; and, The elimination of discrimination in respect of employment and occupation.⁶⁷

While this is a declaration and not a legally binding document it highlights the important place that the elimination of child labour has in the ILO. The core labour standards are applicable to all member states, whether they have ratified the relevant conventions or not:

[Member States] have an obligation, arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions⁶⁸

Indeed, while there are clear, definitive standards set by the ILO, the impact is very limited due to the lack of a strong supervisory mechanism to the Conventions. However, ratification of these conventions is evidence of a commitment towards the elimination of child labour.

3.3.2. *The UNCRC and other UN Human Rights Instruments*

The UNCRC, which was adopted in 1989 and entered into force on 2 September 1990, contains in Article 32 protection from:

Economic exploitation and from performing any work which 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.⁶⁹

Here we see that the links between child labour and education is explicitly mentioned.⁷⁰ This also establishes links between child labour and the harm that it causes a child. Furthermore, the CRC places a positive obligation on all parties states to provide a minimum age for admission to employment and for the appropriate regulation of working hours and conditions through legislative, administrative, social and educational

⁶⁷ The International Labour Organization's Fundamental Conventions, p. 74.

⁶⁸ Ibid.

⁶⁹ Article 32, CRC.

⁷⁰ Links between child labour and education will be discussed later in 2.4.1.

means.⁷¹ There has not been a General Comment on Article 32 by the Committee on the Rights of the Child. There was however, a general day of discussion on economic exploitation held by the Committee in 1993. From this discussion a recommendation was made on the importance of establishing an ombudsman for children at national level. An ombudsman for children is an independent body to the government which monitors the situation of children's rights in a state. The Committee also strongly emphasised the need for coordinated action in this area and the implementation of mechanisms to insure the prevention, protection, and rehabilitation of children at risk of economic exploitation.⁷² The Optional Protocol to the CRC on the sale of children, child prostitution and child pornography, which entered into force in 2002, links the CRC to ILO C182 on the worst forms of child labour.⁷³ The Optional Protocol to the CRC calls for immediate action to be taken by states to protect children from trafficking, prostitution and pornography by strengthening laws and policies at domestic levels.⁷⁴ The CRC is the only Treaty Body which does not have an independent complaints mechanism. Thus, while there are lucid principles and standards set on the prohibition of child labour, the CRC lack mechanisms to ensure full implementation of the convention.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) also protects children from child labour in Article 10 (3):

Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

The ICESCR clearly stipulates that states should provide for minimum ages and that breach of this age limit should be punishable by law. The Committee on Economic, Social and Cultural Rights “reaffirms the need to protect from economic exploitation”

⁷¹ Article 32 (2), CRC.

⁷² CRC Day of General Discussion at: <http://www2.ohchr.org/english/bodies/crc/discussion.htm> (consulted on 03/03/2010).

⁷³ Preamble to the Optional Protocol to the CRC on the sale of children, child prostitution and child pornography.

⁷⁴ Article 3 and Articles 7-10 of the Optional Protocol to the CRC on the sale of children, child prostitution and child pornography.

in General Comment No. 18 on The Right to Work⁷⁵. The General Assembly adopted the optional protocol to the ICESCR for an individual complaints mechanism on 10 December 2008 empowering the Committee to consider individual complaints on issues related to economic, social and cultural rights in the context of the treaty.⁷⁶ This mechanism has not yet entered into force.

In addition, Article 4 of the Universal Declaration of Human Rights (UDHR) on the prohibition of slavery could be interpreted as prohibiting the exploitation of child labour as defined by the ILO and UNICEF.⁷⁷ Due regard should be given to Article 8 of the International Covenant on Civil and Political Rights which prohibit all forms of slave labour and recognises that no person should be in servitude.⁷⁸ The UN Commission of Human Rights set out certain criteria for the Programme of Action for the Elimination of the Exploitation of Child Labour in Resolution 1993/79, including; employment before the normal age of completing primary education, under-age maid service, night work, work in dangerous or unhealthy conditions, activities linked with prostitution, pornography and other forms of sexual trade and exploitation, work concerned with trafficking in and production of illicit drugs, work involving degrading or cruel treatment.⁷⁹ The UN General Assembly resolution in 2002 *A World Fit for Children* called upon all members of society to enhance efforts to, amongst other things, eliminate the worst forms of child labour.⁸⁰ The resolution makes an explicit link between universal primary education and the elimination of child labour:

Education is a human right and a key factor to reducing poverty and child labour and promoting democracy, peace, tolerance and development. Yet more than 100 million children of primary school age, the majority of them girls, are not enrolled in school.⁸¹

The General Assembly of the UN calls for the mobilisation of the international community to assist countries in their efforts to eliminate the worst forms of child labour.⁸² Furthermore, they call on the eradication of all forms of economic

⁷⁵ ICESCR, General Comment No.18, para 15.

⁷⁶ ICESCR, Optional Protocol (GA resolution A/RES/63/117), 2008.

⁷⁷ Humbert, 2009, p. 66.

⁷⁸ UN General Assembly, 1996, 51st Session, A51/492, para 11.

⁷⁹ Cullen, p. 140.

⁸⁰ UN General Assembly Resolution: UN Doc. A/RES/S-27/2, 2002, para 7 (2).

⁸¹ Idem, para 38.

⁸² Idem, para 34.

exploitation.⁸³ A strong emphasis of the resolution is that investment in children's education is the way to a future without child labour.

3.3.3 Protection at the regional level; Europe and Africa

On the regional level, we will briefly discuss the provisions within the EU system and the African system. In the EU, the 1994 European Council Directive 94/33 makes reference to the Charter of Fundamental Social Rights and the International Labour Organisation (ILO) principles. This is the most important legal document in the EU for the protection of children and young people at work. In fact the directive goes beyond the ILO conventions as it outlines rules around working time, annual vacations, breaks during the working hours and restriction of night work for young people.⁸⁴ Article 24 of the Charter of Fundamental Rights of the EU (2000) guarantees the rights of the child but does not explicitly refer to the prohibition of child labour. The member states of the EU are for the most part in line with the legislation suggested in the 1994 Directive for the protection of young people in the work place.⁸⁵ Ratification and implementation of the ILO Conventions on child labour form part of the *Acquis Communautaire*⁸⁶. Article 7 of the Council of Europe's European Social Charter makes provisions relating to the exclusion of children under age 15 from employment, apart from 'light work'.⁸⁷ The European Social Charter details specific and strict standards for the limitation of work by school-age children to two hours per day. This means that in the cases where school going children do light work the work is strictly regulated.⁸⁸ European regional instruments are the only ones which explicitly deal with the rights of young workers.⁸⁹ The strength of protection and the successful implementation of this directive show that

⁸³ Idem, para 36.

⁸⁴ Hartwig, 2008, p. 247.

⁸⁵ Idem, p. 248.

⁸⁶ The Community *acquis* is the body of common rights and obligations which bind all the Member States together within the European Union.

⁸⁷ Cullen, p. 180.

⁸⁸ Ibid.

⁸⁹ Ibid.

the EU is a model region for the elimination of child labour.⁹⁰ The policy documents as discussed in chapter 3 form the basis and guiding principles of EU external action in eliminating child labour.

Article 15 of the African Charter on the Rights and Welfare of the Child⁹¹ (ACRWC) incorporates both the provisions of the ILO conventions and the CRC in that every child should be protected from “all forms of economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s physical, mental, spiritual, moral, or social development”.⁹² The Charter requires for state parties to have “regard to the relevant provisions of the International Labour Organization’s instruments relation to children” i.e. to the ILO Conventions No. 138 and No. 182.

As seen in the section above a vast spectrum of legal protection for children against child labour exists.⁹³ However, the standards and principles in these treaties need to be implemented into the domestic legislation of states in order for real change to take effect.

3.4 Root causes of child labour

3.4.1 Child labour and its links to poverty

If child labour is considered ‘an evil’ it is no surprise that it is widely thought that poverty is at the root of this problem. By this hypothesis, to address child labour, extreme poverty needs to be addressed. In the 1990s a paradigm shift saw that ‘poverty’

⁹⁰ There are arguments that the use of child labour in Europe was a keystone in the industrial revolution, advocating that a society needs child labour to develop. However, the lack of recognised international human rights standards were also a reason for the use of child labour during the industrial revolution. The fact that child labourers were used in England and other states during the industrialisation period is not an excuse for the use of them in developing countries today. However, it can be argued that because the member states of the EU have the experience of eradicating child labour, it has the technical expertise to help other countries.

⁹¹ Ratified by Kenya in 2000.

⁹² Article 15, ACRWC, 1999.

⁹³ Although the Organisation of American States were not mentioned in the discussion above, protection against child labour is found in Article 7 (f) of the Additional Protocol to the American Convention on Human Rights in the Area of economic, Social and Cultural Rights "Protocol of San Salvador".

was not only seen “as low-income and low-consumption but also as low achievement in education, health, nutrition and other areas of human development”.⁹⁴ Poverty is now more directly linked to the non-fulfilment of basic human rights and not just wholly based on economic development. This connects poverty to a rights-based approach to development cooperation by highlighting the key to poverty is the denial of human rights, especially economic, social and cultural rights including food, shelter, clothing, health and education.⁹⁵ Child labour is often born out of desperation and as a survival mechanism for families to obtain their basic needs. Key to addressing poverty and child labour is to understand what keeps the poor, poor.

According to Collier’s concept of ‘the bottom billion’, there are four traps which keep the poorest countries suppressed from economic and social development. He identifies conflict, natural resources, being landlocked by bad neighbours and bad governance as the main traps. South East Asia and Sub-Saharan Africa are the regions identified as forming ‘the bottom billion’.⁹⁶ IPEC has identified natural disasters, conflict and economic shocks as key challenges to a sustainable eradication of child labour.⁹⁷ However, it cannot be underestimated that policy choices by states have also contributed to poverty levels. There is an argument that child labour occurs from a “two-fold causality” whereby families are in poverty and employment prospects are so adverse that parents are forced to send their children to work to supplement the household income.⁹⁸ In economic terms child labour perpetuates the cycle of poverty by inhibiting children from accessing education.⁹⁹ In terms of a link between the globalised market and child labour there is a need to consider both supply-side factors and demand-side factors.¹⁰⁰ Humbert identifies: slow demographic transition, migration, poverty, the role of social protection, lack of access to education, attitudes and poor law enforcement, inadequate laws and discrimination against minorities as supply-side factors

⁹⁴ Nowak, p. 19.

