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Child Labour**

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**The Role of the ILO in Extending the Scope of International Criminal Law to  
the Worst Forms of Child Labour**

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**Thesis submitted to the  
Faculty of Graduate and Postdoctoral Studies  
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## **Abstract**

Our dissertation attempts to demonstrate that the combination of international labour standards and of criminal accountability could provide beneficial protection to children against the worst forms of child labour. We will thus explore the role played by the ILO, through the adoption of *ILO Convention (no.182) on the Worst Forms of Child Labour*, in extending the protection of children against the worst forms of child labour. By analyzing the codified and the customary concepts of international criminal law, we can identify under which principles some of the worst forms of child labour can be taken in charge by the international criminal law sphere while the ILO can play a complementary role in the domestic criminalization and the practical application of criminal laws against the worst forms of child labour.

## **List of Abbreviations**

|              |  |
|--------------|--|
| <b>CEACR</b> | <b>Committee of Expert on the Application of Conventions and Recommendations</b> |
| <b>ICC</b>   | <b>International Criminal Court</b>  |
| <b>ICCPR</b> | <b>International Covenant on Civil and Political Rights</b>                      |
| <b>ICFTU</b> | <b>International Confederation of Free Trade Unions</b>                          |
| <b>ICJ</b>   | <b>International Court of Justice</b>  |
| <b>ICTR</b>  | <b>International Criminal Tribunal for Rwanda</b>                                |
| <b>ICTY</b>  | <b>International Criminal Tribunal for the Former Yugoslavia</b>                 |
| <b>ILO</b>   | <b>International Labour Organisation</b>   |
| <b>IPEC</b>  | <b>International Programme for the Elimination of Child Labour</b>               |
| <b>UN</b>    | <b>United Nations</b>  |

## Introduction

The International Labour Organisation (ILO) has been playing a leading role in the fight against child labour since its creation in 1919<sup>1</sup>. Being mostly a lone player, since those days, to target this phenomenon, it gained more support in the 1980s, following the adoption of the *Convention on the Rights of the Child*<sup>2</sup>. It is during the same period that the ILO started shifting its position regarding child labour in order to emphasize a child's rights approach and focus its work on the worst forms of child labour. With the adoption of *ILO Convention (no.182) on the Worst Forms of Child Labour*<sup>3</sup>, in 1999, the International Labour Organisation has decided to prioritize the fight against child labour, thus starting with the most unacceptable forms, namely the involvement of children in activities such as slavery, prostitution and drug trafficking. This new target has widened the traditional mandate of the ILO, extending its interest to economic exploitation, mostly seen as beyond the normal borders of labour. The inclusion of these new elements in a labour convention has raised concerns about the association that might be done between crimes against children and labour rights violations. The ILO had therefore entered a new terrain: the realm of international criminal law.

The purpose of this thesis is to first examine the criminal elements of the *ILO Convention (no.182) on the Worst Forms of Child Labour*. Given this background, the thesis will then examine the way in which the ILO has shifted its traditional mandate to include the monitoring of international crimes against children. It will finally explore the benefits and limits of the ILO's supervisory system and the possibility of extending the protection against the worst forms of child labour through international criminal law mechanisms.

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<sup>1</sup> See League of Nations, *The Versailles Treaty*, 28 June 1919, (entry into force 10 January 1920), Versailles [*Versailles Treaty*].

<sup>2</sup> United Nations General Assembly, *Convention on the Rights of the Child*, Resolution 44/25, 20 November 1989, (entry into force 2 September 1990), New York, at Articles 32 to 35, [*Convention on the Rights of the Child*], available at <http://www2.ohchr.org/english/law/pdf/crc.pdf>.

<sup>3</sup> International Labour Conference, *Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*, 87<sup>th</sup> Sess., Geneva, 17 June 1999, (entry into force 19 November 2000) [*Convention (no. 182) on the Worst Forms of Child Labour*], available at <http://www.ilo.org/ilolex/english/>.

The essential questions that this dissertation will seek to answer are: Is the ILO including international crimes in this labour Convention; second, is the ILO extending its traditional mandate in order to reach beyond labour into economic exploitation representing crimes against children; and finally, is the ILO an adequate actor in monitoring such obligation? The present thesis attempts to demonstrate that by combining the supervisory mechanisms of the ILO with criminal prosecution, we could provide a greater protection to children against the worst forms of child labour. This said, the thesis does not have as an aim to examine international criminal law in a holistic way, therefore limiting the study of international crimes and international prosecution to some of the gaps of these mechanisms, which the ILO can supplement. Thus, this thesis will help in understanding the benefits but also the limits of the ILO's supervisory system in the monitoring of international crimes and the possibility of avoiding impunity by including international criminal law mechanisms.

## Preliminary Chapter

“As late as the end of the 1980s, the reaction to child labour in the world ranged from indifference to resignation to denial<sup>4</sup>”. Within 20 years, things have come a long way. Nowadays, the fight against child labour is high on the global agenda and the practice is now widely considered unacceptable<sup>5</sup>. However, while the number of child labourers has decreased over the past years, dropping by 11% from 2002 to 2006,<sup>6</sup> there is still an estimated 200 million children caught in the scourge that is child labour.<sup>7</sup>

The multiple causes of child labour have been identified many times by diverse organisations, scholars and researchers<sup>8</sup>. Poverty, social exclusion, tradition, lack of education, low economic development of the country, globalization, all of these realities have played a role in the proliferation and perpetuation of child labour around the globe<sup>9</sup>. Different causes point to different opinions on whether child labour is a plague or a mere question of survival for some children. On one end of the spectrum, we find the opinion,

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<sup>4</sup> International Labour Conference, *The End of Child Labour: Within Reach*. ILO, 95th Sess., Geneva, 2006, at Preface of the report.

<sup>5</sup> Multiple international, regional and national instruments prohibit the economic exploitation of children; See for example *Convention on the Rights of the Child*, supra note 2; See also United Nations General Assembly, *International Covenant on Economic, Social and Cultural Rights*, Resolution 2200A (XXI), 16 December 1966, (entry into force 3 January 1976), New York, at Article 10, [*International Covenant on Economic, Social and Cultural Rights*] available at <http://www2.ohchr.org/english/law/cescr.htm>.

<sup>6</sup> Supra note 4, at xi.

<sup>7</sup> See online, International Labour Organisation, [http://www.ilo.org/global/Themes/Child\\_Labour/lang-en/index.htm](http://www.ilo.org/global/Themes/Child_Labour/lang-en/index.htm) (September 2009).

<sup>8</sup> See for example International Labour Conference, *A Future Without Child Labour*, Report of the Director General, 90<sup>th</sup> Sess., Geneva, 2002, 138 p. [*A Future Without Child Labour*]; See also International Labour Conference, *Report IV(1) Child Labour: Targeting the Intolerable*, 86<sup>th</sup> Sess., Geneva, 1998, 123 p [*Targeting the Intolerable*].; See also Children Rights Network: NGO Group for the CRC Sub-Group on Child Labour, *The Impact of Discrimination on Working Children and on the Phenomenon of Child Labour*, 2002, 6 p.; See also COX, Katherine, “The Inevitability of Nimble Fingers? Law, Development, and Child Labour”, 32 *Vand. J. Transnat’l L.*, 115, 1999, [Cox]; See also ARAT, Zehra F., “Analyzing Child Labor as a Human Rights Issue: Its Causes, Aggravating Policies and Alternative Proposals”, 24, *Human Rights Quarterly*, 177, 2002.

<sup>9</sup> See International Programme for the Elimination of Child Labour (IPEC). *Combating Child Labour: A Handbook for Labour Inspectors*, France, 2002, at 3.; See also supra note 4, at. 42 and 53.

a bit outdated, that child labour is part of the normal economic development scheme of a country and that just as the “West” made use of child labour in the past to benefit its economy, developing States should have the same right nowadays<sup>10</sup>. On the other extreme, lies the opinion that in all cases children must always be spared from working and must complete basic schooling in order to have their rights fully respected. However, most scholars navigate between the two ends of this spectrum<sup>11</sup>, which is where we stand in this paper.

If not everyone can agree that child labour is either acceptable or not, there is a universal consensus that some forms of child labour are completely unacceptable and must be abolished by all means. A 13 year old child working in a factory, with decent working conditions but no opportunity for schooling might raise some eyebrows but the case of a child prostitute or a child caught in a slavery-like position such as debt bondage would definitely get a frown. Even though both cases could be considered child labour, would we have a different ear towards the reasons behind and the consequences of each of those child labour cases? And should they be treated or sanctioned in a similar way?

Child labour takes different shapes and has different causes and consequences that affect as much the wider society as the child himself. This generalization and ambiguity of the term “child labour” has made it hard to fight the phenomenon since there is no formal consensus on what exactly is meant by this term and what needs to be tackled versus what can be acceptable under specific circumstances.<sup>12</sup> Therefore, this ambiguity makes

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<sup>10</sup> See CULLEN, Holly, *The Role of International Law in the Elimination of Child Labour*, Leiden, Martinus Nijhoff Publishers, 2007, at 138-139 [Cullen]; See also Cox, supra note 8, at 129.

<sup>11</sup> See supra note 4, at 23; See also UNICEF, *The State of the World's Children 1997*, Oxford, University Press, 1997, at 24. “At one end of the continuum, the work is beneficial, promoting or enhancing a child’s physical, mental, spiritual, moral or social development without interfering schooling, recreation and rest. At the other end, it is palpably destructive or exploitative. There are vast areas of activity between these two poles, including work that need not impact negatively on the child’s development.”

<sup>12</sup> See Cox, supra note 8, at 122. The ambiguity of what is meant by the term “child labour” lies in part in the fact that the definition of a child is not consistent around the world and that there is no formal consensus on this issue. The *Convention on the Rights of the Child* (supra, note 2) has fixed the age of a child as every person under 18 years of age, but this definition applies only for the purpose of the Convention and therefore, each State can define a child as they which for the purpose of their own domestic

it difficult to reach a universal strategy against child labour, which diminishes the efficiency of international and national supervisory mechanisms.

The International Labour Organisation (ILO) is one of the numerous organisations working on the protection of children against child labour<sup>13</sup>. From its creation in 1919 to nowadays, the work of the ILO has been devoted to the respect of humane working conditions and the achievement of social justice<sup>14</sup>. In 1999, the ILO adopted a new Convention on child labour, the *Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*<sup>15</sup> and its accompanying *Recommendation concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*<sup>16</sup>. These instruments maintain that some forms of child labour are of an extreme nature and must be eliminated immediately. It therefore states that Members who ratify the Convention must take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency<sup>17</sup>. The *ILO Convention (no.182) on the Worst Forms of Child Labour* distinguishes four different forms of child labour:

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legislation. The *Convention on the Rights of the Child* also allows for an exception, which is when majority is attained at an age earlier than 18, such as from the effects of civil acts like marriage.

<sup>13</sup> See the FYFE, Alex, *Worldwide Movement Against Child Labour Progress and Future Directions*, Geneva, International Labour Office, 2007, [Fyfe]. The ILO works alongside other UN agencies such as UNICEF, UNESCO, WHO, UNDP, regional development banks such as ADB, and various UN Human Rights Committees such as the Committee on the Rights of the Child and the Committee on Economic, Social and Cultural Rights.

<sup>14</sup> The notion of human rights did not exist when the ILO was founded. The concept of social justice refers to a wider concept than the one of human rights. See International Labour Organisation, *Constitution of the International Labour Organisation (ILO)*, 1 April 1919, available at <http://www.ilo.org/ilolex/english/constq.htm>, [ILO Constitution], at Preamble. “Whereas universal and lasting peace can be established only if it is based upon social justice”.

<sup>15</sup> *Convention (no.182) on the Worst Forms of Child Labour*, supra note 3.

<sup>16</sup> International Labour Organisation, *Recommendation Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*, 87<sup>th</sup> Sess., Geneva, 17 June 1999, (entry into force 19 November 2000) [*Recommendation (no. 190) on the Worst Forms of Child Labour*], <http://www.ilo.org/ilolex/english/>.

<sup>17</sup> *Convention (no. 182) on the Worst Forms of Child Labour*, supra note 3, at Article 1

- a) Slavery and slavery-like practices, (Article 3(a));
- b) The use, procuring or offering of a child for prostitution or pornography (Article 3(b));
- c) The use, procuring or offering of a child for illicit activities, (Article 3(c));
- d) Work, which by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children (Article 3 (d)).

The worst forms of child labour have also been identified as two distinct categories<sup>18</sup>. Paragraph 3 (d) is associated to the notion of “hazardous work”, referring to conditions of employment that could harm the health, the safety or the morals of the child<sup>19</sup>. The nature of hazardous work is left for the national legislation to define, within guidelines offered in the *Recommendation (no.190) on the Worst Forms of Child Labour*<sup>20</sup>. On the other hand, the paragraphs 3(a) (b) and (c) refer to what is commonly called the ‘unconditional worst forms of child labour’.<sup>21</sup> The distinction is of essential importance for our thesis and will be the starting point of this dissertation.

The adoption of this new instrument mirrors the strategy of prioritization which was put forward with the adoption of the *Declaration on Fundamental Principles and Rights at*

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<sup>18</sup> See ENNEW, Judith et al, “Defining Child Labor as if Human Rights Matter” in *Child Labour and Human Rights*, ed. by Burns H. Weston, Colorado, Lynne Rienner Publishers, 2005, at 36 [Ennew].

<sup>19</sup> See BEQIRAJ, Julinda. “Hazardous Work as a Worst Form of Child Labour: A Comment on Article 3(d) of ILO Convention (no.182) on the Worst Forms of Child Labour” in *Child Labour in a Globalized World*, ed. by Guiseppe Nesi et al, Surrey, Ashgate Publishing, 2008, at 177 [Beqiraj]; See also Cullen, supra note 10; See also *Targeting the Intolerable*, supra note 8; See also supra note 4; See also Ennew ibid. This latter author refers to the *unresolved* worst forms of child labour when talking about the hazardous forms of child labour.

<sup>20</sup> *Recommendation (no. 190) on the Worst Forms of Child Labour*, supra note 16, at Article 3. In determining the types of work referred to in Article 3 (d) of the Convention, consideration should be given to work that exposes to abuse (physical, psychological or sexual); work underground, under water, dangerous heights or in confined spaces; work with dangerous machinery, equipments and tools; work in unhealthy environments; work done under particular difficult conditions.

<sup>21</sup> See supra note 4, at para. 104; See also PERTILE, Marco. “Introduction: The Fight Against Child Labour in a Globalized World” in *Child Labour in a Globalized World*, ed. by Guiseppe Nesi et al, Surrey, Ashgate Publishing, 2008, at 10 [Pertile].; See also Ennew, supra note 18, at 36.

Work.<sup>22</sup> In prioritizing the fight against child labour by focusing firstly on the worst forms of child labour, the ILO is hoping to have a better impact due to the common agreement of a majority of States on the most basic principles<sup>23</sup>.

Adding to this new strategy of prioritization, the *ILO Convention (no.182) on the Worst Forms of Child Labour* is the first ILO Convention to include the idea of children's rights when tackling the issue of child labour. While the ILO has usually focused on setting working standards for children<sup>24</sup>, the latter Convention stands as a new model for the Organisation since it targets forms of child labour which are not recognized as work but rather as gross violations of human rights and even as international crimes<sup>25</sup>.

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<sup>22</sup> International Labour Conference, *ILO Declaration on the Fundamental Principles and Rights at Work*, 86<sup>th</sup> Sess., Geneva, June 1998 [*ILO Declaration on Fundamental Principles and Rights at Work*]. The Declaration was adopted following the United Nations World Summit on Social Development in Copenhagen (1995) and declares that four principles concerning the fundamental rights at work must be protected by all ILO members, whether they have ratified the corresponding ILO Conventions or not. The four principles are: the 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. (Article 2 of the *ILO Declaration on Fundamental Principles and Rights at Work*) The Declaration imposes the obligation to Members States of ILO, to report on all fundamental Conventions, whether ratified or not and to demonstrate the efforts made in order to ensure compliance to the principles. The Declaration was adopted to ensure that economic growth was accompanied by the respect of fundamental rights. See International Labour Conference, *The ILO, Standard Setting and Globalization* Report of the Director General, 85<sup>th</sup> Sess., Geneva, 1997. The Declaration is seen as such a fundamental instrument that some pretend it has the effect of prioritizing certain Convention over others, raising concerns about the seriousness given to other Conventions; See ALSTON, Philip and James Heenan. "Shrinking the International Labour Code: An Unintended Consequence of the 1998 ILO Declaration on Fundamental Principles and Rights at Work", 36, *International Law and Politics*, 221, 2004; See also *Pertile*, supra note 21, at 2-3.

<sup>23</sup> See *Targeting the Intolerable*, supra note 8, at 5.

<sup>24</sup> The earlier Conventions on child labour have mostly aimed the regulation of work and the protection of children against dangers. See for example International Labour Conference, *Convention Fixing the Minimum Age for Admission of Children to Industrial Employment*, 28 November 1919, (entry into force 13 June 1921), Geneva, [*ILO Minimum Age (Industrial) Convention (no.05)*]; See also International Labour Conference, *Convention Concerning the Age for Admission of Children to Employment in Agriculture*, 16 November 1921, (entry into force 31 August 1923), Geneva, [*Minimum Age (Agriculture) Convention (no.10)*].

<sup>25</sup> See *Targeting the Intolerable*, supra note 8, at 31. The International Labour Conference considers the prostitution and the pornography of children to be a crime of violence against children. Also, the Worst Forms of Child Labour are included in the *Convention on the Rights of the Child* (supra note 2) as violation of children's rights. The Convention prohibits the hazardous work of children (Article 32), the use of children in drug trafficking (Article 33), the sexual exploitation of children (Article 34), the sale or trafficking of children (Article 35) and the other forms of exploitation of the child (Article 36).

This said, the new instrument has raised concerns relating to the ILO's "venturing" in international criminal law, an area outside of its own expertise<sup>26</sup>, and to its ability to monitor issues relating to gross violations of children's rights and more predominantly to international crimes, which are not usually associated with labour conditions<sup>27</sup>. At the 87<sup>th</sup> Session of the International Labour Conference in 1999, the Government Member of Spain<sup>28</sup> explained that the Article 3 of the *ILO Convention (no.182) on the Worst Forms of Child Labour* "includes purely illegal or criminal activities among the worst forms of child 'labour'. To call selling drugs 'labour' is contrary to logic and to the law. Moreover, including purely criminal matters in an ILO Convention seems inappropriate, as it is not the best forum for this kind of discussion."<sup>29</sup>

Member States to the International Labour Conference have even questioned the perverse effect such a Convention could have on the seriousness of crimes against children by including them in a labour convention<sup>30</sup>. This concern was clearly expressed by the United States in the 86<sup>th</sup> Session of the International Labour Conference, stating that:

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<sup>26</sup> See *Cullen*, supra note 10, at 5.; See also SMOLIN, David. "Strategic Choices in the International Campaign Against Child Labor" 22, *Human Rights Quarterly*, 942, 2000 [*Strategic Choice in International Campaign against Child Labour*].