⁹⁵ Idem, p.24.

⁹⁶ Collier, 2007, p. 5.

⁹⁷ IPEC, 2006 (a), p.1.

⁹⁸ Dessy and Vencatachellum, 2003, p.4.

⁹⁹ Humbert, 2009, p.31.

¹⁰⁰ Idem, p.29.

and lower costs, the vulnerability of children and the role of technology as demand side factors. Thus, having established that poverty is a root cause of child labour it is a fair assumption that the eradication of child labour is closely linked to MDG 1; the eradication of extreme poverty and hunger.

Child labour may be mainly because to families experiencing poverty but it also occurs within regions that are not poor. In fact, the highest numbers of child labourers are not from the poorest regions.¹⁰¹ It returns to wealth distribution and policy choice. Child labour itself contributes to this because it interferes with the child's education and thus contributes to the perpetuation of poverty by reducing families' access to the economic benefits which education provides. While poverty is a root cause of child labour child labour is also a root cause of poverty. It is cyclical and both need to be addressed simultaneously. This shows the interconnectedness of general human rights with children rights and how child labour cannot be tackled in isolation.

3.4.2 Education for all and child labour

As outlined in 2.2 of this section child labour is intrinsically linked to education. Enrolment in primary education has been used as a tool to classify between harmful child labour and the 'light work' which is permitted in the ILO conventions. If work hinders a child's access to education it is harmful to the child's development, whereas, if the work consists of chores in the household which do not interfere with the child's education it is not harmful.¹⁰² A right to free and compulsory education was first established in the UDHR in 1948. Later, the ICESCR in Article 13 in 1966, the Convention on Technical and Vocational Education 1989 and the CRC 1989 Article 28 all emphasised the right to education. The ICESCR outlined a plan of action for the implementation of this right which stipulates what it means to provide free compulsory education.¹⁰³ The CRC further specifies that the aims of education are to develop the

¹⁰¹ Stop Child Labour, 2004, p. 4. This is particular true in India and China.

¹⁰² Of course this is subject to the nature of the chores.

¹⁰³ CESCR, General Comment No. 11.

child's personality, talents and mental and physical abilities to their fullest potential.¹⁰⁴ The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) 1979 in Article 10 highlighted that all efforts should be made for equal access to primary education for girls as for boys.

The 1990 World Conference on Education for All (EFA) in Thailand set the target of 2000 for the achievement of universal primary education however, this commitment failed to deliver that result and spurred on a new commitment in 2015 pledged at the World Education Forum in Dakar, Senegal in 2000.¹⁰⁵ Additionally to this target there is a conceptual framework for the implementation of the right to education consisting of four key components; availability, accessibility, acceptability and adaptability.¹⁰⁶ Availability refers to the establishment of schools and trained teachers while accessibility is in relation to there being compulsory, free primary and post primary education. Meanwhile acceptability is in reference to the quality of education being provided as agreed on by regulations and supervision mechanisms must be met. Finally, adaptability is related to children with special needs and out of school children, as in children who are working, refugees or children deprived of their education.¹⁰⁷ The latter criterion is particularly important for child labourers because it stipulates that one size does not fit all children in the area of education. It is recognition that education policies have to support the different needs of different children. Child labour is not going to be eradicated overnight and as such there needs to be interim provisions for working children to access and benefit from education. Child labourers need educators to be adaptable and to realise that their needs are different to children who do not work.

As seen above the eradication of child labour is linked to MDG 1; it is equally linked to MDG 2: Universal Primary School Education by 2015. However, in the parts of the world where child labour is the highest, education quality is weakest.¹⁰⁸ This signifies a

¹⁰⁴ Article 29 (1)(a) CRC, 1989.

¹⁰⁵ UNESCO, 2000.

¹⁰⁶ CESCR, General Comment No. 13, para 6.

¹⁰⁷ Tomasevski, 2001, p. 14.

¹⁰⁸ Humbert, p. 29.

direct correlation between the two. Ultimately we need to understand the link between EFA and the elimination of child labour. They are mutually dependent in the sense that one cannot be achieved without at least progress being made in the other. As highlighted in the previous section, policy choices by states are incredibly important to the alleviation of poverty. Indeed, the same can be applied to education. High investment by the state will result in better outcomes in education.¹⁰⁹

Child labour has been around since the beginning of time. For many families it is traditional that perhaps the girls, for example, stay at home and perform domestic duties while the boys help their father's with the Agriculture. The merits of education are not yet realised for First Generation Learners¹¹⁰. Difficulties arrive in breaking this cycle because the benefits of school are long term and require investment in the families in terms of time and perhaps the loss of a wage coming into the household. There is an abundance of empirical evidence which shows that it is more likely that (future) children of a child who goes to school are more likely to go to school than children whose parents did not go.¹¹¹ Thus, meeting EFA and MDG Goal 2 has the potential to break this cycle and result in a culture where primary education is enjoyed by all.

In situations where children have no access to schools, which is the case in remote parts of developing countries (the parts where child labour is identified to be most prominent) removing the child from labour becomes complicated. On the one hand, it still stands that child labour is in direct opposition to the rights of the child, however, on the other hand and in light of the alternatives it may well be in the best interests of the child to remain working and contribute financially to the household then to not work and not have access to education. Moreover, in a situation whereby the local schools are of such poor quality it is argued that work is sometimes the best use of a child's time.¹¹² This argument shows that vital to combating child labour is the need for states to not only

¹⁰⁹ See 3.5 for the example of how investment in education in Kerala has achieved higher enrolment rates and lower child labour.

¹¹⁰ First Generation Learner refers to children who are the first in their family to go to school, meaning that their parents or their parent's parents have not gone to school.

¹¹¹ Lomofsky and Lazarus, 2001, pp. 303 – 317.

¹¹² Edmonds and Pavcnik, 2005, p. 414.

provide access to education but access to quality education which should be implemented in a manner which “raises the return to education might also provide an incentive to reduce the quantity of child labour”.¹¹³ Removing school fees and the provision of any items necessary for the child to participate fully in education such as; uniforms, books, and mid-day meals examples of incentives being used in some developing countries. In order to continue discussing the methods pursued in eliminating child labour we must scrutinise the strategies of the main organisations involved. But does this show that what in practical terms is in the best interests of the child can sometimes be contradictory to the principles of the HRBA to development cooperation? To answer this we firstly need to examine the main strategies pursued by IPEC in the elimination of child labour.

3.4.3. Child labour and the MDGs

As established in this chapter child labour is unquestionably linked to the MDGs; the eradication of extreme poverty (Goal 1) and universal primary education (Goal 2). There are also significant links to be made between child labour and combating HIV/AIDS (Goal 6) as AIDS orphans are amongst the children most at risk of child labour.¹¹⁴ Gender equality (Goal 3) is highly relevant as many discriminatory practices and customs infringe girl’s participation in education and there is often a social acceptance of a girl child doing domestic labour instead of being educated.¹¹⁵ IPEC advocates that the elimination of the worst forms of child labour should have been made an international political commitment like the MDGs, but at the same time concedes that the widespread ratification of the Convention No. 182 shows that there is an international political pledge. The difference between the pledge for the elimination of the worst forms of child labour and the MDGs is that there is no specified timeframe for the former in the Convention while there is for the latter.¹¹⁶ At the recent Word

¹¹³ Idem, p. 215.

¹¹⁴ IPEC, 2006 (a), p. 56.

¹¹⁵ Idem.

¹¹⁶ Idem.

Conference on the Elimination of Child Labour in The Hague a roadmap for the elimination of the worst forms of child labour by 2016 was adopted.¹¹⁷

3.5 Main strategies of ILO/IPEC and other international actors in eliminating child labour

Some of the strategies used in eliminating child labour include; legislative, education, policy measures and international action.¹¹⁸ At the 2010 International Conference on child labour a roadmap for the elimination of the worst forms of child labour was delivered, which recognised that ‘targeted action’ should continue to combine the implementation and enforcement of legislation with the provision of services.¹¹⁹ Basic elements of ILO action to combat child labour include; research, compilation and dissemination of information, advocacy and public awareness and provision of technical assistance to member states in the design and implementation of national policies and programmes to combat child labour.¹²⁰ These remain to be the basic elements of IPEC today, which over the last 20 years has become the “biggest dedicated child labour programme in the world and the largest technical cooperation programme within the ILO”.¹²¹ IPEC shares its understanding of child labour issues with its partner countries through; capacity building, training and knowledge sharing workshops, through child labour courses in collaboration with the ILOs International Training Centres and by the development and dissemination of studies, guidelines, resource materials, collections of good practices and evaluations at the national and regional level.¹²²

IPEC is contributing to the ILOs strategic objectives concerned with the fundamental principles and rights at work.¹²³ The programme is rights-based and respects the best interests of the child as defined in the CRC.¹²⁴ In the 2006 Global Action Plan, IPEC

¹¹⁷ IPEC 2010 (b).

¹¹⁸ Humbert, p. 32.

¹¹⁹ IPEC, 2010 (b), p. 2.

¹²⁰ IPEC, 2004, p.11.

¹²¹ IPEC, 2010 (a), p.19.

¹²² Idem.

¹²³ IPEC, 2009 (a), p. 17.

¹²⁴ IPEC, 2004, p. 10.

highlighted the importance of mainstreaming child labour concerns into national development and policy frameworks, the development of knowledge, tools, and capacity; and resource mobilisation as some of the specific actions it engages in.¹²⁵ This is key to the approach of IPEC as ultimately eliminating child labour is primarily the responsibility of national governments. The main goal is to eradicate child labour. The means for this must be sustainable and therefore the driving force for change must come from the governments themselves. To this end, one of the main objectives for IPEC is to assist in both “initiating and reinforcing positive behaviour and work of local communities, governments and the international community at large”.¹²⁶ Close partnership with member States is therefore essential for IPEC. Furthermore, these methods are connected with the principle that all programmes should contribute to *enabling* duty-bearers to meet their obligations in international human rights law.¹²⁷ IPEC mobilises its technical and knowledge based programme to assist national governments by introducing Time Bound Programmes (TBP).¹²⁸ As established in Convention No. 182, TBPs are in essence “a set of integrated and coordinated policies and programmes to prevent and eliminate a country’s worst forms of child labour within a defined period” which are country led and supported by IPEC.¹²⁹ Establishing programmes which are country led has been a challenge for IPEC and it is clear that political mobilisation is key to the successful implementation of TBPs.¹³⁰ The idea is that although IPEC designed the concept of the TBP, it is a public good which should be used and led by governments in their attempts to eliminate child labour.