<sup>27</sup> HELFER, Laurence. "Understanding Change in International Organizations: Globalization and Innovation in the ILO", 59, *Vanderbilt Law Review*, April 2006, Number 3, at 652 [*Helper*]; See also FODELLA, Alessandre, "Freedom from Child Labour as a Human Right: The Role of the UN System in Implementing ILO Child Labour Standards", in *Child Labour in a Globalized world*, ed. by Guisepppe Nesi et al, Surrey, Ashgate Publishing, 2008, at 212.

<sup>28</sup> The principle of tripartism is often seen as the 'cornerstone' of the International Labour Organisation. In all the organisation's proceeding, representatives from the Government, the Workers' organisation and the Employers' organisations are involved. See OSIEKE, Ebere, *Constitutional Law and Practice in the International Labour Organisation*, Dordrecht, Martinus Nijhoff Publishers, 1985, at 52.

<sup>29</sup> International Labour Conference, *Report IV (2a)*, 87<sup>th</sup> Sess., Geneva, June 1999, at 45 [*Report IV (2a)*]. See also comment of Bolivia: "A clear distinction should be drawn between criminal offences and child labour. There are activities in which the child is a victim or object of the work done by other persons, while in other cases the child is the worker. Thus, the sale and trafficking of children and prostitution are criminal offences, the victim of which are children and should not be considered as "worst forms of child labour".

<sup>30</sup> See International Labour Conference, *Report VI (2)*, 86<sup>th</sup> Sess., Geneva, 1998, [*Report VI (2)*]comment of Mexico: "Some activities are criminal offences. Determining a general minimum age could be interpreted as allowing illegal activities over the age of 18", p. 39 of the report; See also *Report IV (2a)*, *ibid.*, comment of Spain: "This Article [3 of the *ILO Convention (no.182) on the Worst Forms of Child Labour*] includes purely illegal or criminal activities among the worst forms of child 'labour'. To call selling drugs 'labour'

*“(b) There is no problem with these matters [paragraphs 3 (a), (b) and (c)] being covered in the new ILO instrument(s), but there is concern that the ILO not devalue the criminality of child sexual exploitation and drug trafficking by referring to them in a labour Convention. These are criminal violations of human rights, and are in no way legitimate forms of work. Care should be taken to ensure compatibility with other international treaties, in particular Articles 33 and 34 of the Convention on the Rights of the Child, so that dual, competing standards are not inadvertently created.”<sup>31</sup>.*

The international Labour Office acknowledged that while those practices represent crimes, they are also forms of economic exploitation<sup>32</sup>. The Office offers the example of its work on the prohibition of forced labour, referring to the *ILO Forced Labour Convention* (no. 29)<sup>33</sup>, which represents both a criminal practice and a form of economic exploitation.

Hence, why does the ILO decide to include elements of international crimes in a new labour Convention? This question will be the basis of our thesis.

Our dissertation attempts to demonstrate that the combination of international labour standards and of criminal accountability could provide beneficial protection to children against the worst forms of child labour. We will thus explore how international criminal law could expand its protection to include the elements of crime provided by *ILO Convention (no.182) on the Worst Forms of Child Labour*. By analyzing the codified and the customary concepts of international criminal law, we can identify under which principles some of the worst forms of child labour can be taken in charge by the

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is contrary to logic and to the law. Moreover, including purely criminal matters in an ILO Convention seems inappropriate, as this is not the best forum for this kind of discussion. [...]”.

<sup>31</sup> See *Report VI (2)*, *Ibid.*, at 52, comment of the United States.

<sup>32</sup> See *Report VI (2)*, *Ibid.*, at 52; See also *Targeting the Intolerable*, *supra* note 8, at 31.

<sup>33</sup> International Labour Conference, *Convention Concerning Forced or Compulsory Labour.*, 28 June 1930, (entry into force 1May 1932), Geneva, [*ILO Forced Labour Convention* (no. 29)]. In this Convention, the ILO steps outside its normal scope of regulating working conditions and further aims at abolishing a practice that is not itself recognized as labour: forced labour. Article 25 of the Convention states that the illegal extraction of forced or compulsory labour shall be punishable as a penal offence.

international criminal law sphere while the ILO can play a complementary role in the domestic criminalization and the practical application of criminal laws against the worst forms of child labour.

### **Stating the Argument**

When studying the mandate of the ILO, we note that the protection of the child's welfare is stated as a priority in the action of the organisation<sup>34</sup>. However, how far is the ILO to go in order to protect children against exploitative labour? Far from questioning the constitutionality of *ILO Convention (no.182) on the Worst Forms of Child Labour*, we will examine the possibility of the ILO acting as the default expert organisation concerning child labour and therefore having to "adjust" its mandate to cover international legal gaps.

The preamble to the *ILO Convention (no.182) on the Worst Forms of Child Labour* states that some of the worst forms of child labour are already covered by other international instruments such as the *ILO Forced Labour Convention (no. 29)*<sup>35</sup> and the *United Nations Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956*<sup>36</sup>. However, few instruments have made the worst forms of child labour specific crimes against children. Until recent years, the idea of crimes against children was mostly unexplored<sup>37</sup> and even nowadays, studies on the criminal accountability from the perspective of children's rights have rarely been done

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<sup>34</sup> See *ILO Constitution*, supra note 14. The Preamble to the Constitution states that the protection of children, of youth and of women is part of the organisation's mandate. See also International Labour Organisation, *Declaration Concerning the Aims and Purposes of the International Labour Organisation*, 10 May 1944, available at <http://www.ilo.org/ilolex/english/constq.htm>, [*Declaration of Philadelphia*] Article 3 states that the ILO must further the provision of child welfare and maternity protection.

<sup>35</sup> *ILO Forced Labour Convention (no.29)*, supra note 33.

<sup>36</sup> United Nation Economic and Social Council, *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, Resolution 608, 30<sup>th</sup> April 1956, (entry into force 30 April 1957) [*UN Supplementary Slavery Convention, 1956*].

<sup>37</sup> See MEOTTI, Pascale. *La lutte contre l'exploitation des enfants: étude de droit international public*, Lille CEDEX, Atelier national de reproduction des thèses, 1999, 648 [*Meotti*].

and when so, have mostly focused on children and armed conflict. In 2006, Karin Arts explains that we are less equipped to fight crime against children such as trafficking or prostitution, than we are for “traditional” crimes such as crimes against humanity or the crime of genocide.<sup>38</sup>

The *ILO Convention (no.182) on the Worst Forms of Child Labour* is the first instrument to target all the worst forms of child labour into a single treaty and to criminalize the conduct. Consequently, an important question can be raised from all these observations, which will be the focus of this thesis: Is the ILO stepping outside of its traditional role in order to bridge a gap between children’s rights and international criminal accountability by including unconditional worst forms of child labour as defined in Articles 3 (a) to (c) in *ILO Convention (no.182) on the Worst Forms of Child Labour*?

We will argue that the ILO played a leading role through the adoption of the *ILO Convention (no.182) on the Worst Forms of Child Labour*, in extending the scope of international criminal law to specific crimes against children. Throughout our thesis, we will argue that while the ILO has proven to be the most effective body to deal with the phenomena of child labour, its fight cannot be won without the complementary role of international criminal law.

Overall, we will examine whether *ILO Convention (no.182) on the Worst Forms of Child Labour* has been a catalyst in extending the protection offered by international criminal law to children caught in the worst forms of child labour.

We conclude that indeed the protection of children has been accentuated by the complementary work of international criminal law working hand in hand with the regulating work of the International Labour Organisation.

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<sup>38</sup> ARTS, Karin et al. *International Criminal Accountability and the Rights of Children*, The Hague Academic Coalition, United Nations University, Cambridge University Press, 2006, 191.

## Structure of the study

The focal point of the study lies within the shift in the work of the ILO in order to extend the scope of international criminal law. It is not the first time the ILO has reached outside its “traditional role” in order to fill a gap in international law. In 1930, the *ILO Forced Labour Convention (no. 29)*<sup>39</sup>, later complemented by the *ILO Convention (no.105) on the Abolition of Forced Labour*<sup>40</sup>, played a similar role in extending the definition of the crime of slavery to forced labour<sup>41</sup>. By studying this phenomenon, we will seek to make a parallel linkage in regards to the adoption of the *ILO Convention (no.182) on the Worst Forms of Child Labour*. We will therefore observe the trend of the ILO in reaching beyond labour regulation when it comes to a subject closely linked to its competence such as forced labour or child labour and for which it has developed an area of expertise. Therefore, we will study the reason behind the adoption of the *ILO Convention (no.182) on the Worst Forms of Child Labour* and its impact on the fight against child labour, keeping in mind the previously mentioned case of the *ILO Forced Labour Convention (no.29)*.

In order to prove our argument, we will explore three elements: (1) the criminal nature of some of the worst forms of child labour, (2) the reason behind the ILO’s “venture” in international criminal law, engaging in a shift from its usual practice in order to cover the

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<sup>39</sup> *ILO Forced Labour Convention (no.29)*, supra note 33.

<sup>40</sup> International Labour Conference, *Convention concerning the Abolition of Forced Labour*, 25 June 1957, (entry into force 17 January 1959), Geneva [*ILO Convention (no.105) on the Abolition of Forced Labour*] <<http://www.ilo.org/ilolex/english/>>.

<sup>41</sup> See GOUDAL, Jean, “The Question of Forced Labour Before the International Labour Conference”, XIX, *International Labour Review*, 5, 1929, 621. The *ILO Forced Labour Convention (no.29)* was first adopted to avoid the rise of slavery-like conditions in colonies after the adoption of the League of Nations Convention to Suppress the Slave Trade and Slavery of 1926 (Assembly of the League of Nations, *Slavery Convention*, 25 September 1926, (entry into force 9 March 1927), [*League of Nations Slavery Convention*]), through practices related to forced labour. The Convention was therefore an instrument to cover the gap in regulation related to forced “native labour”; See also BASSIOUNI, Cherif. “Enslavement as an International Crime”, 23, *International Law and Politics*, 445, 1991. See also BALES, Kevin. “International Labor Standards: Quality of Information and Measures of Progress in Combating Forced Labour”, 24, *Comparative Labor Law and Policy Journal*, 321, 2003, at 329: “The ILO has not defined slavery per se: [...] This follows the trend noted above of broadening the conceptualization of the issue in policy.”

gap and (3) the way in which the work of the ILO can be the most beneficial to provide an accentuated protection to children against the worst forms of child labour.

To proceed, we have divided the thesis in three parts. Chapter I will consist in an in-depth study of each of the three unconditional worst forms of child labour. Through such an examination we will better understand the criminal nature of each of these unconditional worst forms of child labour and will enable us to prove that the ILO has indeed entered the realm of international criminal law. Chapter II will then examine the reason behind the shift in the ILO's practice, which, with the adoption of *ILO Convention (no.182) on the Worst Forms of Child Labour*, has decided to protect children's rights and criminalize violations of those rights. We will therefore identify the evolution of the practices of the ILO and the reason why it might have extended its mandate to reach beyond its traditional role. Keeping in mind the parallel that can be made with the *ILO Forced Labour Convention (no.29)*<sup>42</sup>, we ask ourselves if the Organisation is extending the protection offered by international criminal law by including extreme abuses against children in an international labour instrument. Finally, the last chapter will explore the monitoring mechanisms of the ILO and their possible adaptation to supervise an international criminal law instrument. We will explore the complementary role that could be played by the ILO supervisory system and international criminal law mechanisms, such as international courts or tribunals. The case of Myanmar, which was examined by a Commission of Inquiry in 1998 will act as a case study throughout Chapter III as it is the most relevant case concerning the violation of obligations which opens criminal responsibility.<sup>43</sup> Therefore, we seek to demonstrate that the role of the ILO might have to be combined with some international criminal law mechanisms in order to avoid reducing

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<sup>42</sup> *ILO Forced Labour Convention (no.29)*, supra note 33.

<sup>43</sup> The case of Myanmar (Burma) and its compliance with the *ILO Forced Labour Convention (no.29)* (supra note 33) has been on the Agenda of the ILO since the early 1990s. The International Labour Office has received numerous complaints and the Government of Myanmar has always refused to comply with the provisions of the Convention. This case is therefore interesting since it deals with the violation of an international labour obligation of criminal nature.

violations of core international crimes against children to purely ordinary labour violations.

From such a study, we conclude that the ILO has played a leading role in extending the protection of children's rights through its *ILO Convention (no.182) on the Worst Forms of Child Labour*, but that its role in the enforcement and the monitoring remains limited to its constitutional mandate. Therefore, collaboration between the ILO and criminal tribunals might bring about the most advantages in the protection of children against the worst forms of child labour. The ILO has indeed stepped into the realm of international criminal law, but in doing so, the Organisation has secured its role in combating child labour and also, has enabled a larger interpretation of child labour by including international crimes against children. Such a step ahead on the issue has raised the possibility of calling upon new mechanisms, such as international criminal courts and tribunals, to combine the efforts to fight against the worst forms of child labour.

### **Scope of the study**

It was decided to limit the study to solely the unconditional worst forms of child labour specified in Article 3 (a), (b) and (c) of the *ILO Convention (no.182) on the Worst Forms of Child Labour* for their close link with international criminal law. Since Article 3 (d) is more associated to general international labour law than it is to international crimes<sup>44</sup>, it lies outside the scope of the study.

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<sup>44</sup> Article 3(d) of the *ILO Convention (no.182) on the Worst Forms of Child Labour* (supra note 3) deals more closely with the exploitative conditions of work rather than violation of children's rights per se. By improving the working conditions, the labour in question might not remain hazardous, as for the unconditional worst forms of child labour, even improved working conditions would never render the work less of a violation of the child's rights. Article 4 of the *ILO Recommendation (no.190) on the Worst Forms of Child Labour* (supra note 16) proves the flexibility of hazardous work, based on the working conditions, by allowing children as young as 16 years old to work in hazardous employments if health, safety and morals of the children concerned are fully protected, and that the children have received adequate specific instruction or vocation training in the relevant branch of activity. Since only included in the Recommendation and not in the Convention, we could assume that the general principle is still to be applied to all children under 18 years of age.

It is easy to fall into the “poster child” effect when referring to the child labour issue. Images of trafficked child prostitutes from Thailand or of boy jockeys in Saudi Arabia are frequently leading the imagination of newsreaders and sensation seekers. However, child labour, and even the worst forms of child labour, happen within the boundaries of a country and are usually more nuanced and even sometimes more invisible than we would be first led to believe. Children get caught in bonded labour in India, work as domestic servants in private houses<sup>45</sup>, are lured into prostitution by a husband or a boyfriend, are bought by the landlord of the family’s residence<sup>46</sup> or are engaged in drug trafficking by lack of prospects and of education. And all these incidents can happen with the consent of family and friends, within national borders and without drama and commotion. These children, even if in less sensational situations and not necessarily part of an organized criminal scheme consist of the main scope of this study. We will examine how the massive and systematic acceptance of children in these situations can become an international crime, even if within the borders of a single state.

### *Child Soldiers*

The question of child soldiers has been a popular one, mostly recently, with the inclusion of the matter in international human rights, criminal and humanitarian law instruments such as the 1977 Protocols additional to the 1949 Geneva Conventions<sup>47</sup>, the Convention on the Rights of the Child<sup>48</sup>, the Rome Statute<sup>49</sup> and the Optional Protocol to the

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<sup>45</sup> See *Targeting the Intolerable*, supra note 8, at 12.

<sup>46</sup> *Ibid.*, at 13.

<sup>47</sup> Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 1 June 1977, (entry into force 7 December 1979), [*Protocol I to the Geneva Conventions*]. The Article 77 (2) is applicable to international armed conflict and states that parties to the conflict must prevent children under the age of fifteen from taking direct part in armed hostilities; see also Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict (Protocol II)*, 8 June 1977, (entry into force 7 December 1978), [*Protocol II to the Geneva Conventions*]. Article 4(30) is applicable in non international armed conflict and states that no child under the age of fifteen shall be recruited for armed forces.

Convention on the Rights of the Child<sup>50</sup>. As intended by the International Labour Conference, the *ILO Convention (no.182) on the Worst Forms of Child Labour* deals with the subject in a very brief way in order to keep this aspect from being the focus of the Convention. The Convention deals with the issue on the sole perspective of forced or compulsory labour for the purpose of the armed forces rather than the war crime to which child soldiers is usually associated.<sup>51</sup>

Child soldiers can be associated to two different legal violations: human rights and humanitarian law<sup>52</sup>. This thesis solely focuses on the law of peace and not on the law of war. Since the point of entry of this dissertation is the *ILO Convention (no.182) on the Worst Forms of Child Labour*, the cases of child soldier will be examined in the same way as the Convention intended it, which means through the lens of forced labour rather

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<sup>48</sup> See *Convention on the Rights of the Child*, supra note 2. Article 38 (2) requires Convention Members to prevent the recruitment of children under 15 years of age to take direct part in the hostilities and after fifteen years of age, priority shall be given to older children. (Article 38 (3)).

<sup>49</sup> General Assembly, *Rome Statute of the International Criminal Court*, 17 July 1998, (entry in force 1 July 2002) [*Rome Statute*]. Articles 8 (2(b (XXVI))) and 8 (2(e(vii))) state that the circumscription of children under the age of fifteen or using them to participate actively in hostilities represents a war crime.

<sup>50</sup> General Assembly, *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts*, 25 May 2000, Resolution A/RES/54/263, (entry into force 12 February 2002) [*Optional Protocol to the Convention on the Rights of the Child on Children in Conflict*]. Articles 1, 2, 3 and 4 of the Protocol prohibit the recruitment of children under 18 years of age.

<sup>51</sup> See *Report IV (2a)*, supra note 29. The International Labour Office summarizes the comments of Member States concerning the inclusion of child soldiers in the Convention by declaring that “a wide majority of comments favour an explicit reference in a separate subparagraph so as not to leave it to national determination.” The discussion is however postponed to a future time. The proposed text in June 1999 did not include child soldiers in Article 3(a) of the Convention. During the discussion, the Committee addressed the question of child soldiers: “There was a wide range of view and how best to deal with the issue of child soldiers, and our text is the result of a compromise. We agreed that the Convention should confine itself to the forced or compulsory recruitment of children for use in military activities. The Committee encouraged the United Nations Working Group to continue its work on a draft optional Protocol to the Convention on the Rights of the Child”. See also, International Labour Conference, *Submission, Discussion and Adoption*, 87<sup>th</sup> Sess., Geneva, June 1999, at 2 of the report.