The 1997 International Conference on child labour recognised that there was need for more technical research and statistics on child labour. Understanding Children’s Work (UCW) is an inter-agency initiative between the ILO, UNICEF and the World Bank and was established to support partner agencies to improve statistical data on child labour.¹³¹

¹²⁵ IPEC, 2010 (a), p. 20.

¹²⁶ Fyfe, 2007, p. 24.

¹²⁷ See footnote No. 17.

¹²⁸ IPEC, 2010 (a), p. 20.

¹²⁹ Idem.

¹³⁰ IPEC, 2006 (a), p. 36.

¹³¹ UCW, <http://www.ucw-project.org/ucw/index.php?id=5> [consulted on 09/06/2010].

In addition to this partnership, the Statistical Information and Monitoring Programme on Child Labour (SIMPOC) was established in an attempt by the ILO to improve data on child labour.¹³² Conditional Cash Transfers (CCT) was established as a method to encourage poor families to send their children to school through positive incentives provided by the government.¹³³ Families were given money but only on the condition that they fulfilled certain obligations aimed at human development such as sending their children to school in place of work. This resulted in a double victory in Latin American states, especially in Brazil and Mexico, where it effectively alleviated poverty in the family while also encouraging families to send their children to school and not allowing them to work.¹³⁴ The strengthening of social protection for families is imperative to poverty alleviation and leads families to be in a position to send their children to school.

As previously established achieving EFA is intrinsically linked to eliminating child labour, IPEC strategies should be representative of this. A newly established programme between ACP States, IPEC and the European Commission ‘Tackling Child Labour through Education’ (TACKLE), is based on the strategy of removing children from child labour while simultaneously providing alternatives.¹³⁵ It is being piloted in 11 ACP States. IPEC advocates for the improvement of access to education as a strategy to end child labour. The improvement of education structures in developing countries need to be mainstreamed into country development strategy papers alongside the elimination of child labour. SCREAM (Supporting Children’s Rights through Education, the Arts and the Media) is another project which uses education methods to raise awareness of child labour amongst youth.¹³⁶ As part of advocacy efforts each year, there is a world day against child labour, which aims at “harnessing the commitment, motivation and expertise of the ILOs partner, as well as the participation of young people”.¹³⁷

¹³² IPEC, 2006 (a), p. 30.

¹³³ IPEC, 2010 (a), p. 22.

¹³⁴ Ibid.

¹³⁵ TACKLE, 2008, p. 5.

¹³⁶ IPEC, 2006 (b), p. 30.

¹³⁷ Idem.

There cannot be EFA when there is a culture of child labour in a State. Taking the positive example of eliminating child labour in Brazil, it is clear how linking the two in national policy can have very positive effects at regional and local levels. Partnered with IPEC since 1992, Brazil introduced a Statute on Children and Adolescents which recognised this link and established an implementation mechanism at local, municipal and national levels in the form of Councils for the Rights of Children and Adolescents.¹³⁸ These councils aimed to strengthen the capacities of local institutions thereby developing their own solutions. Political will and the mobilisation of civil society both played a big role in Brazil's fight to eliminate child labour. The Indian State of Kerala is another positive example of how focusing on improving education provisions can result in reducing child labour. Kerala has almost reached its target of EFA by investing 35% of State revenue into education.¹³⁹ Interestingly to note Kerala was identified as one of the poorest States in India because of its high dependency on Agriculture. In some countries, such as India, Non-Formal Education has been established by local NGOs to deal with the governments' inadequacy of providing EFA. *Stop Child Labour* does not support the establishment of parallel education facilities such as Non-Formal Education Centres as it can have the result of taking away from the governments' responsibility to provide access to primary education for all.¹⁴⁰ The role of NGOs should be limited to supporting the government to improve and implement better policies which will achieve EFA and not to takeover the governments' responsibilities as indicated by the HRBA to development cooperation's which promotes programme which enable duty-bearers to meet their obligations.

In an attempt to commit to the elimination of child labour in the agriculture sector agriculture organisations signed a declaration of intent on cooperation on child labour in agriculture.¹⁴¹ The purpose of the cooperation under the declaration of intent is to

¹³⁸ IPEC, 2010, p. 21.

¹³⁹ IPEC, 2010, p. 22.

¹⁴⁰ *Stop Child Labour*, 2004, p. 2.

¹⁴¹ Declaration of Intent 2007 was made between the International Labour Organization (ILO); Food and Agriculture Organization (FAO); International Fund for Agricultural Development (IFAD); International Federation of Agricultural Producers (IFAP); International Food Policy Research Institute (IFPRI), representing the Consultative Group for International Agricultural Research (CGIAR); International

promote the principles and objectives enshrined in the ILO conventions to protect children from child labour. The major factors constituting agriculture as a form of child labour needing special attention including “large numbers, hazardous nature, lack of regulation, invisibility and the denial of education”.¹⁴² However, it is not recognised as a priority area because “historically an urban and industrial view of what constitutes child labour has prevailed”.¹⁴³ Indeed to mitigate against the invisibility of agriculture as a form of child labour the partner agriculture organisations to the declaration of intent with the ILO have pledged to create awareness of this issue.¹⁴⁴

3.7. Is there a rights-based approach to the elimination of child labour?

It is clear that the rights based approach to development cooperation should be applied to the elimination of child labour because the prohibition of child labour is enshrined in international human rights law. With IPEC assistance States can strengthen their capacity to provide EFA and to combat child labour. Political will is essential to the success of the IPEC programmes. The strategies to combat child labour need to be multi-sectoral and commitment from many different departments within a government. For example, the elimination of child labour in any one state needs the improvement of legislation to strengthen the protection of children from child labour, while simultaneously introducing policy interventions, improving the education system so that schools are accessible to all children, even in rural areas, and the strengthening of social protection programmes.¹⁴⁵ It can be argued that the shift from a prohibition approach to the prioritisation of eliminating the worst forms of child labour by IPEC leaves room for misinterpretations and misguided policies that negate the legally binding obligations enshrined in the CRC and the other treaties. Arguably though, the Convention on the worst forms of child labour did mobilise the international community to take the elimination of child labour seriously. It was also more appealing to some developing

Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers’ Associations (IUF).

¹⁴² IPEC, 2006 (a), p. 38.

¹⁴³ Ibid.

¹⁴⁴ ILO, Declaration of intent on cooperation on child labour in agriculture.

¹⁴⁵ Humbert, p. 33.

countries which didn't want to commit to the Minimum Age Conventions. Ultimately for ILO/IPEC and the eventual aim is no child labour but the 'prioritisation' model is just a way to keep child labour on the international agenda. IPEC provide countries with the technical assistance they need to help them take 'ownership' over the elimination of child labour. Its' strategies range from advocacy on and education in the issues of child labour to strengthening legislative frameworks and solid development frameworks in the countries most at risk of child labour. Political will and commitment are vital to the success of IPECs strategies and thus to the elimination of child labour.

4. EU external action and its role in eliminating child labour

4.1 A rights-based perspective to EU external development policies

Article 177 of the Treaty establishing the European Community describes how development policies should contribute to the progression of human rights and meet the terms of the Member States commitments with the UN.¹⁴⁶ However, Article 177 furthermore outlines the three primary objectives of EU development assistance as: the sustainable economic and social development of the development countries; the smooth and gradual integration of these countries into the world economy; and the campaign against poverty.¹⁴⁷ Hout notes that these objectives indicate that EU development policies are neo-liberal in nature and “that their governance-related strategies in effect display a technocratic orientation and are instrumental to deepening market-based reform in aid- receiving countries”.¹⁴⁸ Clearly, in terms of these objectives, human rights adherence as the overarching aim of EU development is omitted. A rights-based approach to development cooperation “means understanding human rights as both the means and the goal of development”¹⁴⁹, so in order for the EU to positively contribute to the elimination of child labour through its development policies, a right-based approach to development cooperation should, by theory, be explicitly enshrined.

4.1.1 The European Consensus on Development 2005

As previously identified, the UN Common Understanding 2003 highlighted the three key principles of the HRBA to Development Cooperation as the: explicit, accurate use of the international human rights framework; empowerment- as a right; participation in development decisions- as a right; non-discrimination and prioritisation of vulnerable groups; Accountability of duty-bearers to rights-holders.¹⁵⁰ The EU are under no obligations to take on a rights-based approach as defined by the UN, however, if a

¹⁴⁶ Article 177 of the Treaty of the European Community.

¹⁴⁷ Hout, W., 2010, p. 3.

¹⁴⁸ Ibid.

¹⁴⁹ IHRN, 2008, p. 14.

¹⁵⁰ IHRN, 2008, p. 5.

rights-based approach to development is to effect change there needs to be consistency to the dialogue amongst the different actors.

Thus we need to assess how these principles are being applied to EU external action when it comes to eliminating child labour. Firstly, it is essential to examine the broader topic of external development policy in the EU. The European Consensus on Development (the Consensus) 2005 is significant as it represents a 'common vision that guides the action of both the member states and Community level in development cooperation'.¹⁵¹ Notably though, it places the MDGs as the primary objective of its development policy rather than acknowledging that they are political commitments subject to human rights law.¹⁵² The Consensus highlights three main principles to guide its development cooperation, namely; poverty reduction, development based on Europe's democratic values and the recognition that developing countries are main actors responsible for their own development- as such the EU play a supportive role rather than a leading role.

The International Human Rights Network (IHRN) along with Amnesty International, Terre des Hommes and Action Aid, attempted to juxtapose the Consensus to the HRBA to development Cooperation. According to its findings the EU is failing to truly apply a rights-based approach to its development policies. In relation to the first principle, the EU is failing to frame development policies with explicit, accurate and consistent use of human rights language. Although human rights do enter the language of the Consensus, there is an apparent lack of consistency throughout the text as it refers to 'governance' in place of 'democracy' and 'human rights'. In relation to the second and third principles of empowerment and participation (respectively) the Consensus refers to them as necessary for 'aid effectiveness' rather than as fundamental rights. Empowerment is essential to both the realisation of human rights and to development. Without being empowered vulnerable groups such as women, children and people with disabilities cannot realise their rights.¹⁵³ It is particularly clear in relation to poverty

¹⁵¹ Hout, p. 5.