<sup>52</sup> See *Protocol I to the Geneva Conventions*, supra note 47; See also *Protocol II to the Geneva Conventions*, supra note 47. The use of children in an armed conflict contravenes with the Protocols I and II to the Geneva Conventions and the use, compulsory or not, of children in armed conflict violates the human rights of the child. See *Optional Protocol to the Convention on the Rights of the Child on Children in Conflict*, supra note 50.

than as a war crime. Therefore, the issue of child soldier will be included under the general section concerning slavery and slavery-like practices.

### *Sale and Trafficking in Children*

Most of the international instruments dealing with the issue of child trafficking before the adoption of *ILO Convention (no.182) on the Worst Forms of Child Labour* have been focused towards the trafficking for purpose of prostitution or sexual exploitation<sup>53</sup>. In the *Convention on the Rights of the Child*, it has been recognized that trafficking and prostitution of children had to be addressed by different Articles<sup>54</sup>. Similarly, in the *ILO Convention (no.182) on the Worst Forms of Child Labour*, trafficking is mentioned as a slavery-like practice under Article 3(a) and is distinct from the sexual exploitation of the following paragraph. Although trafficking for purpose of forced labour or for sexual exploitation are both part of the worst forms of child labour, we will not solely focus on the sexual exploitation aspect, but also on the phenomena of trafficking for forced labour or other labour exploitation purposes.

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<sup>53</sup> See United Nations General Assembly, *Convention for the Suppression of the Traffic in Persons and of the exploitation of the Prostitution of Others*, Resolution 317(IV), 2 December 1949, (entry into force 25 July 1951), available at < <http://www2.ohchr.org/english/law/trafficpersons.htm>>. The Convention consolidates the previous *Convention for the Suppression of the White Slave Traffic*, 4 May 1910, as amended by the *Protocol to Amend the International Convention for the Suppression of the White Slave Traffic*, 4 May 1949, available at < <http://www1.umn.edu/humanrts/instrree/whiteslavetraffic1910.html>>.; See also United Nations General Assembly, *Convention on the Elimination of all Forms of Discrimination Against Women*, 18 December 1979, (entry into force 3 September 1981). Article 6 of this latter Convention requires the States to take all measures to suppress the traffic and exploitation of prostitution of women. The *Convention on the Rights of the Child* (supra note 2) was the first international instrument to extent the concept of human trafficking outside the limits of prostitution. Article 35 states that “States Parties must take all appropriate [...] measures to prevent the abduction of, the sale of or the traffic in children for any purpose or in any form”.

<sup>54</sup> See Travaux Préparatoires of the *Convention on the Rights of the Child* (supra note 2) in DETRICK, Sharon et al., *The United Nations Convention on the Rights of the Child: a guide to the Travaux Préparatoires*, Leiden, Martinus Nijhoff Publishers, 1992, at 430 [Detrick]. “The delegation of Mexico, Senegal, Venezuela, the ILO and the informal NGO Ad Hoc Group expressed the view that there was a need for two separate Articles, one protecting the child from sexual exploitation and another protecting the child specifically from sale or traffic. The problem of the sale or traffic of children was wider in scope than that of sexual exploitation and children were subjected to sale or traffic for many reasons: economic exploitation, sexual exploitation and sexual abuse, as well as for reasons of adoption or labour.

## Definitions

### *Child Labour*

Since there does not exist an official definition of child labour<sup>55</sup>, the concept can be a confusing one. The ILO has tried defining the notion of child labour by stating guidelines rather than by drafting an overarching definition. Such basic principles on child labour are stated in the *Convention concerning Minimum Age for Admission to Employment of 1973 (ILO Minimum Age Convention (no.138))*.<sup>56</sup>

An important point to mention at this stage is that there is a universal consensus that not all types of child work must be eliminated, for some forms can be beneficial for the development of the child.<sup>57</sup> Therefore, the ILO differentiates child labour from the broader concept of all economic activities performed by a child. In the latter case, the concept would include all productive activity, paid or not, performed by a child (including household and school chores) for at least one hour a week<sup>58</sup>. These would not all represent child labour, for which abolition is required. Child labour would then only refer to work that can be damaging to a child's health and development<sup>59</sup>.

The overarching principles included in the *ILO Minimum Age Convention (no.138)* state that the term 'child labour' stands for all economically active children, excluding children of over 12 years old performing light work and working children of over 15 years old that

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<sup>55</sup> See *Ennew*, supra note 18, at 27.

<sup>56</sup> International Labour Conference, *Convention concerning Minimum Age for Admission to Employment*, 26 June 1973, (entry into force 19 June 1976), Geneva. [*ILO Minimum Age Convention (no. 138)*] available at <<http://www.ilo.org/ilolex/english/>>.

<sup>57</sup> Supra note 4, at 23.

<sup>58</sup> See *Cullen*, supra note 10, at 7.

<sup>59</sup> See WESTON, Burns H., *Child Labour and Human Rights: Making Children Matter*, Colorado, Lynne Rienner Publishers, 2005, at Introduction p.XV.

are not engaged in hazardous types of labour<sup>60</sup>. Said in another way, children of over 12 performing light work and children of over 15 not performing hazardous work would be only considered working children and would not fit the definition of child labour. Only child labour must be progressively eliminated.

The ILO defines hazardous work, in the *ILO Minimum Age Convention (no.138)*, as all work that by its nature or by the conditions under which it is usually performed would be likely to jeopardize the health, the safety and the morals of a child.<sup>61</sup>

Therefore, there is a legality aspect in the notion of child labour stated in the *ILO Minimum Age Convention (no.138)*. For the purpose of this dissertation, the term 'child labour' will be used to represent children working in types of labour which are illegal for a child, under international or national law, whether because of the age of the child, because the working conditions threaten the safety of the child or because it violates the rights of the child.

According to the *ILO Minimum Age Convention (no 138)*<sup>62</sup>, adopted by the ILO in 1973, the common minimum age is set at 15 years old for all employment (however making an exception for developing economies, who are entitled to go down to 14 years of age<sup>63</sup>). Minimum ages may although vary depending on the type of work performed by the child, setting it up to 18 years of age for hazardous work, likely to jeopardize the health, safety and morals of the child<sup>64</sup>, and then setting exceptions for children as young as 12 years

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<sup>60</sup> See *ILO Minimum Age Convention (no.138)*, supra note 56, at Articles 2, 3 and 7.; See also *Cullen*, supra note 10.

<sup>61</sup> See *ILO Minimum Age Convention (no.138)*, 1973, supra note 56, at Article 3 (1)

<sup>62</sup> *ILO Minimum Age Convention (no.138)*, supra note 56.

<sup>63</sup> *ILO Minimum Age Convention (no.138)*, supra note 56, at Article 2(4).

<sup>64</sup> *ILO Minimum Age Convention (no.138)*, supra note 56. Under Article 3(1), exceptions are permissible and allow for children of 16 years of age to work under specific conditions, Article 3(3) states that "[...] national law or regulations or the competent authority may [...] authorize employment or work from the age of 16 years on condition that the health, safety and morals of the young person concerned are fully protected and that the young persons have received adequate specific instruction or vocational training in the relevant branch of activity".

old working in “light work<sup>65</sup>”. We will explore the question more in depth when exploring the role of the ILO in the first chapter.

### *The worst forms of child labour*

If before 1999 all child labour necessitated equal action, the *ILO Convention (no.182) on the Worst Forms of Child Labour*<sup>66</sup> introduced a new prioritization strategy. With the adoption of the Convention, some forms of child labour now have to be eliminated immediately<sup>67</sup> while other forms of child labour have to be abolished gradually with time. The *ILO Minimum Age Convention (no.138)* and the *ILO Convention (no.182) on the Worst Forms of Child Labour* are complementary and not contradictory, setting up the same common objective (abolition of child labour) but specifying supplementary obligation for the worst forms of labour. The new priorities are included in the Article 3 of the *Convention (no.182) on the Worst Forms of Child Labour*:

- a) Slavery and slavery-like practices, which include the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict (Article 3(a));
- b) The use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances (Article 3(b));
- c) The use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties (Article 3(c));

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<sup>65</sup> *ILO Minimum Age Convention (no.138)*, supra note 56, at Article 7(4). Only accessible for countries who have availed themselves of Article 2(4) of the Convention.

<sup>66</sup> *ILO Convention (no.182) on the Worst Forms of Child Labour*, supra note 3.

<sup>67</sup> *ILO Convention (no.182) on the Worst Forms of Child Labour*, supra note 3., at Article 1. “Each Member which ratifies this Convention shall take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency”.

- d) Work, which by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children (Article 3 (d)).<sup>68</sup>

These forms of child labour are considered the most intolerable forms of a child's economic exploitation and must be the prior focus for abolition<sup>69</sup>.

The notion of hazardous work stated in the *ILO Convention (no.182) on the Worst Forms of Child Labour*, Article 3(d), refers to a slightly different notion as the one of hazardous work mentioned in the *ILO Minimum Age Convention (no.138)*, Article 3. While the term hazardous work in this latter Convention refers to work that is "likely to jeopardize the health, safety and morals of the child", in the *ILO Convention (no.182) on the Worst Forms of Child Labour*, it is stated as work which is "likely to harm the health, safety and morals of the child", a narrower concept. Both notions are however defined as hazardous work.

This slight distinction does not make the two Conventions incompatible. While in the *ILO Minimum Age Convention (no.138)*, hazardous work is only allowed for persons of over 18 years old, it allows exceptions to this principles, stating that the employment of persons from the age of 16 in hazardous work is possible if health, safety and morals of the young person are fully protected and that the young person has received adequate instruction or vocational training<sup>70</sup>. On the other hand, the *ILO Convention (no.182) on the Worst Forms of Child Labour* allows for no exceptions whatsoever when referring to hazardous work. The exception, similar to the one contained in *ILO Minimum Age Convention (no.138)*, is only contained in the *Recommendation (no.190) on the Worst Forms of Child Labour*.<sup>71</sup> Therefore, it is normal that the definition included in the *ILO Convention (no.182) on the Worst Forms of Child Labour* be stated in a more narrow

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<sup>68</sup> *ILO Convention (no.182) on the Worst Forms of Child Labour*, supra note 3, at Article 3.

<sup>69</sup> See International Labour Conference, *Resolution concerning the Elimination of Child Labour*, 83<sup>rd</sup> Sess., June 1996, at Articles 1(c), 1(n) and 1(o) and Article 2(e), available at <[http://www.lavoro.minori.it/normativa/documenti/int/ris\\_180696\\_en.pdf](http://www.lavoro.minori.it/normativa/documenti/int/ris_180696_en.pdf)>. [*Resolution concerning the Elimination of Child Labour*] "[...] Starting with its most intolerable forms".

<sup>70</sup> *ILO Minimum Age Convention (no.138)*, supra note 56, at Article 3(3).

<sup>71</sup> *ILO Recommendation (no.190) on the Worst Forms of Child Labour*, supra note 16, at Article 3(4)

way. Since the subject of our dissertation focuses on the *ILO Convention (no.182) on the Worst Forms of Child Labour*, we shall use the word “hazardous work” to refer to the definition spelled out in Article 3(d) of the *ILO Convention (no.182) on the Worst Forms of Child Labour*, unless specified otherwise.

When combining the *ILO Minimum Age Convention (no.138)* and the *ILO Convention (no.182) on the Worst Forms of Child Labour*, we can get a better picture of what is meant by child labour, hazardous work and unconditional worst forms of child labour. This chart can help in better understanding the categories and distinctions between the different forms of child labour covered by the *ILO Minimum Age Convention (no.138)* and the *ILO Convention (no.182) on the Worst Forms of Child Labour*.

| <b>Child Labour</b> |                                       |                                 |                                 |                                  |                                    |   |
|---------------------|---------------------------------------|---------------------------------|---------------------------------|----------------------------------|------------------------------------|---|
|                     |                                       | <b>Child Labour</b>             |                                 |                                  | <b>Worst Forms of Child Labour</b> |   |
| Types of labour     | Work Excluded from the Convention 138 | Light Work                      | Other work non hazardous        | Hazardous Work                   |                                    | Unconditional Worst Forms of Child Labour |
|                     |                                       |                                 |                                 | Jeopardize                       | Harm                               |   |
| Convention          |                                       | 138                             | 138                             | 138                              | <b>182</b>                         | <b>182</b>                                |
| Minimum Age         |                                       | 13 (12 in developing economies) | 15 (14 in developing economies) | 18 (16 under certain conditions) | 18                                 | 18  |

To summarize, the ILO states three general types of work that can be defined as child labour and which must be abolished: (1) the unconditional worst forms of child labour as stated in Article 3 (a) to (c) of the *ILO Convention (no.182) on the Worst Forms of Child Labour*, (2) hazardous work and (3) work undergone by children under the legal national age<sup>72</sup>.

If all those types of child labour need to be eliminated<sup>73</sup>, only the first two need to be eliminated as a matter of urgency<sup>74</sup>, which leads us back to our main thesis: why have we found the need to insert a more focused Convention aimed at the complete and immediate abolition of only the worst forms of child labour?

It is thus interesting to explore the reason why the ILO has taken such a shift by criminalizing (or restating the criminal nature of) certain practices in a labour Convention. We humbly suggest that the ILO gave itself the mission to cover a gap left by codified and customary international law. As stated in the report from the Committee on the Rights of the Child, “such a Convention would fill in the gaps in current international legal instruments dealing with children and their rights and set clear priorities for national and international action”<sup>75</sup>. Hence, in the First Chapter, we will explore this “leap” of the ILO in the sphere of international criminal law and will follow, in the second Chapter with an analysis of the work of the ILO in the fight against child labour and the change of strategy brought about by the *ILO Convention (no.182) on the Worst Forms of Child Labour* in 1999.

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<sup>72</sup> See *Cullen*, supra note 10, at 8.; See also supra note 4, at 24.; See also *A Future Without Child Labour*, supra note 8, at Para. 26.

<sup>73</sup> *ILO Minimum Age Convention (no.138)*, supra note 56, at Article 1. “Each Member for which this Convention is in force undertakes to pursue a national policy designed to ensure the effective abolition of child labour [...]”.

<sup>74</sup> *ILO Convention (no.182) on the Worst Forms of Child Labour*, supra note 3, at Article 1.

<sup>75</sup> See *Targeting the Intolerable*, supra note 8, at 57.

## **Chapter I: Of Work and Crime**

This Chapter explores the three distinct unconditional worst forms of child labour as stated in the *ILO Convention (no.182) on the Worst Forms of Child Labour*. Such study will enable us to advance the hypothesis that the International Labour Organisation has indeed entered the realm of international criminal law. After proving such fact, we can explore the reason behind this shift and the impact on the potential protection of children against the worst forms of child labour. We will therefore be analyzing the criminal aspect of all three unconditional worst forms of child labour, starting with a brief overview of the notion of international crime.

### **1.1 What is an international crime?**

In order to better understand the reason why certain forms of child labour could be defined as an international crime, we will explore briefly this notion of international crime. Cherif Bassiouni explores the idea that an international crime could be the natural extension of human rights in the way in which criminalizing a violation of human rights could increase the respect of the most fundamental human rights.<sup>76</sup> However, not all human rights lead to criminalized prohibitions. In such case, the violation of children's rights would not always represent an international crime. Those that do would enter the realm of international criminal law. Claire de Than and Edwin Shorts add to this by explaining that the cross pollination is flagrant between international human rights law and criminal law.<sup>77</sup> Following the opinion of Bassiouni, they emphasize that when a human rights treaty includes penal sanctions, there is an "overlap" between the two types

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<sup>76</sup> BASSIOUNI, Cherif. "The Proscribing Function of International Criminal Law in the Processes of International Protection of Human Rights" 9, *The Yale Journal of World Public Order*, 193, 1982, at 195. Bassiouni explains that human rights evolve through 5 stages up to criminalization: stage 1: the Enunciative stage; stage 2: the Declarative stage; stage 3: the Prescriptive stage; stage 4: the Enforcement stage; and finally stage 5: the Criminalization stage. See also RATNER, Steven R. and Jason S. Abrams. *Accountability for Human Rights Atrocities in International Law*, Oxford, University Press, 2001, at 12.

<sup>77</sup> DE THAN, Claire and Edwin Shorts. *International Criminal Law and Human Rights*, United Kingdom, Sweet and Maxwell, 2003, at 12.

of law<sup>78</sup>. Robert Cryer warns however that while criminal law reflects a violation of human rights, not all violations of human rights represent international crimes<sup>79</sup>.

This important observation feeds in a division that is frequently seen between two categories of international crimes: transnational crimes and international crimes. The former refers to crimes against one or more than one State while the latter is usually associated with crimes against humanity as a whole. According to Antonio Cassese, an international crime needs to be international in interest and not solely transnational by nature<sup>80</sup>. Hence, in his opinion, piracy and trafficking of narcotics, or of arms, should not be included in the definition of international crimes<sup>81</sup> but might refer more to a notion of transnational crimes, or of crime against the State<sup>82</sup>. The *United Nations Convention Against Transnational Organized Crime and the Protocol Thereto*<sup>83</sup> would give examples of crimes perpetrated against the States for which cooperation between States might be necessary to fight the phenomena, but for which there is not necessarily violation of an international customary rule or that is not of universal interest to repress<sup>84</sup>.

On the other hand, Simbeye argues that the distinction lies mostly between international treaty crimes and international customary crimes<sup>85</sup>. These two ways of defining an

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<sup>78</sup> Ibid., at 12-13.

<sup>79</sup> CRYER, Robert et al. *An Introduction to International Criminal law and procedure*, Cambridge University Press, 2007, at 11.

<sup>80</sup> CASSESE, Antonio. *International Criminal Law*, Oxford University Press, 2003, at 12 [Cassese].

<sup>81</sup> Ibid., at 24.

<sup>82</sup> This has been argued on the opposing side by Claire de Than and Edwin Shorts, (supra note 77) who claim that piracy is the oldest international crime.

<sup>83</sup> United Nations General Assembly, *United Nations Convention Against Transnational Organized Crime and the Protocol Thereto*, Resolution 55/25, 15 November 2000, (entry into force 29 September 2003), Palermo.

<sup>84</sup> Ibid. The Convention targets the organized criminal intent against the domestic law of multiple countries rather than against humanity as a whole. Examples in the Convention are: participation in a criminalized group (Section 5), money laundering (Section 6) and corruption (Section 8).

<sup>85</sup> SIMBEYE, Yitiha. *Immunity and International Criminal Law*, United Kingdom, Ashgate Publishing, 2004, at 36.

international crime draws to a similar conclusion: some crimes enable the responsibility of nationals from a country who explicitly expressed the desire to be bound to it, while other crimes would enable the responsibility of all individuals and of all states, whether they accepted the agreement or not, because part of customary law<sup>86</sup>. According to both the distinctions between international and transnational crimes and the one between customary and treaty crimes, the gross violation of core human rights is set as a higher rule.