¹⁵² Idem, p. 32, see also Para 5 and 6 of the European Consensus on Development 2005.

¹⁵³ EIDHR, Strategy Paper, 2007-2010.

reduction, which is a fundamental aim of EU development cooperation. The EU Commission recognise the need for gender equality and women's empowerment in development cooperation.¹⁵⁴ The Commission highlighted the need to push forward on these areas. Similarly, IHRN finds that the Consensus fails to address the "full spectrum of prohibited discrimination as understood by international human rights law or frame principle four as a matter of human rights violations".¹⁵⁵ Concerning the final principle of accountability the IHRN argue that the EU needs to "develop and apply indicators for measuring human rights change and ensure that contracted experts design, deliver and evaluate according to and in line with HRBA".¹⁵⁶ Accountability is central to development cooperation because the EU needs to know that its efforts are effecting change and that EU funds are being mobilised to the maximum potential.

Why discuss the Consensus? The Consensus was established as a joint statement of the European Parliament, Council and Commission making it representative of the member states. When EU development aid is combined with the aid from the Member States it accounts for over half of the World's aid making it the biggest donor of aid in the world. As such, the principles on which the EU operates its development policies and actions are of utmost importance. As we have identified already, the fundamental objective of development should be the realisation of and progression of human rights. With this in mind, it is interesting to note that the Consensus came to fruition two years after the UN Common Understanding of the HRBA to development cooperation. Taking the IHRN analysis of the Consensus, the HRBA to development cooperation is not sufficiently enshrined in the development policy of the EU.

4.1.2 EU partnership with Africa

A substantial proportion of EU development assistance goes to the 78 ACP states. This partnership was governed by the Lomé Conventions until 2000, when the Cotonou Partnership Agreement was signed and is representative of the changes in the

¹⁵⁴ Communication from the Commission to the European Parliament and the Council - Gender Equality and Women Empowerment in Development Cooperation, 2007.

¹⁵⁵ Hout, p. 29.

¹⁵⁶ Idem, p. 31.

relationship between the EU and the ACP states. The Cotonou Agreement is primarily a trade and aid agreement. However, trade and aid are closely linked to the development of a state and development has been redefined in terms of human rights, it can be argued, therefore, that trade and aid agreements should have human rights at its core. By this rationale the EU should adopt a rights-based approach to development cooperation with African states. The EU has a long standing history and colonial ties with the majority of these states. Colonialism caused an unequal association where the European powers were an oppressive force in the ACP countries. Now, the partnership is, at least in discourse, based on “common interest, mutual recognition and accountability”.¹⁵⁷

The Cotonou Agreement is based on three pillars: aid, trade and political dialogue and in line with other EU development policies; a strong emphasis on the ‘reduction’¹⁵⁸ of poverty’.¹⁵⁹ The second revision of the Cotonou Agreement sees the inclusion of ‘participation’ from civil society as paramount to development cooperation. This makes the document more consistent with a rights-based approach however, ultimately the main aims of this document are not explicitly expressed in terms of human rights. In reference to political dialogue child labour is explicitly noted as a political area of mutual concern in Paragraph 4.¹⁶⁰ Amendments to Article 8 and Article 96 in the revision of the Cotonou Agreement make political dialogue more structured and more powerful by promoting it to the second-level instrument for more difficult situations not solved through previous political dialogue. Political dialogue has been structured in a more efficient way so it can be a method of prevention rather than reaction. Article 50 of the Cotonou Agreement unequivocally commits the partnership to the international labour standards of the ILO, including the elimination of the worst forms of child labour, and advocates for enhanced cooperation in promoting standards strengthened legislation.¹⁶¹ This gives a basis for discussing the relationship between IPEC, the EU and later Kenya.

¹⁵⁷ Commission of the European Communities, A strategy for Africa, Brussels, 12 October 2005, p. 2.

¹⁵⁸ This has been changed in the second revision of the Cotonou Partnership Agreement to ‘eradication’.

¹⁵⁹ Mackie, 2008, p. 145.

¹⁶⁰ Second Revision of the Cotonou Agreement- Agreed Consolidated text, Brussels, 11 March 2010.

¹⁶¹ Article 50, The Cotonou Agreement, 2000.

The overarching principle of the cooperation between the EU and Africa is ‘guided by’, amongst other principles, “respect for human rights... mutual accountability...equality and justice...respect for international law and agreements...gender equality and non-discrimination”¹⁶². Notably though, while human rights are cited in the document as a main objective, they appear to be framed as having equal importance to the MDGs.¹⁶³ Thus, similar to the Consensus, it might be argued that the Strategic Partnership document misses the connection between the MDGs being political commitments to fulfil states human rights obligations. Amongst the principles which govern the EU’s relationship with Africa are: equality, partnership and ownership.¹⁶⁴ Equality in this context is in reference to “mutual recognition, mutual respect and the definition of mutual collective interests”.¹⁶⁵

Partnership essentially signifies that the EU is more than just a donor to Africa. The relationship includes political dialogue whereby the EU can offer support from “its experience of continental integration, regional and social cohesion, institution-building and policy development”.¹⁶⁶ The policy of ownership is of utmost importance as it recognises that policies cannot be imposed from the outside onto Africa but must respect the African Union (AU) and the New Partnership for Africa’s Development, providing the vision of good governance and respect for human rights and democracy.¹⁶⁷ The three main objectives of the relationship are explicitly referenced in the Cotonou Agreement and all other agreements with Africa. The European Instrument for Democracy and Human Rights (EIDHR) is designed to be ‘complementary to’ and ‘reinforce action under the related external assistance instruments’. The strategy aims to enhance respect for human rights and fundamental freedoms in countries most at risk, to strengthen the role of civil society in promoting human rights, support actions on human

¹⁶² The Africa-EU Strategic Partnership.

¹⁶³ The Africa-EU Strategic Partnership, para 7.

¹⁶⁴ EU Strategy for Africa: Towards a Euro-African pact to accelerate Africa’s development, 2005, p.18.

¹⁶⁵ Ibid.

¹⁶⁶ Idem, p. 19.

¹⁶⁷ Ibid.

rights covered by EU Guidelines, including children, and support and strengthen the international and regional framework for the protection of human rights.¹⁶⁸

4.1.3 The absence of explicit reference to human rights in EU development policy

Upon examining the development policies of the EU it is notable that there is a distinct lack of explicit human rights language in the majority of development policy documents referred to in this section. Furthermore, there exists an abundance of reference to ‘good governance’. Indeed, this concept has dominated development discourses and has been described as showing the ‘technocratic’ and ‘neo-liberal’ approach the EU takes to development policy which is “instrumental to deepening market-based reform in aid-receiving countries”.¹⁶⁹ This focus on governance in development policies can lead to human rights being ‘unaddressed by the EU’ approach’.¹⁷⁰ While the EIDHR is a document highlighting the EU’s intentions to respect and uphold human rights standards in development policies, a truly rights-based approach would have human rights language embedded into all policies that relate to the development of a partnered country. In this way, in these development policies a truly rights-based approach is not realised.

4.2 EU’s approach to advancing children’s rights in external action policy

4.2.1 Children’s rights in EU development cooperation policy

Children’s rights are an inherent element of EU development cooperation as they are both explicitly and implicitly built into the policies as stakeholders in all development actions including actions not specifically targeted at children. Children make up one third of the world’s population and the EU Communication on *A special place for children in the EU External Action* recognises that “investing in children is investing in the future”.¹⁷¹ The *EU Guidelines for the Promotion and Protection of the Rights of the Child*, which frames both the priorities and objectives of EU action in the area of

¹⁶⁸ EIDHR Strategy Paper, 2007-2010, p. 5.

¹⁶⁹ Hout, p. 3.

¹⁷⁰ Idem, p. 11.

¹⁷¹ EU Communication, *A Special place for children in EU External Action*, 2008, p. 2.

children's rights, notes 'the importance of key international and European legal human rights instruments, norms and standards as well as political commitments relevant to the protection and promotion of the rights of the child'.¹⁷² The Council Conclusions 2008 cited these Guidelines as providing a 'holistic and universally applicable view of the rights of the child'.¹⁷³ The objectives formed in the EIDHR Strategy Paper 2007-2010 includes extensive references to children's rights.¹⁷⁴ The mainstreaming of children's rights is emphasised as a fundamental aim of the EIDHR.¹⁷⁵ According to Strategy Paper of the EIDHR, analysis of effectiveness and expected results play an important role for the EU in deciding which programmes to fund for the promotion and protection of children's rights.¹⁷⁶

A rights-based approach to development cooperation is explicitly referred to in the basic principles of the Guidelines. They explicitly use the international human rights framework by referring to the CRC and its Optional Protocols and other relevant UN bodies which play a role in protecting and promoting the rights of the child. The Guidelines specifically make reference to the ILO Conventions on Child Labour. They acknowledge the importance of empowering children to participate in decision making and the execution of policies. The principle of non-discrimination and capacity building of "duty-bearers" and "rights-holders" are also enshrined into the basic principles of the Guidelines.¹⁷⁷ From these principles it is clear that the HRBA is enshrined into the Guidelines.

Central to the Council Conclusions is that, in unity with the Paris Declaration on Aid Effectiveness¹⁷⁸, all development efforts should be directed at "strengthening partner countries' own systems and capacities for delivering basic services without

¹⁷² *EU Guidelines for the Protection and promotion of the Rights of the Child*, <http://www.consilium.europa.eu/uedocs/cmsUpload/16031.07.pdf> [consulted on 09/06/2010], p. 4.

¹⁷³ *Council Conclusions on the promotion and protection of the child in the EU's external action- the development and humanitarian dimensions*, 2008, para 2.

¹⁷⁴ EIDHR Strategy Paper 2007-2010.

¹⁷⁵ *Idem*, p. 8.

¹⁷⁶ *Idem*, p. 17. See 4.1.3.

¹⁷⁷ *EU Guidelines for the Protection and Promotion of the Rights of the Child*, p. 6.

¹⁷⁸¹⁷⁸ The Paris Declaration on Aid Effectiveness 2005 saw a commitment by leaders of both developed countries and developing countries to upscale development efforts and to put more emphasis on the accountability of aid (OECD, p. 1).

discrimination”.¹⁷⁹ Essential to the creation of a space for children in EU external action is the acknowledgement that the EU should build up partnerships with the UN agencies, particularly UNICEF, to work together toward the common goal of the realisation of rights for all children.¹⁸⁰ The MDGs are referred to in the policy document and the EU emphasises its commitment to achieving them. In addition they are appropriately placed in the documents as commitments which will contribute to the fulfilment of international human rights obligations.

4.2.2 *Child labour in EU external policy*

Eliminating child labour and in particular the worst forms of child labour are specifically highlighted in the Council Conclusions 2008, the *EU Guidelines* and the Commission Communication on *A Special Place for Children in EU External Action*. The Council emphasises the need for the Commission to promote the ratification and compliance of ILO Conventions on child labour.¹⁸¹ Furthermore, the Council called for an analysis of positive incentives on products made without the use of child labour and trade related measures on products which have used child labour.¹⁸² Free compulsory and universal primary education and protection against violence and exploitation, including child labour, were mentioned amongst the goals of the strategy. The EU highlights the link between the eradication of child labour and the rehabilitation of children to “basic education and vocational training aimed at providing life skills”.¹⁸³ There is no specific link made between the elimination of child labour and education for all in the Guidelines. The Consensus frames the elimination of the worst forms of child labour in the context of poverty eradication.¹⁸⁴

Specific links made between EFA and child labour were highlighted at the fourth session of the EU Forum on the Rights of the Child in 2009 which focused on child

¹⁷⁹ Council Conclusions, *A Special Place for Children in EU External Action*, 2008, para 13.

¹⁸⁰ *Idem*, para 32.

¹⁸¹ *Idem*, para 4.

¹⁸² *Idem*.

¹⁸³ Commission staff working document promoting employment through EU Development Cooperation, p. 23.

¹⁸⁴ European Consensus on Development, 2005, para 97.

labour. Participants included representatives from the Commission, Member States and NGOs.¹⁸⁵ The discussions focused on how the EU should continue to cooperate and engage in partnerships, thereby encouraging developing countries to sign and ratify the ILO Conventions. The link was made between eliminating child labour and promoting “consistent education policies which aim to provide quality, free, compulsory education up to the minimum age for admission to employment”.¹⁸⁶ A connection was made between IPEC and the important role the EU Commission is playing as a donor. Strengthening the social protection of both children and families was recognised as vital to keeping children out of child labour in this economic crisis.¹⁸⁷ The strategy papers which aim at finding a place for children in EU external action are unequivocally linked with the HRBA as they are steered by *the Guidelines* which overtly deals with all 5 main principles of the HRBA to development cooperation. However, ‘Stop Child Labour’ criticises the EU for not having either a binding document setting out the EU policy towards child labour and for not having a department in the Commission which specifically deals with children’s rights.¹⁸⁸

4.3 EU cooperation with the ILO

The relationship between the ILO and the EU is expanding and has been “described by the Commission and Council as one of ‘cooperation’ and ‘constructive dialogue’”.¹⁸⁹ In the Cotonou Agreement respect for both ‘basic social rights’ and a commitment to the protection of ‘core labour standards’ are framed as fundamental aims of the partnership.¹⁹⁰ Although the EU is not a member of the ILO the increasingly important role it plays in promoting labour standards in developing countries is being recognised by the ILO.¹⁹¹ This growth in importance could be a product of the European Court of Justice’s recognition of international labour standards through the jurisprudence of the

¹⁸⁵ Fourth Forum on the Rights of the Child, information on participant groups available at: http://ec.europa.eu/justice_home/fsj/children/forum/doc/participants_09_06_18_en.pdf [consulted on 09/06/2010].

¹⁸⁶ Jankanish, M., IPEC, Speech at 4th EU Forum on the Rights of the Child.

¹⁸⁷ Idem.

¹⁸⁸ Stop Child Labour, 2004, p. 5.

¹⁸⁹ Novitz, p. 215.

¹⁹⁰ Idem, p. 230.

¹⁹¹ Humbert, p. 238.

court.¹⁹² EU influence in the promotion of ‘core labour standards’¹⁹³ could be connected to the EU Generalised System of Preferences (GSP) which consist of “tariff preferences” for selected developing countries.¹⁹⁴ The primary objective of the GSP is to “contribute to the reduction of poverty and the promotion of sustainable development and good governance”.¹⁹⁵ The EU aims to ‘establish a link between trade liberalisation and respect for internationally recognised social and environmental standards’.¹⁹⁶ The Council Regulation 2005 establishes the ratification and implementation of “sixteen human rights conventions including the CRC, and ILO Conventions No. 138 and 182 on child labour” as a pre-condition to GSP.¹⁹⁷ Hence, the EU uses positive measures to encourage states to comply with core labour standards and human rights in general. In the case of non-compliance the EU can impose a ‘temporary withdrawal’ of these preferential treatments in the case where a state is violating their obligations, amongst others, under the child labour conventions of the ILO.¹⁹⁸ In the case of Burma/Myanmar the EU Council used this power to remove the GSP benefits “following findings relating to that country’s forced labour practices in 1996”.¹⁹⁹ In the EU External Relations Working Paper on Work cites the EU’s commitment to work with the ILO for the implementation of IPEC strategies in the ACP region.²⁰⁰

The EU-ILO relationship could be attributed to the ILO needing the endorsement of its core labour standards from the EU.²⁰¹ Explicit references to the ILO core labour standards are throughout the Council Regulation 2001 which revised the EU GSP.²⁰² This former statement is reasonable when consideration is given to the GSP being both

¹⁹² Novitz, p. 215.

¹⁹³ Core Labour Standards can be understood as those set out in the ILO’s Declaration on Fundamental Principles and Rights at Work, 1998, see. 3.3.1.

¹⁹⁴ Humbert, p.301.

¹⁹⁵ European Commission, *The EU’s Generalised System of Preferences*, <http://ec.europa.eu/trade/wider-agenda/development/generalised-system-of-preferences/> [consulted on 13/06/2010].

¹⁹⁶ Humbert, p. 301.

¹⁹⁷ Idem, p. 302 and Article 9 of Council Regulation (EC) No. 980/2005.

¹⁹⁸ Council Regulation (EC) No. 2501/2001 [2001] L346/1, Art 26, http://trade.ec.europa.eu/doclib/docs/2003/may/tradoc_113021.pdf [consulted on 13/06/2010].

¹⁹⁹ Novitz, p. 232.

²⁰⁰ Commission staff working document promoting employment through EU Development Cooperation, p. 23.

²⁰¹ Novitz., p. 239.

²⁰² Council Regulation (EC) No. 2501/2001 [2001] L346/1.

contradictory for the EU and for the ILO. It is contradictory for the former because the EU has failed to provide internal enforcement of all core ILO standards with its member states and it is contradictory for the latter on account of ideological ambivalence with 'social conditionality'.²⁰³ Thus, in many ways, the EU has been given a free reign with its contradictory stance because the ILO needs it to continue promoting ILO standards in trade and aid partnerships such as the Cotonou Agreement.

As already mentioned, the EU GSP Regulations specifically refer to ILO Conventions concerning child labour. In addition, the EU has committed to a Memorandum of Understanding (MOU) with the ILO which includes cooperation on the implementation of core labour standards, with a 'special focus on child labour and education'.²⁰⁴ The MOU specifies that the Partnership will be developed 'through bi-lateral meetings' where policy discussions will take place on issues of 'common interest'.²⁰⁵ Thus, we can conclude that the ILO-EU partnership is, while not yet cemented, continuously growing. The EU regularly cites the core labour standards, including the key Conventions to the elimination of child labour, in its external development policies on trade and aid. The use of core labour standards in these policies is valuable to the ILO because it further promotes them, however, the EU's methods, are somewhat contradictory to the ILO. The elimination of child labour is encompassed in the core labour standards and references to the ILO child labour Conventions are plentiful upon examination of the GSP Regulations and other core external policy documents of the EU. Therefore, the EU's intentions to promote the elimination of child labour and other core labour standards are undeniable. However, it is now necessary to analyse the tangible efforts the EU make in the fight against child labour by examining the role it plays in the relevant country, Kenya in Sub-Saharan Africa.

²⁰³ Novitz, p. 233.

²⁰⁴ European Commission and International Labour Organisation, Memorandum of Understanding, 2004, http://ec.europa.eu/europeaid/what/social-protection/documents/memorandum_of_understanding_ec_ilo_en.pdf [consulted on 13/06/2010].

²⁰⁵ Section D, European Commission and International Labour Organisation, Memorandum of Understanding.

5. Case Study: A rights-based approach to eliminating child labour in Kenya

5.1. Introductory remarks

In this chapter, through the example of Kenya, an analysis of rights-based approaches to eliminating child labour will be conducted. The Case Study is set in Sub-Saharan Africa as the issue of child labour is most urgent in this region of the world. There is an estimated 48 million economically active children in Sub-Saharan Africa.²⁰⁶ Kenya has signed and ratified the ILO Conventions concerning the protection of children from child labour²⁰⁷, the CRC²⁰⁸ and the ICESCR²⁰⁹. However, Kenya has not signed the optional protocol to the ICESCR on the addition of an individual complaints mechanism. At a regional level, Kenya is party to the African Charter on the Rights and Welfare of the Child (ACRWC) and the African Charter on Human and People's Rights (ACHPR). Kenya is also party to the Cotonou Agreement and there is a well established European Commission delegation based in the capital Nairobi. The situation of child labour in Kenya is representative of the region. The main types of child labour identified are domestic and agriculture.²¹⁰ The issues of extreme poverty, high population growth, HIV/AIDS, access to education, food crises, and political unrest and conflict intensify the problem of child labour in the African region.²¹¹ In the forthcoming chapter both the national and multi-lateral efforts to eliminate child labour in Kenya will be analysed, with a particular emphasis on the role the EU is playing.

5.2. Children's rights in Kenya

5.2.1. Developments in children's rights in Kenya

As previously established in this study, children's rights are interrelated and interdependent. Subsequently, to understand the difficulties of eradicating child labour

²⁰⁶ Keita, 2008, p. 347.

²⁰⁷ ILO C138 was ratified by Kenya in 1979, while C182 was ratified in 2001.

²⁰⁸ CRC was ratified by Kenya in 1990

²⁰⁹ ICESCR was ratified by Kenya in 1972.