While transnational crimes can be criminalized in international instruments, such as drug trafficking or organized crime, their criminalization is limited to the will of each State. The concept of transnational crime would then be restricted to what each State wants to define as a crime. However, following our reasoning, an international crime would not be limited by the State's consent. If we take the example of the crime of genocide, it would not be acceptable to limit the prosecution of perpetrators of such crime by the consent of States since it is part of international customary law<sup>87</sup>. Indeed, there would be no need to ratify a treaty against genocide to be liable for such a conduct. This shows an exception of the principle of *Nullem crimen sine lege*<sup>88</sup>.

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<sup>86</sup> In Simbeye's opinion, international customary crimes would include only: piracy, war crimes, genocide, crimes against humanity and the crime of aggression. On the other hand, treaty crimes would include torture, slavery, hostage-taking, aircraft hijacking and sabotage, apartheid, international drug trafficking and maritime violent acts.

<sup>87</sup> See United Nations General Assembly, *The Crime of Genocide, Resolution 96(I)*, 11 December 1946. "The punishment of the crime of genocide is of international concern"; See also United Nations General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, Resolution 260(III), 9 November 1948, (entry into force 12 January 1951), New York. At Article 1, [*Convention on the Prevention and Punishment of the Crime of Genocide*]. "The contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

<sup>88</sup> According to the *nullem crimen sine lege* principle, a conduct cannot consist in a crime if not specified as such in the law. This principle is of great importance in criminal law in order to respect basic human rights, such as stated by Article 15 of the International Covenant on Civil and Political Rights (ICCPR) (United Nations General Assembly, *International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights*, Resolution 2200A(XXI), 16 December 1966 (entry into force 23 March 1976)). However, the paragraph 2 of Article 15 opens up a space by stating that an act recognized as criminal under the general principles of law by the community of nations, does not have to be included in a law to be prosecuted. This notion of *nullem crimen sine lege* was also explored in the Nuremberg trial when the *nullem crimen sine lege* was raised as a defense but rejected as the crimes committed were part of international customary law. Therefore, we can presume that the existence of a

This observation traces us back once again to our concept of the worst forms of child labour. We can now ask ourselves whether the *ILO Convention (no.182) on the Worst Forms of Child Labour* criminalizes “transnational crimes” or “international crimes”. The answer will have an influence on the extent of benefits encompassed by the adoption of the Convention.

The International Law Commission<sup>89</sup>, in 1976, attempted to formulate a definition of an international crime by distinguishing it from the concept of international delict<sup>90</sup>. Even if a non-binding instrument, the decisions of the International Law Commission reflect elements of customary international law and can help in interpreting aspects of the law. In its draft Article 19 of 1976<sup>91</sup>, the International Law Commission stated that an internationally wrongful act is any breach of an international obligation from a State. However, an international crime would only represent the internationally wrongful acts that result of the breach of an obligation so essential for the protection of fundamental

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crime is not limited to definitions found in international tribunal Statutes, treaties or case law, but includes as well customary law and the general principles of law.

<sup>89</sup> The International Law Commission was established in 1948 under Resolution 174 (II) of the General Assembly of 1947: “Establishment of an International Law Commission”. The purpose of this commission was to give effect to Article 13(1) of the United Nations Charter which states that “the General Assembly shall initiate studies and make recommendations for the purpose of: (a) [...] encouraging the progressive development of international law and its codification”. Article 15 of the International Law Commission’s Statute specifies the mandate of the body by explaining the term “progressive development of international law” as being the “[...] preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not been sufficiently developed in the practice of States” and that the codification refers to specifying and systematizing existing rules of international law in field where there is extensive precedents and practice. The role of the International Law Commission limits itself therefore at the drafting of Convention, which the General Assembly can decide to adopt into a formal Convention.

<sup>90</sup> AGO, Roberto. “Fifth Report on State Responsibility: The internationally Wrongful Act of the State, Source of International Responsibility” , *Extract from the yearbook of the International Law Commission*, 1976, Vol. II(1). The International Law Commission started studying State Responsibility in 1955, following a request from the General Assembly in 1953 (Resolution 799(VIII)). Numerous reports were presented by the consecutive Special Rapporteurs on the question of state responsibility. At its 27<sup>th</sup> Sess., in 1975, the Commission presented a general plan for draft Articles on State Responsibility.

<sup>91</sup> *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Part I, Provisionally adopted by the International Law Commission, 32<sup>nd</sup> Sess. on 5 May 1980, Geneva, at Draft Article 19.

interests of the international community. If the internationally wrongful act does not constitute a crime, it is then an international delict.

In order to understand what could constitute the fundamental interests of the international community referred to in Draft Article 19, the paragraph 3 of the same Draft Article<sup>92</sup> gave a few examples: maintenance of peace and security, safeguarding the right to self-determination of peoples, safeguarding the human being and finally, safeguarding and preserving the human environment.

For the purpose of this study, the crime of slavery is of particular importance as much of the unconditional worst forms of child labour can be attached to this crime or to an aspect of this crime. The exploitation of a child for sexual or illicit purposes and its forced labour can also be linked, by close or by far, to modern forms of slavery<sup>93</sup>.

In order to prove that the ILO has “ventured” into international criminal law, we will explore the nature of the three unconditional worst forms of child labour and determine if they are part of international criminal law, starting with slavery and slavery-like practices.

## **1.2 International Crimes: How is the *ILO Convention (no.182) on the Worst Forms of Child Labour Pushing the Norm Further***

### *a) Slavery and Slavery-like practices*

Article 3(a) of the *ILO Convention (no.182) on the Worst Forms of Child Labour* identifies the first category of the worst form of child labour as “all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict.”

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<sup>92</sup>Ibid., at Draft Article 19(3).

<sup>93</sup> See Targeting the Intolerable, supra note 8, at 19. When talking about “contemporary forms of slavery”, the ILO includes prostitution and debt bondage, at 21.; See also The United Nations Working Group on Contemporary Forms of Slavery, Fact sheet no.14, available at <<http://www.ohchr.org/Documents/Publications/FactSheet14en.pdf>>.

“Slavery is one of the oldest human rights issue to be addressed by international law”.<sup>94</sup> While slavery can be referred to as a war crime since the late 1800s<sup>95</sup>, the law of peace has also developed a prohibition of slavery, starting in 1815.<sup>96</sup> More recently, the *Universal Declaration of Human Right*<sup>97</sup> and the *International Covenant on Civil and Political Rights (ICCPR)*<sup>98</sup> have both declared slavery and slavery-like practices as violations of human rights<sup>99</sup>. The criminalization of slavery was made clear many times such as in the *League of Nations Convention to Suppress the Slave Trade and Slavery* of 1926<sup>100</sup>, which requires the adoption of measures in order for severe penalties may be imposed in violation of the Convention under Article 6, the *ILO Forced Labour Convention (no.29)*<sup>101</sup> which recognizes forced labour as a penal offence and recognizes the obligation of the State to ensure that the penalties are strictly and adequately enforced

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<sup>94</sup> See Bassiouni, supra note 41. Slavery has been considered a crime under the law of war (humanitarian law) since 1899, with the adoption of the Hague Convention. On the other hand, slavery was also declared illegal in times of peace by international instruments, as early as 1815. While the two notions can be overlapping, the protection offered by the law of war could not apply to protect civilian during times of peace, but the opposite could be true. In this dissertation, we will focus solely on slavery as a crime in time of peace and therefore as an international crime rather than as a war crime. See also Cullen supra note 10, at 17.

<sup>95</sup> International Peace Conference, *Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land*, 29 July 1899, The Hague; See also International Peace Conference, *Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, 18 October 1907, The Hague.

<sup>96</sup> *Declaration Relative to the Universal Abolition of the Slave Trade*, Consolidated Treaty Series, vol. 63, No. 473, 4 February, 1815, as cited in WEISSBRODT, David and Anti-Slavery International, *Abolishing Slavery and its Contemporary Forms*, Office of the United Nations High Commissioner for Human Rights, New York and Geneva, United Nations, 2002.

<sup>97</sup> General Assembly of the United Nations, *Universal Declaration of Human Rights*, 10 December 1948, Resolution 217 A (III), Paris.

<sup>98</sup> See *International Covenant on Civil and Political Rights*, supra note 88.

<sup>99</sup> *Universal Declaration of Human Rights*, supra note 97, at Article 4: “No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms”; See also *International Covenant on Civil and Political Rights*, supra note 85, at Article 8: “(1) No one shall be held in slavery or servitude; slavery and the slave trade in all their forms shall be prohibited; (2) No one shall be held in servitude; (3)a) No one shall be required to perform forced or compulsory labour [...]”.

<sup>100</sup> *League of Nations Slavery Convention*, supra note 41.

<sup>101</sup> *ILO Forced Labour Convention (no.29)*, supra note 33.

under Article 25, and the *United Nations Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery* of 1956<sup>102</sup> (hereafter the *UN Supplementary Slavery Convention*, 1956) which recognizes slavery as a penal offence and criminalizes the conduct under Articles 1, 2 and 5<sup>103</sup>. Finally, under the Statutes of both the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, as well as under the *Rome Statute of the International Criminal Court*, slavery has also been recognized as a crime against humanity<sup>104</sup>.

However, defining the scope of this international crime might be more daunting. If slavery is easily recognized as a crime, is it the same for slavery-like practices such as debt bondage, serfdom and sale and trafficking of persons, and more importantly, of children?

The *League of Nations Convention to Suppress the Slave Trade and Slavery* of 1926 was the first instrument to define the scope of slavery in a precise way. According to this treaty, slavery is characterized as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised”<sup>105</sup>. In 1956, the *UN Supplementary Slavery Convention* extended the protection to debt bondage, serfdom, forced marriage and related practices, and to the sale or trade of children by their parents or guardian for exploitation or for their labour<sup>106</sup>.

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<sup>102</sup> *UN Supplementary Slavery Convention, 1956*, supra note 36.

<sup>103</sup> Article 3 of the *UN Supplementary Slavery Convention, 1956*, (supra note 36), states that slave trading shall be a criminal offence under the law of the States Parties to the Convention.

<sup>104</sup> *Rome Statute*, supra note 49, at Article 7 (c); See also Security Council of the United Nations, *Statute of the International Criminal Tribunal for the Former Yugoslavia*, Resolution 827, R/RES/827, 25 May 1993, as amended on 13 May 1998 by Resolution 1166, as amended on 30 November 2000 by Resolution 1329, at Article 5 (c); See also Security Council, *Statute of the International Tribunal for Rwanda*, Resolution 955, S/RES/955, 8 November 1994, at Article 3 (c).

<sup>105</sup> *League of Nations Slavery Convention, 1926*, supra note 41.

<sup>106</sup> *UN Supplementary Slavery Convention, 1956*, supra note 33, at Article 1.

The *ILO Forced Labour Convention (no.29)*, adopted in 1930,<sup>107</sup> also helped in reaching out to new forms of slavery by including forced labour in the concept of slavery. In 1998, the Commission of Inquiry on Myanmar concerning the *ILO Forced Labour Convention (no.29)* concluded that:

*“There exists now in international law a peremptory norm prohibiting any recourse to forced labour and that the right not to be compelled to perform forced or compulsory labour is one of the basic human rights. A State which supports, instigates, accepts or tolerates forced labour on its territory commits a wrongful act for which it bears international responsibility; furthermore, this wrongful act results from a breach of an international obligation that is so essential for the protection of the fundamental interests of the international community that it could be qualified, if committed on a widespread scale, as an international crime under the terms of the Article 19 of the draft Articles of the International Law Commission on state responsibility<sup>108</sup>”*

Under the *Rome Statute of the International Criminal Court*<sup>109</sup>, the crime of enslavement is defined as “the exercise of any or all of the powers attached to the right of ownership over a person and includes the exercise of such power in the course of trafficking in person, in particular women and children”<sup>110</sup>. However, in order for the crime of enslavement to be part of the international crimes for which the International Criminal Court (ICC) has jurisdiction, it needs to be conducted as part of a widespread or systematic attack against a civilian population<sup>111</sup>.

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<sup>107</sup> *ILO Forced Labour Convention (no.29)*, supra note 33.

<sup>108</sup> Governing Body, *Report of the Commission of Inquiry appointed under Article 26 of the Constitution of the International Labour Organization to examine the observance by Myanmar of the ILO Forced Labour Convention (No. 29)*, Geneva, 2 July 1998, at para. 203, available at < <http://www.ilo.org/public/english/standards/relm/gb/docs/gb273/myanmar.htm>>.

<sup>109</sup> *Rome Statutes*, supra note 49.

<sup>110</sup> *Rome Statute*, supra note 49, at Article 7; See also JUROVICS, Yann. *Reflexion sur la spécificité du crime contre l’humanité*, Paris, Librairie Général de Droit et de Jurisprudence, 2002. Jurovics reminds the reader that it is the severity of the act that enables the definition of crime against humanity and not only the crime itself. It is the fact that the crime is committed with the intent of dehumanising a person, it will be defined as a crime against humanity: “Ainsi perçe déjà cette spécificité du crime contre l’humanité, déterminé plus par l’intention qu’il véhicule que par le moyen par lequel le criminel le réalise”.

We can find more specifications in the *Elements of Crime*, an annex accompanying the *Rome Statute of the International Criminal Court*<sup>112</sup>. The elements of the crime of enslavement include the exercise by the perpetrator of any or all of the powers attaching to the right of ownership over one or more persons, such as purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty. A footnote specifies that the crime of enslavement would include the extraction of forced labour or otherwise the reduction of a person to a servile status, as it refers to the *UN Supplementary Slavery Convention of 1956*, which could then include debt bondage and serfdom.<sup>113</sup> Article 7 (1g)-2 of the *Rome Statutes of the International Criminal Court* expands the protection against slavery to a case in which a person was forced to be engaged in one or more act of sexual nature.<sup>114</sup>

The International Ad Hoc Tribunal for Rwanda (ICTR)<sup>115</sup> has also included enslavement in its definition of crime against humanity for which it has jurisdiction<sup>116</sup>. Once again, the enslavement has to be part of a widespread or systematic attack against civilian populations.<sup>117</sup> In addition, the ICTR limits even more the scope of the crime by stating

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<sup>111</sup> *Rome Statute*, supra note 49, at Article 7. “For the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population.” The acts have to be done in pursuance of a State or organizational policy. See JUROVICS, *Ibid.*, at 279. Either the widespread or the systematic character of the attack proves the furtherance of an organized scheme, of a specific policy. See also *Prosecutor v. Du [KO TADI] a/k/a/ “DULE”*, IT-94-1-T, Opinion and Judgement, (7 May 1997) at para. 648, (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber), [*Tadic*]. “[...] either the finding of widespreadness, which refers to the number of victims, or systemacity, indicating that a pattern or methodical plan is evident, fulfills this requirement.”.

<sup>112</sup> Assembly of States Parties, *Elements of Crime*, Document ICC-AS/1/3 (Part II/B), Adopted on 9 September 2002, entry into force on 9 September 2002 [*Elements of Crime*], available at [http://www.icc-cpi.int/NR/rdonlyres/9CAEE830-38CF-41D6-AB0B-68E5F9082543/0/Element\\_of\\_Crimes\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/9CAEE830-38CF-41D6-AB0B-68E5F9082543/0/Element_of_Crimes_English.pdf)

<sup>113</sup> *UN Supplementary Slavery Convention, 1956*, supra note 33.

<sup>114</sup> *Elements of crime*, supra note 112.

<sup>115</sup> *Statute of the International Tribunal for Rwanda*, supra note 104.

<sup>116</sup> *Statute of the International Tribunal for Rwanda*, supra note 104, at Article 3(c).

that the attack must be based on national, political, ethnic, racial or religious grounds.<sup>118</sup> No mention is made about an attack made on the ground of age. Therefore, would enslavement not be a crime under such Statutes if performed on children for the only reason of them being children?

The Statutes to the International Criminal Tribunal for the Former Yugoslavia (ICTY)<sup>119</sup> have also included the crime of enslavement as part of crimes against humanity but without the requirement of a widespread and systematic attack<sup>120</sup>. However, its scope is limited to the presence of an armed conflict, which steps outside of our definition of enslavement.<sup>121</sup> Nonetheless, the case law can provide us with information on customary law.

In the case of *Prosecutor v. Dragoljub Kunarac, Radomir Kunarac and Aoran Kunarac [Kunarac]*<sup>122</sup> of the ICTY, the court spends time to examine the extent of the crime of enslavement. It declared the crime of enslavement to refer to the control from a person over another or its ownership, controlling choices and freedom, without consent of the person. Such consent, if given under threat, coercion, because of an abuse of power or because of the vulnerable position of the victim can be made irrelevant. Thus, the court has found that the definition of slavery includes forced or compulsory labour.<sup>123</sup>

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<sup>117</sup> *Statute of the International Tribunal for Rwanda*, supra note 104, at Article 3. The Tribunal has the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population [...].

<sup>118</sup> *Statute of the International Tribunal for Rwanda*, supra note 104, at Article 3. The attack must be on national, political, ethnic, racial or religious grounds.

<sup>119</sup> *Statute of the International Tribunal for the Former Yugoslavia*, supra note 104.

<sup>120</sup> *Statute of the International Tribunal for the Former Yugoslavia*, supra note 104, at Article 5 (c)

<sup>121</sup> *Statute of the International Tribunal for the Former Yugoslavia*, supra note 104, at Article 5. “The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character [...]”.

<sup>122</sup> *Prosecutor v. Dragoljub Kunarac, Radomir Kunarac and Aoran Kunarac*, IT-96-23 & 23\1, Judgement, 22 February 2001, (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber) [*Kunarac*].

Finally, the UN Working Group on Contemporary Forms of Slavery has defined slavery, in its various modern forms and practices, as a crime against humanity.<sup>124</sup> It therefore defines, in its Fact Sheet no.14, modern slavery as to include the sale of children, child prostitution, child pornography, the exploitation of child labour, the use of children in armed conflict, debt bondage and trafficking in person.<sup>125</sup>

We can therefore first conclude that the ILO is entering the realm of international criminal law by treating of the subject of slavery and slavery-like practices in the *ILO Convention (no.182) on the Worst Forms of Child Labour*. But what about the possibility of the Convention extending the previously existing codified law to slavery?