²¹⁰ IPEC, see <http://www.ilo.org/ipec/Regionsandcountries/Africa/lang--en/index.htm> [consulted 19/06/2010]

²¹¹ Idem.

in Kenya it is important to first explore the general situation of children's rights. Similar to other Sub-Saharan African states Kenya has a very large young population with over 40% of the total population being under 15 years old.²¹² An estimation of 1 to 1.3 million children have been orphaned due to the extent of the HIV/AIDS epidemic.²¹³ Enrolment in primary education is approximately 76% and the number of people living in poverty is estimated at 20%.²¹⁴ According to ILO/IPEC indicators, 82.3% of child labourers (age 5-14) in Kenya work in Agriculture, while 15.4% work in services and 2.3% in industry.²¹⁵ Kenya experienced a period of political and social unrest which resulted in violence in 2008 in the aftermath of the general elections. This claimed the lives of 1000 people and a further 300,000 were displaced.²¹⁶ The repercussions of this period on children are significant because displaced children often end up on the street and street children have been identified as a particularly vulnerable group to child labour. The relevant national legislation enacted to protect children from child labour includes the Employment Act, Chapter 226, Act No. 2 of 1976 (consolidated to 1984); the Children's Act Cap 586 Laws of Kenya, 2001 – Free and compulsory education for children ages 6-14; the Constitution of Kenya, Act No. 5 of 1969 (Revised Edition 1998).²¹⁷ Additionally, the Children's Act of 2001 is applicable and is analysed below.

The Children's Act of 2001 deepens the protection and promotion of Children's Rights in Kenya. The Act represents a long-overdue modernisation of the legal framework for the protection of children's rights in light of the state's commitments since signing the CRC and the ACRWC.²¹⁸ It is clear that, for the most part, the main principles of the Children's Act stem from a combination of the CRC and the ACRWC, namely; the best interests of the child, the child's right to life, survival and development, right to non-discrimination and the rights of a child to participation.²¹⁹ At the same time, it is worth mentioning the influence that the jurisprudence of the Kenyan Courts had on the

²¹² UNDP Human Development Report 2006.

²¹³ UNAIDS, <http://www.unaids.org/en/CountryResponses/Countries/kenya.asp> [consulted on 18/06/2010].

²¹⁴ UNICEF, http://www.unicef.org/infobycountry/kenya_statistics.html [consulted on 18/06/2010]

²¹⁵ IPEC, Kenya: Child Labour Data Country Brief, 2006.

²¹⁶ Human Rights Watch, Country summary: Kenya January 2010, p.1.

²¹⁷ IPEC, Kenya: Child Labour Data Country Brief, 2006.

²¹⁸ Odongo, G. O., 2004, p. 419.

²¹⁹ Sections 2-5, Kenya Children's Act 8 2001.

drafting of the Act. *Wambwa v Okumu*, a case concerning child custody, saw the Kenyan High Court upholding the *best interests of the child* principle over the patriarchal local customary law.²²⁰ Indeed, the Children's Act 2001 outlaws and criminalises customary practices including female circumcision, early marriage, and all other practices that are considered harmful to the child's life, health or social welfare, dignity, or physical or psychological development.²²¹ This is particularly significant because it is formal recognition in Kenyan domestic legislation that the fundamental rights of the child are universally applicable and must be respected in all circumstances and violation of these rights cannot be vindicated by claiming that it is 'customary practice'. This insertion to the Act shows that consideration had been given to the CRC's recommendations. The Children's Act, however, has failed to raise the age of criminal responsibility from 8 years, which the CRC has criticised as too young.²²² This could be considered a major weak point of the Act as it fails to address a key concern of the committee on the rights of the child.

The right to parental care is provided for as are other economic, social and cultural rights including the right to healthcare and to free compulsory education.²²³ As previously identified, this provision of free compulsory education is very important for the campaign against child labour as it provides an alternative for many children and their families. The Act provides for the penalisation of parents for not enrolling their children in school.²²⁴ This provision is problematic because the state has not provided for education facilities to meet the needs of all children in Kenya, especially in relation to vulnerable groups and children with special needs. Parents cannot be made responsible for the governments' failure to meet its obligations as regards education provision. Another issue here is that because of extreme poverty some families feel that they have to send their children to work and not to school out of necessity, even if there is provision for free education. Fundamentally, the root causes need to be addressed. Criminalising parents for not sending their children to school is not going to address the

²²⁰ Odongo, p. 422.

²²¹ Kenya: Children's Act 8 2001, Section 14.

²²² CRC/C/KEN/CO/2, 19 June 2007.

²²³ Kenya: Children's Act 8 2001, Section 6-9.

²²⁴ CRIN, Child Rights References in the Universal Periodic Review, 2010, para 46.

systematic problems of poverty and inequality. However, this might be an important provision to ensure that education is seen as a child's right and not a choice for the parents to make (provided that it is available, accessible, acceptable and adaptable). The prohibition of child labour for children less than 16 years and children's involvement in armed conflict is explicit in the Children's Act.²²⁵ The state is responsible for the "rehabilitation, care, recovery and re-integration into normal social life" for any child who has been involved in armed conflict.²²⁶ The Minister is responsible for regulating working conditions of children over 16 years.²²⁷ However, there are no specifications of regulations for the working conditions of children over 16 years.

The Children's Act establishes the National Council for Children's Services which has a supervisory function and is comprised of members of government, and quite uniquely, members of NGOs.²²⁸ The Children's Act devolves some powers from the national to the local level by instilling the responsibility of the promotion and protection of the rights and welfare of children to the local authority.²²⁹ The Children's Act stipulates that all the rights should be implemented by the government by "progressive realisation" or by the "maximum of its available resources".²³⁰ Accordingly, the implementation of this Act is likely to involve a very long process and is heavily dependent on the political will of the government of the day. This is because the nature of many of these rights place obligations on the state. An example of this is the establishment of free compulsory education in the Children's Act. While a welcomed provision, the implementation of this norm requires a lot of financial and technical commitment in order to provide more schools, teachers and resources to account for the sudden increase in enrolment rates.²³¹ Another significant concern is that the socio-economic rights established in the Children's Act are not enshrined in Kenyan Constitutional Law.²³² Therefore, while this

²²⁵ Kenya Children's Act 8 2001, Section 10.

²²⁶ *Idem*, Section 10 (3).

²²⁷ *Idem*, Section 10 (4).

²²⁸ Odongo, p. 427.

²²⁹ *Idem*, p. 421.

²³⁰ Kenya: Children's Act 8 2001, Section 3.

²³¹ CRC/C/KEN/CO/2, 19 June 2007.

²³² Odongo, p. 424.

Children's Act represents a positive evolution in the legal framework for the protection of children in Kenya, its real impact remains to be seen.²³³

5.2.2. *Concluding observations from the Committee on the Rights of the Child*

The concluding observations 2007 from the Committee illustrate that, while the Kenyan Government have made some progress in the area of promotion and protection of children's rights, there remain fundamental issues and concerns over the protection of children's rights.²³⁴ The Committee highlights concern over the lack of a comprehensive national plan of action to address the recommendations from the Committee and the General Assembly Special Session on Children *A world fit for children*.²³⁵ Concerning Article 32 of the CRC, the Committee expresses concern that there is an "absence of domestic regulations and policies for provisions concerning child labour and the high number of children engaged in economic activities compounded by high poverty levels and the effects of HIV/AIDS".²³⁶ Indeed in relation to poverty the committee regrets that the Poverty Reduction Strategy Paper (PRSP)²³⁷ does not adequately address working children. Furthermore, the Committee recommends that the state should explicitly deal with the rights and needs of children in policy documents which are addressing the issue of poverty in Kenya.²³⁸ Here we see that the need to address the issue of child labour in Kenya can only be achieved through a multi-level commitment by the state. As regards HIV/AIDS the Committee concluded that the state needs to strengthen efforts to facilitate children who have been orphaned as a result of it.²³⁹ HIV/AIDS' orphans are at a higher risk of exploitation than other children and as a result are at a higher risk of child labour, especially of the worst forms of child labour.

²³³ Idem, p. 428.

²³⁴ CRC/C/KEN/CO/2, 19 June 2007, para 6.

²³⁵ Idem, para 11.

²³⁶ Idem, para 61.

²³⁷ PRSPs are prepared by the member countries in broad consultation with stakeholders and development partners, including the World Bank and the IMF. See IMF Country Report No. 05/11, January 2005.

²³⁸ Some of the documents and strategies highlighted in the concluding observations include: Poverty Eradication Plan, the Poverty Reduction Strategy, the Constituency Development Fund under the CDF Act of 2003, the Local Authorities Transfer Fund, the Local Authority Service Delivery Action Plan.

²³⁹ CRC/C/KEN/CO/2, para 52.

Although not mentioned explicitly by the Committee, the protection of minority and indigenous children is essential to the effective eradication of child labour. It can be interpreted that child labour is high amongst minority and indigenous groups since the Committee highlighted that enrolment rates in education are lowest amongst these groups.²⁴⁰ Low enrolment rates amongst these groups are probably due to the lack of access to education. Many of these children live in remote parts of Kenya, especially those from hunter-gatherer and pastoralist groups of people. The Committee recommended that efforts to provide education for these indigenous groups should be accelerated. Suggestions on how this might be achieved include providing mobile schools and training of teachers from within these communities.²⁴¹ Where education provision is weak child labour tends to be high.²⁴² The interrelatedness and interdependency of children's rights is palpable in these circumstances. The Committee made three notable recommendations to the state in relation to addressing child labour. Firstly, it was advised to "develop and enact legislation, as well as policies, to protect children from the worst forms of child labour, including measures to address the root causes of this problem".²⁴³ Secondly, the Committee advocated for the state to "strengthen the capacity of the institutions responsible for the control and protection of child labour". Thirdly, the Committee urged the state to "seek the support and assistance" of the ILO, UNICEF and NGOs "in order to develop a comprehensive programme to prevent and combat child labour in full compliance with ILO Convention No. 182 (1999)". The succeeding section of this chapter will address how the state is addressing these recommendations.

Concerning the Optional Protocol to the CRC on the involvement of Children in Armed Conflict, the Committee commends the ratification but stresses the need to follow up with an initial report on the specific situation of Children in Armed Conflict in Kenya.²⁴⁴ In relation to sexual exploitation and trafficking, the Committee expresses concern over the "rising number of children internally trafficked and engaged in

²⁴⁰ *Idem*, para 69.

²⁴¹ *Ibid*.

²⁴² See *supra* note 76.

²⁴³ CRC/C/KEN/CO/2, para 61.