The case of children being used for slavery-like practices is unfortunately less explored than the same activity for adults. Even though all instruments are applicable to adults as much as to children, there rarely seems to be an emphasis on a specific violation of children's rights by their use in forced labour, their trafficking or other practices associated to slavery. The Whitaker Report of 1984<sup>126</sup> notes the gap between the definitions presented up to then of slavery and the new slavery-like practices that were not covered by the law<sup>127</sup>. It mentions, among other things, the exploitation of child labour. Even though it might seem covered by the *Un Slavery Conventions* of 1926 and

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<sup>123</sup> *Kunarac*, supra note 122, at Para. 515 and following. Paragraph 542 of the judgement states that: "Further indications of enslavement include exploitation, the extraction of forced or compulsory labour or service [...]".

<sup>124</sup> Economic and Social Council, *Contemporary Form of Slavery: Report of the Working Group on Contemporary Forms of Slavery on its twenty sixth Sess.*, UN Doc E/CN.4/Sub.2/2001/30, 16 July 2001.

<sup>125</sup> Supra note 93.

<sup>126</sup> WHITAKER, Benjamin. *Slavery: report updating the Report on Slavery submitted to the Sub-Commission in 1966*, UN Doc E/CN.4/Sub.2/1982/20/Rev.1, 1984, as cited in *Weissbrodt*, supra note 96.

<sup>127</sup> See *Bassiouni*, supra note 41, at 457; See also QUIRK, Joel, "The Anti-Slavery Project: Linking the Historical and Contemporary", 28 *Human Rights Quarterly* 565, 2006 at 567. The author explains that despite the length of the slavery definition published in 1991 by the United Nations Centre for Human Rights, which gives an exhaustive list, certain slavery-like practices remain outside the scope of this definition. The author gives the example of "cult" slavery, domestic servitude or abuses on migrant workers prisoners or street children.

the *UN Supplementary Slavery Convention* of 1956<sup>128</sup>, the new forms of child enslavement, forced labour and slavery-like practices are not explicitly covered by the limited wording of these instruments. As mentioned before, the *Un Supplementary Slavery Convention* of 1956<sup>129</sup> protects children against trade and not against trafficking<sup>130</sup>: the wording explicitly limits the protection to the cases where a parent or guardian would hand out a child for his or her exploitation. There is no mention of cases where a parent could have been deceived or misinformed or where a child could have been kidnapped which can be included in trafficking but not in trade. As well, according to the report, the debt bondage definition would not be reflective of the actual reality of debt bondage in children in parts of Asia.<sup>131</sup>

We have to wait until 1989 to see a first instrument that will focus more on the prohibition of the forced labour of children. Under Article 32 of the *Convention on the Rights of the Child*<sup>132</sup>, the child must be protected against all form of economic exploitation. Article 35 of the *Convention on the Rights of the Child*<sup>133</sup> protects the child against trade and trafficking for any purpose and in any form. Once more though, the Convention stays within the field of trafficking and trade, similarly to the *UN Supplementary Slavery Convention of 1956*<sup>134</sup>. No mention is made of debt bondage or forced labour or of other practice similar to slavery.

The *ILO Convention (no.182) on the Worst Forms of Child Labour* thus, seems to be the first international instrument to target the child (under 18 years of age) for all slavery-like practices, in a wide sense, and not solely the trade and trafficking of children or the issue

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<sup>128</sup> *UN Supplementary Slavery Convention, 1956*, supra note 33.

<sup>129</sup> *UN Supplementary Slavery Convention, 1956*, supra note 33.

<sup>130</sup> See *Cullen*, supra note 10, at 50.

<sup>131</sup> See *Bassiouni*, supra note 41, at 458.

<sup>132</sup> *Convention on the Rights of the Child*, Supra note 2, at Article 32.

<sup>133</sup> *Convention on the Rights of the Child*, Supra note 2, at Article 35.

<sup>134</sup> *UN Supplementary Slavery Convention, 1956*, supra note 36.

of child soldiers. More precise than the *Convention on the Right of the Child* about what slavery includes, the Article 3(a) of *ILO Convention (no.182) on the Worst Forms of Child Labour* relates to slavery and slavery-like practices such as debt bondage, forced labour, trafficking, serfdom, forced or compulsory recruitment of child soldiers. The word “including” would mean that the list is not exhaustive and could therefore open up the protection to new forms of slavery-like practices.

Therefore, as examined above, we can conclude that international customary law includes all the slavery-like practices mentioned in the *ILO Convention (no.182) on the Worst Forms of Child Labour*. Various international treaties criminalize slavery in a wider sense. The high ratification of the *Convention on the Rights of the Child* and of the *ILO Convention (no.182) on the Worst Forms of Child Labour* would prove the customary norm behind the criminalization of enslavement of children. We could thus conclude that all the slavery-like practices mentioned in Article 3(a) of the *ILO Convention (no.182) on the Worst Forms of Child Labour* represent crimes under international treaty and customary law.

#### *b) Procurement of a Child for Prostitution or Pornography*

Child prostitution and child pornography, as stand alone offenses, have unfortunately not been in the radar of public international law for very long. Previous to the adoption of the *Convention on the Rights of the Child*,<sup>135</sup> treaties related to the matter have usually tackled the criminal aspect of child sexual exploitation, mostly associating trafficking with enforced prostitution.<sup>136</sup> Still in some countries, the child victim is treated as a

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<sup>135</sup> *Convention on the Right of the Child*, supra note 2.

<sup>136</sup> See for example *International Agreement for the Suppression of the White Slave Trade*, 18 May 1904, 35 Stat. 426, 1 L.N.T.S. 83; See also *International Convention for the Suppression of the White Slave Traffic*, supra note 53, at Article 1. The Protocol states that whoever has led away, procured or enticed even with her consent, a woman or girl under age for immoral purposes, shall be punished [...]; See also *International Convention for the Suppression of Traffic in Women and Children*, 30 September, 1921, (entry into force 15 June 1922), Geneva, available at <<http://www.vilp.de/Enpdf/e158.pdf>>; See also *International Convention for the Suppression of the Traffic in Person and of the Exploitation of the Prostitution of Others*, supra note 53, at Article 1; See DEMLEITNER, Nora V., “Forced Prostitution: Naming an International Offence”, 18 *Fordham International Law Journal* 163, 1994. The author recalls

criminal rather than a victim.<sup>137</sup> In the *Travaux Préparatoires* to the *ILO Convention (no.182) on the Worst Forms of Child Labour*, it was emphasized that prostitution and illegal activities should not be stated in the same paragraph, as there is not always a link between those two issues.

Thus the first Convention to specifically tackle this phenomenon with a child's rights perspective and without any trafficking aspect was the *Convention on the Rights of the Child* in 1989<sup>138</sup>. As stated in its Article 34, State Parties must prevent: the inducement or coercion of a child to engage in any unlawful sexual activity, the exploitative use of children in prostitution or other unlawful sexual practices and the exploitative use of children in pornographic performances and materials.

Although this first strike on child prostitution and pornography might seem quite eloquent, it does not go as far as prohibiting or criminalizing the practice. The general guidelines for periodic report inform on the more specific national, bilateral and multinational measures to be taken by States in order to implement the Article 34 of the *Convention on the Right of the Child*.<sup>139</sup>

However, the *Optional Protocol on the sale of children*<sup>140</sup> has come to fill the gap left by the *Convention on the Rights of the Child*. It criminalizes the sale of children as well as child prostitution and child pornography. In this new instrument, we do not find the element of exploitation as referred to in the *Convention on the Rights of the Child*. Prostitution of a child simply signifies the use of a child in sexual activities for

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that the first international treaties concerning forced prostitution only dealt with the trafficking aspect of the problem, recalling that the holding a woman in a brothel was of national matter.

<sup>137</sup> For example, Libya declares the young person less than 18 years of age committing acts of prostitution or debauchery are considered vagrant.

<sup>138</sup> *Convention on the Rights of the Child*, supra note 2, at Article 34

<sup>139</sup> United Nations, *General Guidelines Regarding the Form and Contents of Periodic Reports to be Submitted by State Parties under Article 44, Paragraph 1(b), of the Convention*, CRC/C/58, 20 November 1996, at para. 158. See also *Detrick*, at 594.

<sup>140</sup> United Nations General Assembly, *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, Resolution A/RES/54/263, 25 May 2000, (entry into force 18 January 2002).

remuneration or other consideration. The same goes for child pornography, which does not include any element of coercion or exploitation.

In a similar way, Article 3 b) of *ILO Convention (no.182) on the Worst Forms of Child Labour* states that the mere fact of using, procuring or offering a person of less than 18 years of age for the purpose of prostitution or pornography represents a crime. As the Optional Protocol, this instrument extends the protection far beyond the one offered by the *Convention on the Rights of the Child* by overwriting the element of exploitation and of coercion.

Therefore, the consent of the child to prostitution or pornography has no influence on the violation of the child's right. Hence, the protection extends beyond the pure exploitation of the child but reaches even to the consenting child. "A child's consent to a sexual act would not exclude it from the prohibition. It is not unusual in national law for the age of sexual consent to be less than 18, but for it still to be a crime to entice persons under 18 into sexual acts, to procure them for prostitution or to draw economic benefit from sexual activities involving them."<sup>141</sup>

Prostitution itself, as a consenting adult is not recognized as a crime under international law. However, the enforced prostitution of a person has been recognized as a crime under numerous international instruments<sup>142</sup>. The *Convention on the Rights of the Child's* Article 34 reemphasizes this crime to make it specific to children. However, it only offers to children a similar protection than the one offered to adults by other criminal law instruments, without explicitly widening that protection to situations that would not represent a crime for adults (such as consenting prostitution). In a similar way, Article 7 (1)g)-3 p) of the *Rome Statute of the International Criminal Court*, declares the enforced

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<sup>141</sup> See *Report VI (2)*, supra note 30, at 54. The Committee on Child Labour states that "Some countries pointed out that there might be a problem where prostitution was legal below the age of 18 or the age of sexual consent less than 18. This provision would still prohibit the use, engagement or offering of a person under 18 years for prostitution. A child's consent to a sexual act would not exclude it from the prohibition. It is not unusual in national law for the age of sexual consent to be less than 18, but for it still to be a crime to entice persons under 18 into sexual acts, to procure them for prostitution or to draw economic benefit from sexual activities involving them."

<sup>142</sup> See for example *Rome Statutes*, supra note 49, at Article 7; See also supra note 136.

prostitution of a person to be a crime against humanity. The *Elements of Crime* document, in its turn, states that forced or coercive prostitution has to be interpreted in the wide sense of all act of sexual nature, which we can understand as including pornography. It does not however include the prostitution of children of under 18 years of age in a non coercive way, such as the *ILO Convention (no.182) on the Worst Forms of Child Labour* refers to it.

This is where the *ILO Convention (no.182) on the Worst Forms of Child Labour* brings an additional element. While consenting (not enforced) prostitution is not illegal for adults, the Convention makes it illegal for children, creating a new specific crime only against children.

Thus, the criminalization of the use, procuring or offering of a child for prostitution or pornography was made clear in both the *Optional Protocol of the Convention on the Rights of the Child* and the *Recommendation (no.190) on the Worst Forms of Child Labour*.<sup>143</sup> In addition, the widespread ratification of *ILO Convention (no.182) on the Worst Forms of Child Labour*<sup>144</sup> (169 States) and of the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*,<sup>145</sup> (132 States, on date of August 2009) would prove a general consensus on the intolerable nature of the conduct.

Hence, customary law recognizes the trafficking of children for the purpose of prostitution as being an international crime, as well as the enforced prostitution and pornography of children under 18 years of age.

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<sup>143</sup> See *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, supra note 140, at Article 3; *Recommendation (no.190) on the Worst Forms of Child Labour*, supra note 16, at Article 12.

<sup>144</sup> *ILO Convention (no.182) on the Worst Forms of Child Labour*, supra note 3.

<sup>145</sup> *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, supra note 140.

### *c) Procurement of a Child for Illicit Activities*

Finally, the last unconditional worst form of child labour is defined in Article 3 (c) of the *ILO Convention (no.182) on the Worst Forms of Child Labour*: “The use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties”<sup>146</sup>

In 1998, when the Committee on Child Labour presented its report, there was a discussion concerning the addition of a new clause after Paragraph 3(c) of the Convention. Up to then, the provision concerning the ‘use of children in trafficking of drugs and other illegal activities’ was included under Article 3, paragraph b), which concerned the prostitution and pornography of children. There was preoccupation that the inclusion of the term illegal in the same provision as prostitution and pornography of children might lead to the interpretation the prostitution had to be illegal under national law to consist in a worst form of child labour.<sup>147</sup> However, in 1999, the final version of the text of the Convention distinguished the involvement of children in illicit activities from the prostitution and pornography of children, creating a new paragraph 3(c) in the Convention.

In the same instance, it was proposed to use the term *illicit* rather than *illegal*, in order to avoid mixing banal illegality (such as copyright transgression) with intolerable forms of child labour such as organized crimes.<sup>148</sup> The term *illicit* was therefore used to include

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<sup>146</sup> An interesting note to point out at this stage relates to the *Resolution concerning the Elimination of Child Labour of 1996* (supra note 69). In this Resolution, the International Labour Conference states the most intolerable aspects of child labour as being the employment of children in slave-like or bonded conditions and in dangerous and hazardous work, the exploitation of very young children, and the commercial sexual exploitation of children. No mention was made at the time about the use or procuring of children in illicit activities such as drug trafficking.

<sup>147</sup> International Labour Conference, *Report of the Committee on Child Labour, 86<sup>th</sup> Sess.*, 1998, Geneva, at para. 134 [*Report of the Committee on Child Labour: 86<sup>th</sup> Sess.*]. “The representative of the Secretary-General explained that the placement of “illegal activities” in the text was separate from the reference to prostitution, production of pornography and pornographic performances because the latter were intended to be prohibited regardless of whether they were illegal under national legislation.”

drug trafficking (such as suggested by the survey) and other illicit activities such as criminal organisations or gambling. It was proposed to use a similar wording than the one employed in the *Convention on the Rights of the Child*.

Article 33 of the *Convention on the Rights of the Child* establishes in very similar words the prohibition stated in the *ILO Convention (no.182) on the Worst Forms of Child Labour* (Article 3-c): “State Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances.”<sup>149</sup> However, the *ILO Convention (no.182) on the Worst Forms of Child Labour*, being a labour Convention, only focuses on the second part of the Article, meaning the use, procuring or offering of a child for illicit activities, such as drug trafficking.

The *ILO Convention (no.182) on the Worst Forms of Child Labour* once again seems to extend the protection further than the *Convention on the Rights of the Child* by going beyond the sole drug trade and including all illicit acts, which could refer as much to arms trafficking as to organized crime.

There is still a little skepticism as to include or not narcotic and drug trafficking in the realm of international crimes<sup>150</sup>. Included in the *United Nations Convention against Transnational Organized Crime and the Protocol Thereto*<sup>151</sup> the offenses of drug trafficking would be more defined as a transnational and not an international crime.

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<sup>148</sup> International Labour Conference, *Report of the Committee on Child Labour*, 87<sup>th</sup> Sess., 1999, Geneva, under Article 3 – amendments [*Report of the Committee on Child Labour: 87<sup>th</sup> Sess.*], available at <http://www.ilo.org/public/english/standards/realm/ilc/ilc86/com-chil.htm> (August 2009).

<sup>149</sup> *Convention on the Rights of the Child*, supra note 2, at Article 33

<sup>150</sup> See *Cassese*, supra note 80.

<sup>151</sup> Supra note 80

It is important however to note the nuance between the illicit activity itself as a transnational crime and the use or procuring of a child to perform such activity as an international crime. In the latter case, the fact that a child is used for the production, sale or trafficking of drug could represent an international crime and this is the object of our focus in this section.

The *United Nations Convention against Illicit Traffic in Narcotics Drugs and Psychotropic Substances*<sup>152</sup> defines the activities that must be criminalized under the Member States' domestic law. While there is no mention made of the use or procuring of a child to accomplish those activities as being a crime, Article 5 (f) of the Convention states that the victimization or the use of minors in the commitment of a drug related offence should be taken into consideration in declaring the offence as particularly serious.

Also, as mentioned before, the *Convention on the Rights of the Child* prohibits the use, procuring or offering of a child for the trafficking of drugs. However, this is limited to drugs and does not include other illicit activities.

The United Nations' General Assembly Resolution 45/115<sup>153</sup> of the following year, 1990, recognized the seriousness of involving children in illicit activities. It requests States to set up programmes to counter this phenomena including research, training, combating the criminality (ensuring sanctions are applied to instigating adults and not to the child) and policy setting. One sub-paragraph mentions children are victim of such crime and not perpetrators. Indeed, we could presume that it recognizes, in an implicit way, the crime of using children in illicit activities. However, the Resolution does not clearly criminalize the practice.

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<sup>152</sup> United Nations Conference, *United Nations Convention Against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances*, 19 December 1988, (entry into force 11 November 1990), Vienna.

<sup>153</sup> United Nations General Assembly, *Instrumental use of children in criminal activities*, Resolution 45/115, 68<sup>th</sup> plenary meeting, 14 December 1990, A/RES/45/115.

Under national law, some countries have recognized the crime of using a child for illicit purposes, mostly related to drugs. In Australia, for instance, Articles 624 of the Criminal Code Amendment Act, 2002, prohibits the procuring of a child to traffic a controlled drug. Article 626 adds that a child is not criminally responsible for drug related offenses<sup>154</sup>. Under Article 304 of the Ukrainian Criminal Code, it is prohibited to engage minors in criminal activities<sup>155</sup>. In France, it is recognized illegal to provoke a minor into committing a criminal offence.<sup>156</sup>

The *ILO Convention (no.182) on the Worst Forms of Child Labour* extends the protection of children exposed to danger due to the illicit aspect of the activities they are involved in. If we look at the reasons behind the prohibition of forced or compulsory recruitment of children in armed conflict, or the reason behind the prohibition of the procurement of a child for the purpose of prostitution, we realize that the main reason is the protection of children against exploitation, and hence, the violation of their basic rights. The inclusion of children in illicit activities such as drug or arms trafficking suggests the exposure of a child to criminal activities, violence and abuse. Thus, we can conclude that the use or procuring of a child for illicit activities represents an international crime.

### 1.3 Conclusion of Chapter I

We conclude with this section that the ILO is indeed entering the realm of international criminal law with its adoption of the *ILO Convention (no.182) on the Worst Forms of*

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<sup>154</sup> Criminal Code 2002, A2002-51, effective 4 September 2009, Australia, at 624 and 626, available at <<http://www.legislation.act.gov.au/a/2002-51/current/pdf/2002-51.pdf>>. “A person commits an offence if the person procures a child to traffic in a commercial quantity of a controlled drug.