²⁴⁴ CRC/C/KEN/CO/2, para 71. Without this initial report the Committee cannot make recommendations.

prostitution as part of sex tourism”.²⁴⁵ Deep concern is expressed regarding the lack of an established minimum age of sexual consent for boys. The Committee advocates for the ratification of the Optional Protocol on the sale of children, child prostitution and child pornography and promotes further technical assistance from IPEC. Here we see that the Committee recognises the important role of IPEC on this issue which is consistent with responding to the worst form of child labour in ILO Convention No. 182.

5.3. Approaches to eliminating child labour in Kenya

5.3.1. The challenge of child labour in Kenya

From the above sections on progress made by the Kenyan Government in relation to children’s rights we can see that there have been efforts to strengthen domestic legislation to protect children from economic exploitation. However, child labour continues to be one of the most serious challenges to the state’s development. Therefore, it is essential to study the specific difficulties of eliminating child labour in Kenya in order to understand how EU external efforts can effect change. Poverty and insufficient education structures were put forward as the root causes of child labour. Kenya experiences both of these problems. The Committee to the CRC has noted that an opportunity was missed to include the rights and needs of the children into the PRSP. It returns to the point that child labour can only be eradicated if both the root causes are tackled and a child’s rights-based approach is adopted in policy making by the state.

CDL and agricultural child labourers constitute the majority of child labourers in Kenya. A comprehensive report by the Government in 1998-1999 showed that approximately one million three-hundred thousand children were working and not attending primary education.²⁴⁶ A further 588,400 children worked but did attend school.²⁴⁷ Socio-economic circumstances of families in rural parts of Kenya were

²⁴⁵ Idem, para 65.

²⁴⁶ Republic of Kenya, 2001, vii.

²⁴⁷ Ibid.

reported to have effected parent's decisions to send their children to work.²⁴⁸ This indicates that while parents might recognise that it is their child's right to go to school and not to have to work they feel that they cannot survive without them working due to the socio-economic circumstance they live in. There is a strong connection between street children, HIV/AIDs and subsequently child labour in the informal sector in Kenya.²⁴⁹ This again is representative of sub Saharan-Africa and indeed most developing countries. Street children are vulnerable to many forms of exploitation not least child labour. Recently IPEC have been making concerted efforts in the Sub-Saharan African region to make connections between eliminating child labour, creating youth employment, and HIV prevention. According to the recent study by IPEC "nearly two-thirds of those living with HIV/AIDS are found in sub-Saharan Africa and there are thought to be 12 million orphans. In some countries up to 10% of children orphaned by HIV/AIDS are heads of households and many have no option but to seek work".²⁵⁰

The ILOs Decent Work Programme for Kenya has made progress in linking youth empowerment and youth employment with the elimination of child labour.²⁵¹ Together they constitute one of the fundamental objectives of the Decent Work Agenda for Kenya. Protection and regulation for young workers is essential in Kenya where there is such a young population. Decent work opportunities are jobs which will help a person not only subsist but get out of systemic poverty and work in a safe environment.²⁵² It is critical in Kenya, and other Sub-Saharan African states to focus on providing decent work for youth because without provisions for them unemployment would soar. So the economic and social development of Kenya lies with decent work opportunities for youth. But to get this decent employment the youth need to have both an education and vocational skills.²⁵³ Child labourers, for the most part, do not attain the education or skills necessary to find decent work in their future. Thus, decent work for youth in Kenya is inextricably linked to eliminating child labour. Likewise, the link with EFA

²⁴⁸ Munene and Ruto, 2010, p. 137.

²⁴⁹ IPEC, 2010 (a), p. 44.

²⁵⁰ Idem.

²⁵¹ Decent Work Agenda for Kenya, p. 370.

²⁵² For more on decent work see <http://www.ilo.org/public/english/bureau/program/dwcp/about/index.htm> [accessed 01/07/2010].

²⁵³ ILO, Kenya Decent Work Programme, p.6.

and decent work is tangible. As such, a focus point of the ILO decent work programme for Kenya is- the achievement of MDG 2. Kenya has been part of the IPEC programme since its inception in 1992. Kenya adopted a TBP in 2004 and is in the process of implementing it.²⁵⁴

5.3.2. Strategies to prevent the most prevalent forms of child labour in Kenya

Girls are more vulnerable to child domestic labour and to being deprived of an education in Kenya.²⁵⁵ This is because girls are expected to marry and leave the family home at a young age. The boys carry on the family name and as such their education is viewed as more important.²⁵⁶ This is why many girl children are sent to work as child domestic labourers in the cities. As we have already identified child domestic labourers endure many hardships as a result of the labour. In Kenya some of the concerns faced by child domestic labourers have been recognised as; long working hours (sometimes in excess of 41 hours/week), hazardous working environments, hunger, physical and emotional abuse, and economic exploitation in the sense that they often get underpaid or not paid at all for their work.²⁵⁷ As already acknowledged in chapter 3, this is a very complex form of child labour to categorise as it occurs within private homes. While recognising that parents or guardians only send their children to work when it is a case of having no other means to support the rest of the family, there is also a need to recognise that this practice is socially acceptable and that this aspect also needs to be addressed at the community level. It is important to recognise the role that parents or guardians of the child play in handing the child over to work with the employers.²⁵⁸ This highlights the need for a multi-level strategy to address both the systematic poverty from the government level down to the local level while also addressing the cultural acceptance of child labour. This can be changed through educating communities about the fundamental rights of all children.

²⁵⁴ IPEC, 2006 (a), p. 35. See 3.5 for more on TBPs.

²⁵⁵ IPEC, 2009 (b), p.12

²⁵⁶ Munene and Ruto, p. 138.

²⁵⁷ Idem, p. 140.

²⁵⁸ Idem, p. 139.

Agriculture accounts for more than 80% of child labourers in Kenya.²⁵⁹ This is the case because the majority of the population still live in rural areas where agriculture is the dominant occupation. The two main problems associated with child agricultural labour are the hazards involved in this under-regulated sector and the interference it causes with education. Some of the hazards identified by Kenyan children in a UNICEF report include: “cuts and wounds from pruned coffee and tea bushes, long working hours, lifting heavy loads, exposure to farm chemicals, lack of drinking water and toilets, and excessive noise”.²⁶⁰ Clearly it is a sector which has significant hazards and needs more regulation in Kenya. However, this is difficult to resolve and challenged by the nature of agriculture. For IPEC, it has an underrepresentation of projects to deal with the prevalence of Agricultural child labour.²⁶¹ The introduction of a three year programme (called Comagri) on the prevention, withdrawal and rehabilitation of children engaged in hazardous work in commercial agriculture was an attempt to bridge this gap in Kenya and other Sub-Sahara African states.²⁶² As previously recognised, farm work is not necessarily unacceptable work for children. There are circumstances where a child giving a helping hand on his/her family farm is not harmful to the development of the child and therefore it can be an acceptable form of child work. What is unacceptable, however, is when this work interferes with a child’s right to primary education. The lack of access to education in some of the rural areas of Kenya is a cause for concern as until sufficient education facilities are available to all children agricultural child labour will prevail over education.

5.3.3. *Other forms of child labour in Kenya*

While domestic and agriculture account for the majority of child labour in Kenya, it exists in other sectors too including the informal sector and the commercial sexual industry.²⁶³ In an attempt to combat the commercial sexual form of child labour the children’s department, with the cooperation of hoteliers, has overseen the international

²⁵⁹ IPEC, Country Data Brief, 2006.

²⁶⁰ UNICEF, 2005, p.30.

²⁶¹ IPEC, 2006 (a) p. 39.

²⁶² Ibid; programme also in operation in Zambia, Malawi, Uganda and Tanzania.

²⁶³ CRIN, 2010, para 64.

Code of Sexual Exploitation of children in sexual tourism.²⁶⁴ Child labour has been found in artisanal and small scale mining in Kenya. This problem is restricted to small scale operations because they are less regulated than larger mining operations.²⁶⁵ While the Committee on the rights of the child criticised Kenya's PRSP for not adequately addressing the link between working children and poverty, IPEC supports the emphasis that has been placed on agriculture and rural development. The participatory process used in the drafting of the PRSP "offers an excellent opportunity for the ILO's constituents to influence priorities, policy-makers and institutions, as has happened in Kenya".²⁶⁶ Child labour in the informal sector is strongly connected to street children. Indeed as we have seen Kenya was recommended to heighten protection in regards to street children.

For the approximate 500,000 children in Kenya who both work and attend primary school, an IPEC Study on Kenya showed that there was a correlation between working children and their input in school. It showed that working children were more likely to be tired and to attend school less if they worked.²⁶⁷ If the work they do outside the hours of school interferes with their performance in school it is child labour rather than 'light work'.

5.3.4. Eliminating child labour in Kenya through education

As expected, enrolment in education has increased dramatically since the introduction of free and compulsory education in 2003. However an estimated 1.3 million children remain out of school.²⁶⁸ Along with this increase in enrolment the introduction of free education brings with it a new set of challenges for the government. A key challenge is the strain the introduction of free and compulsory education places on available resources. "Overstretched facilities", "overcrowded schools" and the "scarcity of schools in some areas" have been identified as the current challenges for the education

²⁶⁴ Ibid.

²⁶⁵ IPEC, 2004 (b), p. 1.

²⁶⁶ IPEC, 2006 (a), p. 57.

²⁶⁷ Idem, p. 32.

²⁶⁸ CRIN, 2010, para 104.

sector.²⁶⁹ The increase of student to teacher ratio and the lack of provisions for new schools to cater for the increase in enrolment are exemplary of this strain. Indeed, the quality of education must come under scrutiny when it is reported that only 47% of enrolled children finish primary education.²⁷⁰

The United Nations Educational, Scientific and Cultural Organisation (UNESCO) have worked with the Government on strategic planning for a more efficient education system. UNESCO identified a main challenge for Kenya as the reallocation of resources within the education sector itself to deal with the increase of students in the system.²⁷¹ This shows that the Governments' role in providing EFA must extend beyond legislative means, to a multi-level commitment with the aim of developing a holistic education system. As already stated, the implementation of EFA needs a strategic framework which takes account of not only the availability and accessibility of education but also its acceptability and adaptability. Indeed it becomes clear that while the introduction of free compulsory education is a positive step for the development of children's rights in Kenya, the legislation needs to be backed up by adequate financing and commitment to education reform policies to meet the new needs of the enlarged education sector. Ultimately, while the introduction of free education is a positive step, the implementation of policy in educational reform is the only way to remove the barriers which are keeping the aforementioned approximately one million three-hundred thousand children out of primary education in Kenya and thus keeping them from realising their basic human right to primary education.