<sup>155</sup> Criminal Code of Ukraine, entry into force 1 September 2001, at Article 304, available at <<http://www.legislationline.org/documents/section/criminal-codes>>. “Engaging minors in criminal activity, drinking alcohol, begging, or gambling, shall be punishable by restraint of liberty for a term up to five years, or imprisonment for the same time”

<sup>156</sup> Code Pénal, France, 14 Janvier 2008, Article 227-21: « Le fait de provoquer directement un mineur à commettre un crime ou un délit est puni de cinq ans d'emprisonnement et de 15000 Euros d'amende. », available at <<http://www.droit.org/jo/copdf/Penal.pdf>>; See also NOGUCHI, Yoshie. “The Use of Children in Illicit Activities as a Worst Form of Child Labour: A Comment on Article 3(c) of ILO Convention 182”, in *Child Labour in a Globalized World*, ed. by Guiseppe Nesi et al, Surrey, Ashgate Publishing, 2008, at 159.

*Child Labour*. We even notice that it pushes further some of the rights previously provided to children. According to Yoshie Noguchi, the Convention goes beyond the labour rights of the child. It actually protects the child against exploitation rather than indecent work since the ILO does not consider prostitution as work, even though it touches upon the subject in a labour convention<sup>157</sup>. Therefore, the Convention does not solely satisfy the redress of working conditions for the protection of children, but aims at suppressing the exploitation of children.

The *ILO Convention (no.182) on the Worst Forms of Child Labour* elaborates a distinct prohibition and criminalization of the worst forms of child labour. Under Article 1, the worst forms of child labour must be eliminated and prohibited as a matter of urgency.<sup>158</sup> Article 7 states that sanctions, *including penal sanctions* must be taken to ensure the implementation and enforcement of the provisions contained in the Convention<sup>159</sup>. Finally, Article 8 emphasizes on international cooperation in giving effect to the provisions of the Convention<sup>160</sup>.

In the *Travaux Préparatoires* of the *ILO Convention (no.182) on the Worst Forms of Child Labour*, the dilemma seemed to lie in the inclusion of either criminal or penal sanction for hazardous work, paragraph 3(d) of the Convention<sup>161</sup>. In consequence, the Article 7(1) of the Convention only mentions the obligation to implement sanctions,

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<sup>157</sup> See NOGUCHI, Yoshie. "ILO Convention No. 182 on the worst forms of child labour and the Convention on the Rights of the Child", 10 *The International Journal of Children's Rights*, 355, 2002, at 358; See also ALEN, A et al., *The UN Children's Rights Convention: Theory Meets Practice*, Antwerpen, Intersentia, 2007, at 277.

<sup>158</sup> *ILO Convention (no.182) on the Worst Forms of Child Labour*, supra note 3, at Article 1.

<sup>159</sup> *ILO Convention (no.182) on the Worst Forms of Child Labour*, supra note 3, at Article 1.

<sup>160</sup> *ILO Convention (no.182) on the Worst Forms of Child Labour*, supra note 3, at Article 8. "Members shall take appropriate steps to assist one another in giving effect to the provisions of this Convention through enhanced international cooperation and/or assistance including support for social and economic development, poverty eradication programmes and universal education".

<sup>161</sup> See *Report of the Committee on Child Labour: 86<sup>th</sup> Sess*, supra note 147. The summary of answers to questions 9: "Some countries wanted to see more detail in the Convention about the measures to be taken and the kind of violations for which criminal penalties should apply. Others wished to leave the determination totally to national law and practice".

*including penal sanction*, rather than only criminal sanctions for all the worst forms of child labour. The Members of the ILO were therefore not willing to include all hazardous work into the definition of crime. Dangerous and threatening working conditions can always be improved while the nature itself of the unconditional worst forms of child labour can never be improved to a point of acceptance<sup>162</sup>.

When examining the different unconditional worst forms of child labour, we realize that each of them has an element of attachment to the wider crime of slavery. The UN Working Group on Contemporary Forms of Slavery<sup>163</sup> defines the modern forms of slavery as including, amongst other, the exploitation of child labour, the prostitution and pornography of children, the use of children in armed conflict, debt bondage and trafficking in person. Hence, the worst forms of child labour, as defined in the Convention, are included in the extended definition of contemporary forms of slavery.

However, there has been criticism as to the competence of the ILO to regulate such criminal matter. As noted above, there has been the fear of reducing crimes against children to bare labour rights violation.

In order to better understand the work done by the International Labour Organisation in the criminalization of the unconditional worst forms of child labour, we shall examine in more depth the structure, the history and the mandate of the ILO on this matter.

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<sup>162</sup> See *Ennew*, supra note 18, at 36.

<sup>163</sup> Supra note 93.

## **Chapter II: ILO: Standard Setting and the Fight Against the Worst Forms of Child Labour**

The aim of this chapter consists in determining how and why the ILO has decided to include international crimes in a labour convention. Was this an attempt by the Organisation to extend the scope of the protection offered by international criminal law regarding some of the worst forms of child labour through the codification of international customary law? In order to answer this question, we will study the evolution of the mandate of the ILO and its sudden shift in the area of child labour. This will be done in three sections: An overview of the history and the mandate of the ILO, an exploration of ILO's work in the regulation of child labour and finally, the adoption of the *Convention (no.182) on the Worst Forms of Child Labour* as a new strategy in combating child labour.

### **2.1 The International Labour Organisation: An Overview**

#### *2.1.1 Mandate and History*

The International Labour Organisation (ILO) was created in 1919, following the First World War. The Peace Conference, which followed the War, set up a Commission on International Labour Legislation, which led to the inclusion of part XIII in the Treaty of Versailles and other Peace Treaties.<sup>164</sup> It is under this section that the International Labour Organisation was created<sup>165</sup>.

The organisation was established with a view that decent working conditions were essential for lasting peace. Its mandate is stated first in its Constitution<sup>166</sup> and later

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<sup>164</sup> *Versailles Treaty*, supra note 1.

<sup>165</sup> *Versailles Treaty*, supra note 1, at Article 387 : "A permanent organisation is hereby established for the promotion of the objects set forth in the Preamble."

<sup>166</sup> See *ILO Constitution*, supra note 14.

reiterated in the *Declaration of Philadelphia* (1944)<sup>167</sup>, which was annexed to the Constitution. The Preamble to the Constitution states the ethos of the organisation as follows: “lasting universal peace can be established only if it is based upon social justice, the peace and harmony of the world is threatened by conditions of employment which involve unjust hardship and privation and the failure by any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve their own conditions”<sup>168</sup>. The normative work of the ILO reflects therefore this belief by ensuring decent work conditions and livelihood, job security and better living standards to everyone.<sup>169</sup> In 1944, the *Declaration of Philadelphia*<sup>170</sup> recalled the basic principles of the organisation namely that: labour is not a commodity, freedom of expression and of association are essential to sustained progress, poverty anywhere constitutes a danger to prosperity everywhere, and all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity<sup>171</sup>. The *Declaration of Philadelphia* played an important role in sculpting the actual mandate of the ILO, which now focuses on human values and on the interaction between working conditions and external factors such as the social and economic context<sup>172</sup>. The *Declaration of Philadelphia* made previous ambiguity about the ILO’s mandate disappear by enabling the ILO to “act across the whole field of labor and the human and social

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<sup>167</sup> See *Declaration of Philadelphia*, supra note 34.

<sup>168</sup> *ILO Constitution*, supra note 14, at Preamble. If only a few countries adopt the standards, the competition might become unequal.

<sup>169</sup> See ILO Website at [http://www.ilo.org/global/About\\_the\\_ILO/Mission\\_and\\_objectives/lang-en/index.htm](http://www.ilo.org/global/About_the_ILO/Mission_and_objectives/lang-en/index.htm).

<sup>170</sup> *Declaration of Philadelphia*, supra note 34.

<sup>171</sup> *Declaration of Philadelphia*, supra note 34, at Sections I and II.

<sup>172</sup> See BARTOLOMEI, Hector G. et al., *The International Labor Organization: The International Standards System and Basic Human Rights*, Colorado, Westview Press, 1996, at 5.

rights associated with it”<sup>173</sup> “[...]The Declaration set out an ambitious agenda of social and economic reforms.”<sup>174</sup>

### 2.1.2 ILO's Standard Setting

In order to achieve the Organisation's aim, the International Labour Conference has the mandate to adopt conventions and recommendations setting labour standards, to be ratified by the Member States of the Organisation<sup>175</sup>. The International Conference Committee has therefore the power to decide whether the adoption of a proposed item on the agenda will be framed into a convention (binding to the parties) or a recommendation (non-binding guideline also referred to as soft law)<sup>176</sup>. Up to 2009, 188 Conventions and 199 Recommendations have been adopted<sup>177</sup>.

Recommendations, which cannot be ratified, are adopted for subjects that are not suitable for adoption in a Convention.<sup>178</sup> Therefore, they represent what is usually referred to as soft law. In 1984, the Director general recalled that in the past, recommendations would stand on their own, and would mostly refer to matters linked to policy or practical programmes or would act as exploratory instrument before the adoption of a treaty.<sup>179</sup> While Recommendations usually attract very little attention, they will hold a particularly important role in our study since it is the *Recommendation (no.190) on the Worst Forms*

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<sup>173</sup> See *Bartolomei*, supra note 172, at 6.

<sup>174</sup> See *Helper*, supra note 27, at 691.

<sup>175</sup> *ILO Constitution*, supra note 14, at Article 19.

<sup>176</sup> *ILO Constitution*, supra note 14, at Article 19 (1).

<sup>177</sup> Available at < <http://www.ilo.org/ilolex/english/>>.

<sup>178</sup> *ILO Constitution*, supra note 14, at Article 19(1); See also *Bartolomei*, supra note 172, at 20. The author mentions that Recommendations can be useful for subjects that are too advanced for general application or which are complex or differ in application depending on the country or finally, to examine in more details the Convention which it accompanies. See also LEARY, Virginia A., “Non Binding Accords in the Field of Labor”, 29, *Stud. Transnat'l Legal Pol'y*, 247, 1997.

<sup>179</sup> International Labour Conference, *Report of the Director General, 70<sup>th</sup> Sess., 1984, [Report of the Director General, 1984]*.

of *Child Labour*<sup>180</sup> that criminalizes the unconditional worst forms of child labour rather than the *ILO Convention (no.182) on the Worst Forms of Child Labour*.<sup>181</sup>

Even though the ILO has been adopting standards for nearly a century, it has not always done it in a same way. We note different phases in the lifetime of the ILO and different strategies in its way of ensuring decent work conditions around the globe. We mainly observe a Pre-War, a Post-War and a Contemporary era<sup>182</sup> in the work of the ILO. The innovations and precisions of its mandate in the first years of its creation enabled the ILO to survive the Second World War and to have a defined direction. On the other hand, the Post-War era is often referred to as a period where the organisation seemed to want to cover too many grounds with too little support<sup>183</sup>. Although the adoption of the *Declaration of Philadelphia*<sup>184</sup> and the new political and economical environment enabled the organization to widen and clarify its mandate, the conventions adopted in the years following the Second World War have been sparsely ratified showing the lack of success of this strategy. In the most recent years, the ILO has managed to focus more on core standards, narrowing its scope in order to accentuate its support.<sup>185</sup>

However, three main principles have always been kept in mind when creating new standards: (1) universality (seeking a wide ratification) (2) flexibility (needs to be

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<sup>180</sup> *ILO Recommendation (no.190) on the Worst Forms of Child Labour*, supra note 16, at Article 12

<sup>181</sup> The *ILO Recommendation (no.190) on the Worst Forms of Child Labour* (supra note 16) requires the Member State to provide that the cases stated in Article 3 (a), (b) and (c) of the Convention are criminal offences. On the other hand, the *ILO ILO Convention (no.182) on the Worst Forms of Child Labour* (supra note 3) requires, under Article 7(1), to apply penal sanction or, as appropriate, other sanctions.

<sup>182</sup> See *Helper*, supra note 27.

<sup>183</sup> *Ibid.* *Helper* explains this phenomenon as being the result of multiple factors. The emergence of new countries following the end of World War II gave rise to an increased variety in program demands. Also, the rise of new international organizations, mostly in the area of human rights created a form of competition for the ILO. That is the reason we saw the creation of more human rights related Conventions after the war such as right to associate. Finally, the ILO could spread its wings larger from the presence of a favorable economic environment, which pushed members to be more generous (Conventions on welfare and training saw the day in that period).

<sup>184</sup> *Declaration of Philadelphia*, supra note 34.

<sup>185</sup> See *Helper*, supra note 27.

adaptable to rapid changes) and (3) centralization (necessity for a centralized monitoring mechanism).<sup>186</sup>

It has been noted by scholars that there are two main styles of conventions: promotional and traditional<sup>187</sup>. In the former case, the convention aims at reaching an overall goal or objective, by exposing the vision of the convention and practical guidelines on the ways in which to achieve them<sup>188</sup>. On the other hand, the latter type of convention states specific standards concerning labour conditions.<sup>189</sup> We note that the conventions linked to child labour were mostly of a traditional type before the adoption of the ILO Minimum Age Convention (no.138), which aims the abolition of child labour as an overarching goal<sup>190</sup>. *ILO Convention (no.182) on the Worst Forms of Child Labour* follows a similar pattern.

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<sup>186</sup> See *Helper*, supra note 27, at 672.

<sup>187</sup> CREIGHTON, Breen, “Combating Child Labour: The Role of International Labour Standards”, 18, *Comparative Labor Law Journal*, 362, 1997, at 371 [*Creighton*]; See also *Report of the Director General 1984*, supra note 176; See also Alen, supra note 154, at 276.

<sup>188</sup> For example, *ILO Convention concerning Discrimination in Respect of Employment and Occupation* (Convention no.111) aims the promotion, through national policy, equality of opportunity of treatment in respect of employment and occupation. The Convention aims a wider goal and gives the Government more freedom in the means of implementation, focusing more on the end result.

<sup>189</sup> For example, *ILO Convention concerning Termination of Employment and the Initiative of the Employer* (Convention no. 158) states in Article 1 that “the provisions of this Convention shall [...] be given effect by laws and regulations”. In this case, the Convention does not aim a wider goal than simply the adoption of protective measures, as stated directly in the Convention.

<sup>190</sup> Previous instrument concerning the minimum age for work were regulating conditions of employment. *ILO Minimum Age Convention (no.138)* (supra note 56) was the first Convention to extend the protection to a general goal of abolition of child labour.

## 2.2 Regulating Child Labour

### 2.2.1 ILO Minimum Age Convention (no.138): The traditional approach

The Preamble to the ILO Constitution mentions that the protection of children, young persons and women is part of the mandate of the organisation<sup>191</sup>. It is therefore not surprising that the ILO tackled child labour as early as the year of its creation. In 1919 it adopted two conventions concerning children: the *Minimum Age (Industry) Convention (no.5)*<sup>192</sup> and the *Night Work of Young Persons Convention (no.6)*<sup>193</sup>. These were soon followed by numerous other instruments concerning the minimum age for the employment of children<sup>194</sup>, the medical examination of young workers<sup>195</sup> and night work

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<sup>191</sup> The ILO Constitution mentions the child's welfare, which refers more to the protection of the child as an object of law rather than the protection of the rights of the child, which was only put forward after the adoption of the *Convention on the Rights of the Child* (supra note 2). See also BORZAGA, Matteo, "Limiting the Minimum Age: Convention 138 and the Origin of the ILO's Action in the Field of Child Labour" in *Child Labour in a Globalized World*, ed. by Guiseppe Nesi et al, Surrey, Ashgate Publishing, 2008, at 39-40.

<sup>192</sup> International Labour Conference, *Convention Fixing the Minimum Age for Admission of Children to Industrial Employment*, 28 November 1919, (entry into force 13 June 1921), Geneva.

<sup>193</sup> International Labour Conference, *Convention concerning the Night Work of Young Persons Employed in Industry*, 28 November 1919, (entry into force on 13 June 1921), Geneva.

<sup>194</sup> International Labour Conference, *Convention Fixing the Minimum Age for Admission of Children to Employment at Sea*, 9 of June 1920, (entry into force 27 September 1921), Geneva; International Labour Conference, *Convention concerning the Age for Admission of Children to Employment in Agriculture*, 16 November 1921, (entry into force 31 August 1923), Geneva; International Labour Conference, *Convention Fixing the Minimum Age for the Admission of Young Persons to Employment as Trimmers or Stokers*, 11 November 1921, (entry into force 20 November 1922), Geneva; International Labour Conference, *Convention concerning the Age for Admission of Children to Non-Industrial Employment*, 30 April 1932, (entry into force 6 June 1935), Geneva; International Labour Conference, *Convention Fixing the Minimum Age for the Admission of Children to Employment at Sea (Revised)*, 24 October 1936, (entry into force 11 April 1939), Geneva; International Labour Conference, *Convention Fixing the Minimum Age for Admission of Children to Industrial Employment (Revised 1937)*, 22 June 1937, (entry into force on 21 February 1941), Geneva; International Labour Conference, *Convention concerning the Age for Admission of Children to Non-Industrial Employment (Revised 1937)*, 22 June 1937, (entry into force 29 December 1950), Geneva; International Labour Conference, *Convention concerning the Restriction of Night Work of Children and Young Persons in Non-Industrial Occupations*, 19 October 1946, (entry into force 29 December 1950), Geneva; International Labour Conference, *Convention concerning the Minimum Age for Admission to Employment as Fishermen*, 19 June 1959, (entry into force 7 November 1961), Geneva; International Labour Conference, *Convention concerning the Minimum Age for Admission to Employment Underground in Mines*, 22 June 1965, (entry into force 10 November 1967), Geneva; *ILO Minimum Age Convention (no.138)*, supra note 56; and *ILO Convention (no.182) on the Worst Forms of Child Labour*, supra note 3.

of young persons<sup>196</sup>. These Conventions gave broad guidelines in the hiring and working conditions of young persons, originally fixing a minimum age of employment at 14<sup>197</sup>, which was later revised to 15<sup>198</sup>. In these conventions, various exceptions were allowed by the convention itself or by the legislation of the ratifying State. For instance, when the child would work in a family business or when there was a state of emergency, the general principle could be overthrown<sup>199</sup>. Also, in some cases, the simple fact that the child would prove to be fit enough would enable such exception<sup>200</sup>, or even, two children could be hired to do the job of one<sup>201</sup>.

In 1932, the *ILO Minimum Age Convention (Non Industrial) (no.33)* introduced the concept of employment that, by its nature or by the circumstances under which it is carried on, could represent a danger to the life, health or morals of the child.<sup>202</sup> For the

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<sup>195</sup> International Labour Conference, *Convention concerning the Compulsory Medical Examination of Children and Young Persons Employed at Sea*, 11 November 1921 (entry into force 20 November 1922), Geneva; International Labour Conference, *Convention concerning Medical Examination for Fitness for Employment in Industry of Children and Young Persons*, 9 October 1946, (entry into force 29 December 1950), Geneva; International Labour Conference, *Convention concerning Medical Examination of Children and Young Persons for Fitness for Employment in Non-Industrial Occupations*, 9 October 1946, (entry into force 29 December 1950), Geneva; International Labour Conference, *Convention concerning Medical Examination of Young Persons for Fitness for Employment Underground in Mines*, 23 June 1965, (entry into force 13 December 1967), Geneva.