School-feeding programmes in primary school were introduced by the government as one response to the challenges facing some children.²⁷² This approach of providing school-feeding programmes has the double effect of getting children to both enrol and attend school while simultaneously relieving them of the need to work due to necessity. This act is a positive incentive for families to send their children to school and not to work. While acknowledging that there are positive steps being made the CRC has

²⁶⁹ CRIN, 2010, para 59.

²⁷⁰ Ridell, 2003, p. 4.

²⁷¹ Idem, p. 5.

²⁷² CRIN, 2010, para 47.

nonetheless criticised the state for the lack of domestic regulations and policies in the area of child labour.²⁷³

5.4. EU and Kenya- a partnership to eliminate child labour?

5.4.1. The nature of partnership between the EU and Kenya

Kenya is part of the ACP partnership on aid and trade. As shown in chapter four, the Cotonou Agreement is the basis of this partnership. The main areas of development which the EU delegation in Kenya focuses on are: infrastructure, agriculture and rural development, macroeconomic support, social sector, environment, water and energy, private sector development, governance, support to non state actors and NGO projects.²⁷⁴ Poverty reduction, the promotion of democracy, the progression of human rights and good governance are the main aims of the partnership.²⁷⁵ The objectives and aims of the Kenya-EU partnership are established in the Strategy Paper.

5.4.2. A place for the elimination of child labour in the partnership

Mainstreaming child labour prevention into other domestic laws and policies is amongst the commitments made in the strategy paper.²⁷⁶ Agriculture is recognised as an intrinsic part of Kenyan livelihoods. The economy is largely dependent on agricultural exports and as such securing EU investment in this area is vital for the government of Kenya. In the strategy paper there is an emphasis on the importance of agriculture in Kenya and the government recognises the issue of both school drop out and child labour in the rural areas where agriculture is the main vocation. As a remedy for this problem the document stipulates that the protection of children from child labour needs to be mainstreamed into domestic laws and policies. This needs to be embedded into the Education Act, the Children's Act, the Industry Act and policy documents like the

²⁷³ CRC/C/KEN/CO/2, para 50.

²⁷⁴ Delegation of the EU to Kenya, <http://www.delken.ec.europa.eu> [consulted on 01/07/2010].

²⁷⁵ Delegation of the EU to Kenya, <http://www.delken.ec.europa.eu/en/news.asp?newsid=146> [consulted on 01/07/2010].

²⁷⁶ Republic of Kenya- European Commission, Country Strategy Report and Indicative Report for the period 2008-2013, p. 16.

orphans and vulnerable children policy.²⁷⁷ However, there are no substantive plans regarding how to operationalise this intention outlined in the strategy. In fact, EU commitment to the elimination of child labour does not go beyond the understanding of this intention. It is not a core area of the work of the EU delegation in Kenya. While the elimination of child labour is highlighted as an area of mutual political concern in the Cotonou Agreement the way and means of eliminating child labour are not established in policy documents for EU-Kenyan development cooperation.

The relationship between the ILO and the EU in the elimination of child labour is coming to fruition with the implementation of the new TACKLE programme which is being piloted in Kenya amongst other ACP states. This project brings together the reduction of poverty with the elimination of child labour through the medium of education. This programme aims to strengthen local capacities to formulate, implement and enforce policies to combat child labour. The EU will provide the financial assistance while the ILO will provide the technical support to implement the programme in the ACP countries.²⁷⁸ Partnership with the ILO and IPEC is critical because while the EU may have the financial capacity IPEC has the expertise.

While programmes like these and partnership with IPEC is vital, the EU could also exercise its powers in relation to political dialogue. The revised version of the Cotonou Agreement does place more importance in political dialogue.²⁷⁹ The EU could place more pressure on the Kenyan government to uphold its commitments to the CRC and the ILO Conventions. This would not interfere with the EU's principle of subsidiarity because it would simply be exerting its influence in order to promote core labour standards which Kenya are already party to and thus obligated to uphold. Political will has been proven to be the only truly effective way of sustainably reducing the problem of child labour as seen in chapter three through the examples of Brazil and the region of Kerala in India. Thus, the EU exercising its muscle to promote these standards has the potential to truly contribute to the elimination of child labour in Kenya.

²⁷⁷ Idem, p. 37.

²⁷⁸ EU-ILO, TACKLE.

²⁷⁹ See section 4.1.2. for more on the changes made in regards to the role of political dialogue in the agreement.

6. CONCLUSIONS AND RECOMMENDATIONS

This thesis began with exploring how a rights-based approach to the elimination of child labour can be applied. This established that a rights-based approach is essential as it puts the child at the centre of the debate. Child labour is a violation of children's rights and as such the issue needs to be dealt with through a human rights lens. A rights-based approach is necessary to show that states are the 'duty holders' and have obligations to uphold. A rights-based approach to the elimination of child labour requires a multi-level strategy from all actors to respond to its multiple root causes. The examination moved on to assess the global situation of child labour with emphasis on establishing a working definition of child labour. This analysis showed that there is a lack of consistency in the various definitions used by different actors. Then a look at the protection of children from child labour in international human rights law showed that while child labour is prohibited at all levels the lack of monitoring mechanisms for the ILO Conventions and the lack of an individual complaints mechanism to the CRC weakens the overall protection. However, it can be said that the main protection for children comes in the form of domestic legislation. Upon examining the EU core policy documents in external action, namely; the Consensus and the Cotonou Agreement, it can be determined that there is an absence of explicit reference to human rights. However, upon examination of the *EU Guidelines for the Promotion and Protection of the Rights of the Child*, and the EIDHR it becomes clear that the advancement of human rights is a main concern of EU external action. Furthermore, the growing relationship between the EU and the ILO on the promotion of core labour standards is substantiation of this commitment.

To readdress the principle research question: is a rights-based approach to development cooperation being implemented by the EU in its external action policies to combat child labour? The EU has shown commitment to the promotion of core labour standards through the MOU signed with the ILO. Additionally the EU has shown, at least in intention, a commitment to upscale its actions to eradicate child labour, especially the worst forms. The focus on child labour at the fourth forum on the rights of the child is testament of this commitment. However, this rhetoric needs to be put into concerted action. One way it could be put into action is through the median of political dialogue.

The role of political dialogue has been given more competencies in the revised Cotonou Agreement in 2010. This change places more power on political dialogue which if used for child labour has the potential of effecting real change. There is now an opportunity presented to the EU to apply its intentions of commitment to the elimination of child labour. From this discussion it is clear that the research question can be answered in the negative, however, it has been identified that there is evidence of political will and if that is applied in an appropriate way a rights-based approach to EU external action in eliminating child labour is on the horizon. Thus, it is recommended that the EU accelerate its efforts to pressurise the government of Kenya to pass a comprehensive rights based national policy for the elimination of child labour.

Ultimately, responsibility for the elimination of child labour lies with the state. The study asked if there is a rights-based approach to eliminating child labour in Kenya? In order to answer this question we must first see how the strategies pursued fit into the fundamental facets of a rights-based approach. Is there explicit reference to CRC and ILO Conventions in the policy and practices to eliminate child labour? Policies and practices- do they seek to empower child labourers and their families to realise their rights? Do the policies and practices promote participation of the children and families affected by child labour in decision making? Do the policies and practices address discrimination and prioritise vulnerable groups?

The overarching aim of the Children's Act 2001 is to strengthen Kenya's compliance with the CRC. The inclusion of the best interests of the child is of particular relevance to a rights-based approach to development. Additionally, ILO Conventions are both signed by Kenya and they have been working in cooperation with IPEC since the programme began in 1992. IPEC programmes do seek to empower the families and children to realise their rights by removing them from child labour and reintegrating them into education. The CRC have criticised the state for not having enacted policies to protect children from the worst forms of child labour. Indeed lack of state policies on this issue indicate that this is an area which needs to be strengthened. The state has stated it is committed to mainstreaming the issue of child labour in domestic policy. It can be said that there is a clear commitment to address the issue of poverty through the

PRSP. However, the PRSP also represents an opportunity lost in linking poverty to child labour. So, while there are some positive elements of progression in children's rights discourse, Kenya has not yet reached a rights-based approach to eliminating child labour.

The example of Kenya showed that, while it has made significant progress in the sphere of children's rights, it has a long road ahead before the elimination of child labour. There are signs of commitment through the ratification of international standards such as the ILO Conventions and the CRC and its Optional Protocol on the involvement of children in armed conflict; however, it has not yet ratified the Optional Protocol to the CRC on the sale of children, child prostitution and child pornography. The lack of a comprehensive national policy focused on the elimination of child labour shows that a rights-based approach to child labour is not yet applied. This lack at national policy level is alarming considering the fact that child labour has been identified as a main obstacle to the achievement of EFA and ultimately the fulfilment of the states obligations in the CRC. Furthermore, child labour is an inhibiting factor in the overall development of the state. To this end it is recommended that Kenya adopts a national policy which specifically deals with child labour. If a new policy on the elimination of child labour was enacted by the state it should make a concerted effort to promote the participation of children and families' in the decision making process. In addition, the prioritisation of addressing discrimination of indigenous groups, minorities, children with HIV/AIDS and orphans of HIV/AIDS and all children in extreme poverty must be addressed by the child labour policy. Particular emphasis must be placed on the eradication of the two most prevalent forms of child labour in Kenya- namely child domestic labour and agricultural child labour.

Children's rights are inter-related and the realisation of them is mutually dependent. This study has clearly shown the inextricable links between child labour and the right to education. Furthermore, this study has demonstrated that child labour is closely linked to general economic, social and cultural rights. It is vital to deal with child labour as a rights issue. If it is not dealt with in this way, any progress will be unsustainable. It is therefore the concluding recommendation of this study is that a rights-based approach to

the elimination of child labour be applied by the EU. There is clearly a need at EU level to approach any strategies and efforts to advance children's rights through external action through the lens of the best interests of the child and be taking a rights-based approach to development cooperation. A comprehensive policy to this effect is needed at EU level. The Commission communications advocate for this. The EU has been criticised for not having an established department to deal solely with the rights of the child in external action. With the eradication of child labour being so closely linked to the realisation of education for all and the reduction of poverty- both of which are fundamental goals of EU external action- the EU needs to make more concerted efforts in this field by adopting a rights based-approach to the elimination of child labour.

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