<sup>196</sup> International Labour Conference, *Convention concerning the Night Work of Young Persons Employed in Industry (Revised 1948)*, 10 July 1948, (entry into force on 12 June 1951), Geneva.

<sup>197</sup> Exception made of the *ILO Minimum Age (Stokers and Trimmers) Convention*, supra note 194, at Article 2.

<sup>198</sup> *ILO Minimum Age Sea Convention (Revised) (no.58)*, supra note 194, at Article 2; *ILO Minimum Age (Industry) Convention (Revised) (no.59)*, supra note 194, at Article 2; *ILO Minimum Age (Non Industrial Employment) Convention (Revised) (no.60)*, supra note 194, at Article 2; *ILO Night Work for Young Person (Industry) Convention (Revised) (no.90)*, supra note 194, at Article 3 (sets the minimum age at 18); *ILO Minimum Age (Underground) Convention (no.123)*, supra note 194, at Article 2 (Sets the minimum age at 16 years old).

<sup>199</sup> See for example *ILO Minimum Age (Non Industrial Employment) Convention (no.33)*, supra note 194, at Article I (3(a)).

<sup>200</sup> See for example *ILO Minimum Age (Trimmers and Stokers) Convention (no.15)*, supra note 194, at Article 3 (c); *ILO Minimum Age (Sea) Convention (no.58)*, supra note 194, at Article 2 (2)

<sup>201</sup> See for example *ILO Minimum Age (Trimmers and Stokers) Convention (no.15)*, supra note 194, at Article 4.

<sup>202</sup> *ILO Minimum Age (Non Industrial) Convention (no.33)*, supra note 194, at Article 5.

first time, an ILO convention on child labour would present a general criteria asking for a higher minimum age: the criteria of danger to the life, health or morals of the child. This concept would serve as a basis for the *ILO Minimum Age Convention (no.138)* of 1973<sup>203</sup>.

Up to 1973, the concept of child labour did not exist and the word child did not always refer to adolescents or young persons of over fourteen years of age.<sup>204</sup> Even the *Declaration of Philadelphia* does not refer to the abolition of child labour but simply to the care for child welfare.<sup>205</sup>

In 1973, with a view to combine the wide variety of instruments concerning child labour, the International Labour Conference adopted a new instrument: the *ILO Minimum Age Convention (no.138)*, 1973<sup>206</sup>, that would unite previously adopted standards under one instrument<sup>207</sup>. For the first time, the ILO tried to delimit the concept of child labour as a whole. The concept though remained controversial, partly due to the fact that not everyone agreed on what could be represented by the term “child”.<sup>208</sup> Since the Convention would unite all the different economic sectors, it would have to elicit broader principles rather than specific rules. While no specific definition of child labour was

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<sup>203</sup> *ILO Minimum Age Convention (no.138)*, supra note 56.

<sup>204</sup> See *Strategic Choice in International Campaign against Child Labour*, supra note 26; See also SMOLIN, David, “Conflict and Ideology in the International Campaign against Child Labour”, 16, *Hofstra Labor and Employment Law Journal*, 383, 1999 [*Conflict and Ideology in the International Campaign against Child Labour*]. Smolin defines the campaign against child labour as divided into four stages. Stage one represents general provisions, stage two the raising of the minimum age from 14 to 15, stage three was centered around the *Minimum Age Convention (no.138)* (supra note 56), with the goal of uniting preexisting Convention on child labour into one flexible and progressive with the aim of abolishing child labour. Finally, the fourth stage, which is still alive today, started in the early 1990s. It aims at making child labour a focus area of work of the ILO, at using child labour as a means to increase social justice in all areas, at implementing comprehensive assistance programmes and at prioritizing through the targeting of the worst forms of child labour and moving the ILO into areas outside its traditional role (such as criminal law).

<sup>205</sup> See *Strategic Choice in International Campaign against Child Labour*, supra note 26; See also *Declaration of Philadelphia*, supra note 34.

<sup>206</sup> *ILO Minimum Age Convention (no 138)*, supra note 56; See also Cox, supra note 8, at 21.

<sup>207</sup> See *ILO Minimum Age Convention (no.138)*, supra note 56, at Preamble. “Considering that the time has come to establish a general instrument on the subject, which would gradually replace the existing ones applicable to limited economic sectors [...]”.

<sup>208</sup> See HOBBS, Sandy et al., *Child Labour: A World History*, California, ABC-CLIO, 1999, at Preface.

given in the Convention itself, it gave guidelines as to minimum ages and basic working conditions outside of which child labour would occur. Without going into detail yet, it explained that work done by a young child, work that would impede the schooling process and work that could represent a danger to the health, safety and morals of a child would consist in child labour and should therefore be gradually abolished.

Hence, the *ILO Minimum Age Convention (no.138)* aims at progressively reaching the complete abolition of child labour and at regulating the minimum age for work in all fields of work but comprises many exceptions. It fixes the standard minimum age at 15 years old, but allows countries with developing economies to lower this age to 14 years old<sup>209</sup>. The same goes for work likely to jeopardize the health and safety of the child, which should not be performed by young persons under 18 years of age<sup>210</sup>, as it also allows for cases of exception which can lower the minimum required age to 16<sup>211</sup>.

The Convention also defines work considered as hazardous and which should not be performed by persons under 18 years of age (with the exception noted above)<sup>212</sup>. It refers to work or employment which, by its nature or the circumstances in which it is carried out, is likely to jeopardize the health, safety or morals of young persons of less than 18 years of age. However, the designation of what constitutes hazardous work is left to the legislation of each ratifying State<sup>213</sup>. Such a broad definition with so few guidelines has

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<sup>209</sup> *ILO Minimum Age Convention (no.138)*, supra note 56, at Article 2 (4). “Notwithstanding the provision of paragraph 3 of this Article, a Member whose economy and educational facilities are insufficiently developed may, after consultation with the organisations of employer and workers concerned, where such exist, initially specify a minimum age of 14 years.”

<sup>210</sup> *ILO Minimum Age Convention (no.138)*, supra note 56, at Article 3.

<sup>211</sup> *ILO Minimum Age Convention (no.138)*, supra note 56, at Article 3(3). “Notwithstanding the provisions of paragraph 1 of this Article, national laws or regulations or the competent authority may, after consultation with the organisations of employers and workers concerned, where such exist, authorize employment or work as from the age of 16 years on the condition that the health, safety and morals of the young persons are fully protected and that the young persons have received adequate specific instruction or vocational training in the relevant branch of activity.”

<sup>212</sup> *ILO Minimum Age Convention (no.138)*, supra note 56 at Article 3.

<sup>213</sup> Article 3 of the *ILO Minimum Age Convention (no.138)* (supra note 56) states that “The types of employment or work [which by its nature or the circumstances in which it is carried out is likely to

raised many debates and problems in the monitoring of progress towards the abolition of child labour<sup>214</sup>.

Another criticism concerning the *ILO Minimum Age Convention (no. 138)* has been its lack of flexibility<sup>215</sup>. By wanting to regulate all spheres of economic activities, it acts as a deterrent for States of developed as much as developing countries in ratifying the Convention. By setting the absolute minimum age of work at 13 years of age in developed countries, even for light work, it might have seemed too rigid in the view of many governments. Creighton gives the example of the eleven-year-old boy who would wash a neighbor's car on a Saturday afternoon for a few dollars or of the twelve year old who would do a newspaper run before school.<sup>216</sup>

However, even if the *ILO Minimum Age Convention (no.138)* has had problems gathering ratifications in the first decades of its adoption<sup>217</sup>, it acted as a foundation for an international agreement on the critical effects of child labour, and stated essential basic lines in the regulation of children's work. It has been recognized that the Convention does not give priorities for national action and leaves the competent authorities of each country to define it<sup>218</sup>. By failing to address this issue, the ILO Minimum Age Convention (no.138) puts all the forms of child labour on the same level, preventing countries with high level of abusive child labour to focus resources on those<sup>219</sup>.

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jeopardize the health, safety and morals or young persons] shall be determined by national law or regulation, or by the competent authority [...].

<sup>214</sup> See *Beqiraj*, supra note 19, at 190.

<sup>215</sup> See *Creighton*, supra note 187, at 386.

<sup>216</sup> *Creighton*, supra note 187, at 387.

<sup>217</sup> See *Helfer*, supra note 27.

<sup>218</sup> *Creighton*, supra note 187: See also CULLEN, Holly, "Child Labour Standards: From Treaties to Labels" in *Child Labor and Human Rights* ed. by Burns H Weston, supra note 18, at 97.

<sup>219</sup> *Creighton*, supra note 187, at 391.

### 2.2.2 *A first step towards universal agreement: Children's Rights and the ILO Convention (no.182) on the Worst Forms of Child Labour*

Smolin refers to the years 1990s up to today as the fourth stage in the campaign against child labour<sup>220</sup>. In his view, from that date on, the ILO started to focus more its work towards the issues surrounding child labour, using the laboring child as a stepping-stone towards a wider improvement in social justice. Smolin refers to this period of the ILO's fight against child labour as a move into areas that are less associated with the ILO's traditional role such as criminal law.<sup>221</sup>

The start of this new era for the ILO's supervisory mechanisms can be traced back to the adoption of the *Convention on the Rights of the Child* in 1989. With the arrival of this new instrument the protection of the rights of the child were added to the general notion of the welfare of the child. For the first time, the child became subject of law rather than merely object<sup>222</sup>.

Articles 32 and following of the Convention raise rights and protections against abusive work and exploitation of the child for benefit of profit. Article 32<sup>223</sup> gives the child the right to be protected from economic exploitation and against any work that could include risks or could compromise his education or could harm his natural development. Article 33<sup>224</sup> protects the child against the use of illicit drugs and against being used in the

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<sup>220</sup> See *Strategic Choice in International Campaign against Child Labour*, supra note 26.

<sup>221</sup> See *Strategic Choice in International Campaign against Child Labour*, supra note 26, at 946.

<sup>222</sup> See also *Meotti*, supra note 37, at 31.

<sup>223</sup> *Convention on the Rights of the Child*, supra note 2, at Article. "States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development."

<sup>224</sup> *Convention on the Rights of the Child*, supra note 2, at Article 33. "States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances."

production and the trafficking of such substances. Article 34<sup>225</sup> protects the child against sexual exploitation and violence. Article 35<sup>226</sup> gives the right to the child not to be sold or trafficked. Finally, Article 36<sup>227</sup> protects the child against any other types of exploitation.

The year of the Child in 1979 and the adoption of the Convention on the Rights of the Child<sup>228</sup> acted therefore as some of the catalysts in the decision to improve the mechanisms available to fight against child labour<sup>229</sup>. The *Convention on the Rights of the Child* having reached unseen number of ratification in the shortest amount of time<sup>230</sup> would be the proof that there existed a universal interest towards the protection of the child.

In response to this momentum, the ILO was launching in 1992, its International Programme on the Elimination of Child Labour (IPEC)<sup>231</sup>, furthering the new expansion in the efforts put into the global fight for social justice including the fight against child labour. The programme IPEC was aimed at increasing technical assistance in developing countries, and prioritized the strategy against child labour by focusing mostly on the worst forms of child labour.

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<sup>225</sup> *Convention on the Rights of the Child*, supra note 2, at Article 34. “States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse.”

<sup>226</sup> *Convention on the Rights of the Child*, supra note 2, at Article 35. “States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.”

<sup>227</sup> *Convention on the Rights of the Child*, supra note 2, at Article 36. “States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.”

<sup>228</sup> *Convention on the Rights of the Child*, supra note 2.

<sup>229</sup> See *Resolution concerning the Elimination of Child Labour of 1996*, supra note 69. Refers to the Year of the Child and the *Convention on the Rights of the Child*, supra note 2.

<sup>230</sup> In 1990, 63 States had ratified the *Convention on the Rights of the Child*. The following year, in 1991, 42 more States became Members to the Convention. To date, only two countries have not yet ratified the Convention (United States and Sudan). See SILK, James J. and Meron Makonnen, “Ending Child Labor: A Role for International Human Rights Law?”, 22, *Saint Louis University Public Law Review*, 359, 2003, at 361.

<sup>231</sup> The International Programme for the Elimination of Child Labour was created in 1992 with the overall aim the progressive elimination of child labour through capacity building and technical assistance. See <http://www.ilo.org/ipec/programme/lang--en/index.htm>

In 1995, the Committee on Employment and Social Policy of the Governing Body of the ILO<sup>232</sup> submitted a report on the extent of child labour in the world<sup>233</sup>. At the view of the results, the Governing body of the ILO unanimously decided to bring the subject of child labour on the table for the 1998 conference as a “subject for standard setting”<sup>234</sup>. It stressed that governments, workers’ and employers’ organisations had to work towards “progressive elimination of child labour” while emphasizing the need to “immediately proceed with the abolition of its most intolerable aspect, namely the employment of children in slave-like and bonded conditions and in dangerous and hazardous work, the exploitation of very young children, and the commercial sexual exploitation of children”<sup>235</sup>.

The *Resolution concerning the elimination of child labour*, adopted at the 83<sup>rd</sup> Session of the International Labour Conference in 1996, expressed the worldwide concerns that “despite the fact that virtually every country has laws prohibiting child exploitation, the problem still exists and the incidence of child labour continues”<sup>236</sup>. At the same occasion, the Resolution states that there is thus a need to eliminate immediately its “most intolerable aspects”<sup>237</sup>.

According to the proposals of the Governing Body, a new Convention should focus on two types of intolerable child labour: (1) work or employment that violates fundamental

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<sup>232</sup> See International Labour Organisation, *Guide to the Procedure and Functioning of the Governing Body and its Committees*, available at <http://www.ilo.org/public/english/standards/reln/gb/refs/gbguide.htm#ESP>. The Committee’s mandate is to advise the Governing Body on policies and activities related to employment, training, enterprise development and cooperatives, industrial relations and labour administration, working conditions and environment, social security and the promotion of equality between men and women in employment.

<sup>233</sup> ILO Governing Body, *Child Labour: Report to the ILO Committee on Employment and Social Policy* (Geneva: International Labor Office) ILO Doc. GB.264/ESP/1, November 1995, 18.

<sup>234</sup> See *Resolution concerning the Elimination of Child Labour of 1996*, supra note 69, at Section 1 b)

<sup>235</sup> See *Resolution concerning the Elimination of Child Labour of 1996*, supra note 69, at Section 1 c)

<sup>236</sup> See *Resolution concerning the Elimination of Child Labour of 1996*, supra note 69.

<sup>237</sup> See *Resolution concerning the Elimination of Child Labour of 1996*, supra note 69.

human rights such as slavery of children, child prostitution or the use of children in drug trafficking and (2) work or employment that, by its nature or the circumstances in which it is performed, exposes children to particularly serious hazard to their safety or health (hazardous work)<sup>238</sup>. This new shift in the ILO's vision of child labour follows the path traced by the *Convention on the Rights of the Child* a decade previously, by combining children's rights and child welfare.

The Committee on child labour of the International Labour Conference presented a draft Convention on the worst forms of child labour in 1998<sup>239</sup>. During the course of this session, the reporter for the Committee on Child Labour, Mrs. Melkas, summarized previous debates stating that “[poverty] should never be used as an excuse to condone the situation of children working in hazardous and life-threatening situations, or in conditions that violate their fundamental rights and dignity.”<sup>240</sup> From these words we could conclude that hazardous forms of child labour and violation of children's rights are non excusable under any circumstances and that therefore, progressive abolition due to poor economic development is unacceptable for these hazardous, and exploitative types of work. Hence, even before the adoption of a convention, there seemed to be an acknowledgment of the severe violation of children rights represented by extremely hazardous work and work that violates the rights of the child.<sup>241</sup>

This last point is an important one to address. The main new element brought under the discussions over the *ILO Convention (no.182) on the Worst Forms of Child Labour*

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<sup>238</sup> See *Creighton*, supra note 187, at 31.

<sup>239</sup> See *Report of the Committee on Child Labour, 86<sup>th</sup> Sess.*, supra note 147.

<sup>240</sup> International Labour Conference. *Report of the Committee on Child Labour: Submission, Discussion and Adoption*, 86<sup>th</sup> Sess., June 1998, Geneva. Available at <http://www.ilo.org/public/english/standards/reim/ilc/ilc86/com-chid.htm> (August 2009).

<sup>241</sup> These rights were already recognized under the *Convention on the Rights of the Child* (supra note 2). The right to be protected against economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development (Article 33 of the *Convention on the Rights of the Child*), the right to be protected against exploitation in illicit production and trafficking of [narcotic drugs and psychotropic substances] (Article 33 of the *Convention on the Rights of the Child*), the right to be protected from sexual exploitation and sexual abuse (Article 34 of the *Convention on the Rights of the Child*), the right to be protected from sale or trafficking (Article 35 of the *Convention on the Rights of the Child*).

relates to the inclusion of the concept of children's rights. While the ILO Minimum Age Convention (no.138) was mostly focused on specifying minimum working conditions to ensure the welfare of children, the *ILO Convention (no.182) on the Worst Forms of Child Labour* goes a step further and tackles the mere question of rights.

At the 87<sup>th</sup> Session of International Labour Conference, the Secretary-General recalled the decision made the previous year, that "there should be a legally binding Convention, supplemented by a Recommendation, obliging States ratifying the Convention to take measures to secure the prohibition and immediate elimination of the worst forms of child labour. It adds on by stating that the Convention should be short, precise and contain basic principles capable of being ratified and effectively implemented. The determination of the types of work deemed to be hazardous or likely to jeopardize the health, safety or morals of children should be made at national level [...]"<sup>242</sup> Therefore, Members of the International Labour Organisation were looking for a simple and straightforward instrument that would focus solely on the worst forms of child labour<sup>243</sup>, which refer to more than only the danger of the working conditions themselves but even more, to the concept of violation of the child's fundamental rights. Such a convention, focusing on gross violations of children's rights and complementing the United Nations' *Convention on the Rights of the Child*, could make universal ratification more likely.<sup>244</sup>

We note in the *ILO Convention (no.182) on the Worst Forms of Child Labour*, in a similar way as in the *Convention on the Rights of the Child*, the paradigm between

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<sup>242</sup> International Labour Conference, *Report of the Committee on Child Labour (Corr)*, 87<sup>th</sup> Sess., Geneva, 1998, at paragraph 6 [*Report of the Committee on Child Labour (Corr.)*].

<sup>243</sup> See *Report of the Committee on Child Labour (Corr.)*, supra note 242. Comments made by Melkes in plenary and discussion: "Many interventions during the Committee's sittings stressed the importance of a short, yet precise, Convention, containing basic principles capable of being immediately and effectively implemented both in developed and developing countries alike."

<sup>244</sup> In 1998, the United Kingdom, speaking on behalf of the governments members of the European Union stated that "the continuing prevalence of harmful child labour, even in the face of existing international standards, has made it necessary to have a new Convention focused on the worst, or extreme forms of child labour to complement Convention n.138, Convention 29 and the United Nations Convention on the Rights of the Child. A new Convention should be clear and focused to make universal ratification more likely" – *Report of the Committee on Child Labour: 86<sup>th</sup> Sess.*, supra note 147, at para. 23.

protecting children and protecting children's rights<sup>245</sup> and therefore including children as a subject of law and not only as an object of law. From protecting children from hazardous work by setting standards, such as working conditions and the setting of a minimum age, to ensuring the respect of their rights such as the right to be protected from slavery and sexual exploitation, the new instrument of the ILO seems to take the Organisation on a different path in its fight against child labour.

Therefore, at its following session, in 1999, the International Labour Conference of the ILO adopted the *Convention (no.182) on the Worst Forms of Child Labour*<sup>246</sup>, which confirmed a universal consensus that some extreme forms of child labour represent extreme forms of exploitation under any circumstances and must thus be eliminated immediately. This said, it is the first time an ILO instrument, in the area of child labour, distinguishes some extreme forms of child labour as requiring immediate elimination because they violate children's rights.

The instrument was unanimously adopted in 1999 and, already in 10 years, it has been ratified by 171 Member States of the ILO out of 182 (on date of August 2009)<sup>247</sup>. It was the fastest ratified ILO Convention in all of the ILO's history.

While the new Convention was under preparation, another tool adopted by the ILO would become useful in its work to fight the worst forms of child labour. The *ILO Declaration on Fundamental Principles and Rights at Work*, of 1998<sup>248</sup>, would come as a reminder of the importance of human rights on the ILO's agenda. The Declaration reiterates the mandate of the ILO to set and deal with international standards and most importantly, adds that it has universal support and acknowledgement to promote fundamental rights at

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<sup>245</sup> VEERMAN, Philip and Michael Freeman. *The Ideologies of Children's Rights*, Leiden, Martinus Nijhoff Publishers, 1992, at 5.

<sup>246</sup> *ILO Convention (no.182) on the Worst Forms of Child Labour*, supra note 3.

<sup>247</sup> Information available at <http://www.ilo.org/ilolex/english/newratframeE.htm> .

<sup>248</sup> *ILO Declaration on Fundamental Principles and Rights at Work*, supra note 22.

work<sup>249</sup>. The *Declaration on Fundamental Principles and Rights at Work* stipulates that all Members of the ILO, whether they have ratified the *ILO Minimum Age Convention (no.138)* and the *Convention (no.182) on the Worst Forms of Child Labour* or not, will have to respect, promote and realize the effective abolition of child labour.<sup>250</sup> Therefore, the ILO has reiterated and strengthened its mandate towards the fights against child labour in general, as well as in its worst forms.

### **2.3 The ILO Convention (no.182) on the Worst Forms of Child Labour: Prioritizing the Fight Against Child Labour**

The *ILO Convention (no.182) on the Worst Forms of Child Labour* brings in a new strategy in the fight against child labour. With the adoption of the Convention, the concept of “the worst forms of child labour” was born. The latter refers to all forms of economic exploitation considered absolutely intolerable under any circumstances for a child to perform, which means for any person of less than 18 years of age, following the *Convention on the Rights of the Child*<sup>251</sup>.

The *ILO Convention (no.182) on the Worst Forms of Child Labour* is the first binding international instrument to apply the concept of prioritizing to the fight against child labour. In stating that some forms of child labour can be worst than others, the ILO has chosen a specific strategy to counter the gross violation of children’s rights. David Smolin<sup>252</sup> has been one of few authors to examine and criticize this strategy of prioritizing<sup>253</sup>. He questions the way in which the ILO has decided to prioritize, explaining that the ILO has prioritized upon the wrong criteria<sup>254</sup>. One of his arguments

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<sup>249</sup> *ILO Declaration on Fundamental Principles and Rights at Work*, supra note 22, at Preamble.

<sup>250</sup> *ILO Declaration on Fundamental Principles and Rights at Work*, supra note 22, at Article 2 (c).

<sup>251</sup> *Convention on the Rights of the Child*, supra note 2, at Article 1.

<sup>252</sup> See *Strategic Choice in International Campaign against Child Labour*, supra note 26.

<sup>253</sup> See also *Pertile*, supra note 21, at 3.

relates to the fact that even if some cases of child labour are worst than others, the resources should be invested where they have a better chance of having a positive impact. In his sense, the ILO has not taken into account the effectiveness factor of the impact of the Convention and has simply focused on the most important. He adds on that the ILO should have focused its limited resources in its own areas of expertise in order to create the best impact and not seek to extend its protection to new areas that had not been previously explored by the organisation.

These arguments are of great interest for this paper as they show a different view on the objective of the *ILO Convention (no.182) on the Worst Forms of Child Labour*. We believe this ILO Convention, as a prioritization instrument, reflects international customary law and has for prime purpose the extension of the criminal protection against the worst forms of child labour. The prioritization has been done on the basis of the forms of child labour that are widely accepted as intolerable under international law rather than through their chances of success.

In the *Travaux Préparatoires* to the *ILO Convention (no.182) on the Worst Forms of Child Labour*, the International Labour Office ensures the Members that the Convention will not have as a consequence to undermine the seriousness of the worst forms of child labour<sup>255</sup>. In addition, the Convention itself refers to international criminal instruments,

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<sup>254</sup> David Smolin claims that the prioritization done by the ILO under the *ILO Convention (no.182) on the Worst Forms of Child Labour* (supra note 3) is based on the severity of the needs, the visibility and political and ideological considerations. It has therefore rejected the prioritization through the models of triage, competency, relationship and utility. In his sense the ILO has not focused on investing resources where they can be the most effective (triage) nor on a area in which it has the most expertise (competency and utility). It has rather decide to target the direst needs, even if chances of success were weak. Also, Smolin criticize the choice of targeting the most visible needs, according to an external perception (visibility). Finally, he also mentions the political needs of this prioritization, trying to meet common grounds of various agendas, but without always targeting the real need. In his sense, the drug trade and the issue of child soldiers are virtually hopeless cases, making this prioritizing inefficient. He also states that the ILO has close to no expertise in nor relationship with criminal justice system. The tripartite system of the ILO, involving workers and employers organisations, defines the labour nature of the organisation, having no natural connection with crime enforcement bodies in national context. Overall, Smolin declares the Convention to be mainly symbolic as it is irrational as a tool to actually mobilize and prioritize. See also *Cullen*, supra note 218, at 98.

<sup>255</sup> See *Report VI (2)*, supra note 30, at 52.

which shows that there is a conscious effort to work collaboratively with international customary and criminal law<sup>256</sup>.

#### **2.4 ILO Convention (no.182) on the Worst Forms of Child Labour: An odd sibling**

It is of interest to note how the *ILO Convention (no.182) on the Worst Forms of Child Labour* is different from other ILO Conventions. In almost 200 Conventions adopted by the ILO, only two seem to step outside of the traditional mandate of the organisation: the *ILO Forced Labour Convention* (no.29) (supplemented by the Convention 105 on the abolition of forced labour)<sup>257</sup> and *ILO Convention (no.182) on the Worst Forms of Child Labour* on the worst forms of child labour. What differentiates these Conventions from the others is the fact that they aim realities that are not accepted nor defined as work by the organisation, but rather to realities linked to economic exploitation and even to criminal law<sup>258</sup>. In these two cases, the ILO does not regulate in any way working conditions but seeks the abolishment of a phenomenon related to labour but which it does not accept as a form of work<sup>259</sup>. Such a prohibitionist characteristic is mostly found in international criminal law instruments.<sup>260</sup>

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<sup>256</sup> *Convention (no.182) on the Worst Forms of Child Labour*, supra note 3 . Preamble of the Convention states: “Recalling that some of the worst forms of child labour are covered by other international instruments, in particular the ILO Forced Labour Convention, 1930, and the United Nations Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956”.

<sup>257</sup> *Convention (no.105) on the Abolition of Forced Labour*, supra note 40.

<sup>258</sup> The *ILO Forced Labour Convention* (no.29), (supra note 33) was adopted in 1930 with the aim of abolishing forced labour in colonies, what was then referred to as *native labour*. As the *League of Nations Slavery Convention* (supra note 41) was adopted in 1926, the Assembly and the Council of the League of Nations drew the attention of the ILO on the subject of forced labour and other slavery-like practices through Resolutions, asking the organisation to study ways to prevent “forced labour from developing into conditions analogous to slavery”. The instrument soon became included in international criminal law, reflecting customary law in the area of slavery, which would now include forms of forced labour.

<sup>259</sup> See *Noguchi*, supra note 157.

<sup>260</sup> For example, the prohibition of torture: United Nations General Assembly, *Convention Against Torture and other Cruel , Inhuman or Degrading Treatment or Punishment*, 10 December 1984, (entry into force 26 June 1987), at Article 2; prohibition of genocide: *Convention on the Prevention and Punishment of the Crime of Genocide*, supra note 87, at Article 1.

Also, in the way in which the Conventions aim at prohibiting a practice rather than regulating it, there is a sense that these Conventions seek the universalization of certain principles rather than simply the internationalization of them<sup>261</sup>. Indeed, this distinction can lead us back to our previous topic of international versus transnational law (or customary versus treaty law). While universal norms are applicable to all and defy border, international rules are subject to the will of the State as an actor in the application of a treaty. The ILO Conventions 182 and 29 are therefore seeking to promote a universal norm on the worst forms of child labour and on slavery.

Of these two Conventions, *ILO Convention (no.182) on the Worst Forms of Child Labour* stands out as distinct in the way in which it does not allow any exception to the abolition of the worst forms of child labour. The *ILO Forced Labour Convention (no.29)* on the other hand, allows for a few exceptions concerning forced labour<sup>262</sup>. *ILO Convention (no.182) on the Worst Forms of Child Labour* is therefore a new type of instrument for the ILO for two reasons: (1) it aims at abolishing a practice that is not defined as labour and is more familiar to the area of criminal law (in the sense of maintaining illegal work as a crime), rather than at regulating work related conditions and (2) it does not allow for any exception to its application.

But why would the ILO venture itself in an area that is not necessarily its own area of expertise? And how can it play a complementary role in the wider protection of children's rights?

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<sup>261</sup> See HENKIN, Louis. *International Law: Politics and Values*, Leiden, Martinus Nijhoff Publishers, 1995, at 178. According to the author, the universalization is dominated by the promotion of core values to the universality of human kind. On the other hand, the internationalization reflects a political will to defend those values. The universalization of the Universal Declaration on Human Rights has led to the adoption of numerous treaties with international consequences.

<sup>262</sup> *ILO Forced Labour Convention (no.29)*, supra note 33. Article 2(2) allows for four exception to the application of the Convention: "(a) any work or service exacted in virtue of compulsory military service laws for work of a purely military character; (b) any work or service which forms part of the normal civic obligations of the citizen of a fully self governing country; (c) any work or service exacted from any person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at te disposal of private individuals, companies or associations; (d) an work or service exacted in case of emergency [...]"

## 2.5 Conclusion of Chapter II

As seen in the introductory section, some Member State representatives were concerned about the inclusion of criminal elements in a labour Convention. These concerns were addressed by the ILO, which specified that, while those practices represent crimes, they are also forms of economic exploitation<sup>263</sup>. Linking back once again to the *ILO Forced Labour Convention* (no.29), the ILO explains that it is not the first time it has regulated such matters, since forced labour and slavery are universally recognized as international crimes. In the same way as the ILO has used the *ILO Forced Labour Convention* (no.29) to extend the definition of slavery in international customary law, would it be using the *ILO Convention (no.182) on the Worst Forms of Child Labour* to push the general criminal protection to the specific cases of children, as crimes against children?

In the 1998 report of the ILO Committee on Child Labour, *Targeting the intolerable*, we state that this new instrument “would fill in the gaps in current international legal instruments dealing with children and their rights [...]”<sup>264</sup>. The narrow definition of slavery and slavery-like practices did not seem clear enough to enclose all the worst forms of child labour on a specific base.<sup>265</sup> While *ILO Forced Labour Convention* (no.29) deals with some aspects of slavery-like practices, the *Convention (no.182) on the worst Forms of Child Labour* adds specificity and focus on children<sup>266</sup>. On the other hand, the generality in children’s rights instruments made it hard to apply and hold accountable.

According to Marco Pertile, the ILO is the best equipped actor to deal with the issue of the worst forms of child labour, the reason being: the comprehensive standard setting process of the organisation, its reliable supervisory system, its substantial expertise in

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<sup>263</sup> See *Targeting the Intolerable*, supra note 8.

<sup>264</sup> See *Targeting the Intolerable*, supra note 8, at 57.

<sup>265</sup> See *Cullen*, supra note 10; See also Bassiouni, supra note 41.

<sup>266</sup> See *Targeting the Intolerable*, supra note 8, at 22.

technical assistance and its unique decision making process bases on a tripartite approach.<sup>267</sup> The recognition that the phenomenon of the unconditional worst forms of child labour embodies an economic exploitation aspect gives the ILO the benefit of tackling the issue under a new perspective.

Hence, the ILO seems to have taken the lead in the area of the worst forms of child labour, maybe even jumping ahead to ensure its control of the supervision of the phenomenon and a multi faceted approach to its abolition. However, is the ILO jumping too far? Will it manage to supervise in a proper manner international crimes without diminishing the seriousness of the accountability?

In the Chapter III, we will explore the possible internal and external resources on which the ILO can rely in order to properly apply international criminal law.

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<sup>267</sup> See *Pertile*, supra note 21; See also *Conflict and Ideology in the International Campaign against Child Labour*, supra note 204.

## **Chapter III: Jurisdiction to Adjudicate International Crimes of the Worst Forms of Child Labour**

This final chapter explores the jurisdiction to adjudicate international crimes of the unconditional worst forms of child labour. The ILO benefits from renowned supervisory mechanisms in order to promote the respect, the application and the enforcement of *ILO Convention (no.182) on the Worst Forms of Child Labour*. However, such mechanisms might not meet the prosecution needs required by international crimes, which are included in the Convention. At the opposite of labour conditions, international crimes cannot be left to progressive elimination and long-term cooperation and must be prohibited and immediately abolished.<sup>268</sup> In order not to undermine the seriousness of the crimes included in the ILO Convention 182, there should not be indolence when faced with the perpetration of such offences, and impunity should not be acceptable based on the simple fact that the crime was incorporated in a Labour Convention. We will therefore explore whether the International Labour Organisation's and the international criminal law's mechanisms can each generously interpret their mandate in order to ensure the effective enforcement of the prohibition of the unconditional worst forms of child labour, making use of a multifaceted approach to achieve a common goal.

### **3.1 ILO Mechanisms**

The ILO monitoring system has been widely recognized as one of the most efficient relatively to other United Nations systems<sup>269</sup>. However, the ILO does not possess stern enforcement mechanisms outside the diplomatic frame<sup>270</sup>. How can the ILO therefore ensure compliance of Member States to such an important labour Convention?

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<sup>268</sup> *ILO Convention (no.182) on the Worst Forms of Child Labour*, supra note 3, at Article 1.

<sup>269</sup> See WISSKIRCHEN, Alfred. "The Standard Setting and Monitoring activity of the ILO: Legal Questions and Practical Experiences", *International Labour Law Review*, Vol. 144, No. 3, 253, 2005, at 269 [Wisskirchen].

<sup>270</sup> Ibid., at 269; see also COONEY, Sean. "Testing Times for the ILO: Institutional Reform for the New International Political Economy" in *Comparative Labour Law and Policy Journal*, vol. 20: 365, 1999 [Cooney].

We will first proceed to a study of the mechanisms set in place under the Constitution of the ILO in order to ensure respect of the Organisation's labour Conventions. Such a study will provide us with a better understanding of the work which can be accomplished by the ILO in order to protect children against the worst forms of child labour. We will then follow with the analysis of the international criminal law mechanisms in order to find where the two "systems" could be compatible and complimentary.

The supervisory mechanisms of the International Labour Organisation operate in two distinct channels: the regular system and the special system.

### *3.1.1 The Regular System of Supervision*

Under Article 22 of the ILO Constitution, Member States, which have ratified a Convention, are required to produce reports periodically after ratification<sup>271</sup>. Regular Conventions require a report every five years while all fundamental conventions, such as the *ILO Convention (no.182) on the Worst Forms of Child Labour*, require a report from the Government every two years.<sup>272</sup>

The Committee of Experts on the Application of Conventions and Recommendations (CEACR) is responsible for the examination of the application of the Conventions and Recommendations through the governments' reports<sup>273</sup>. This Committee of Experts, set up in 1926<sup>274</sup>, is composed of 20 jurists appointed by the Governing Body every three years<sup>275</sup>. Following the receipt of a country's bi-annual report for the *ILO Convention*

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<sup>271</sup> *ILO Constitution*, supra note 14, at Article 22.

<sup>272</sup> See *Wisskirchen*, supra note 271, at 270.

<sup>273</sup> See for example General Report of the Committee of Expert on the Application of Conventions and Recommendations, 2009, available at < <http://www.ilo.org/ilolex/english/ceacrrepsq.htm>>.

<sup>274</sup> See *Osieke*, supra note 28, at 173.

(no.182) on the Worst Forms of Child Labour, the Committee of Expert will formulate recommendations in the form of an observation (public) or of a direct request (private).

These comments of the CEACR play a role similar to international jurisprudence. Hence, they help in interpreting the meaning of the ILO conventions. In ensuring the proper implementation of ILO *Convention (no.182) on the Worst Forms of Child Labour*, including its criminal provisions, the Committee has made it clear numerous times that criminalization of the conducts of the worst forms of child labour is required by the Convention<sup>276</sup>.

This regular supervisory system requires however the good faith and the will of the Member State's government in order to fully succeed. Even if such an approach can provide numerous advantages, it still means that a crime of the worst forms of child labour could be left unpunished just by the lack of will or of capacity of a government. In this case, what are the available options?

For example, the ILO faced this kind of problem with the cooperation of the Government of Liberia in the 1990s. In 1990, the CEACR commented on the compliance of the State of Liberia with the *ILO Forced Labour Convention (no.29)*, stating that the Government had to supply supplementary information on various aspects of the implementation of the

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<sup>275</sup> See: [http://www.ilo.org/global/What\\_we\\_do/InternationalLabourStandards/ApplyingandpromotingInternationalLabourStandards/CommitteeofExperts/lang--en/index.htm](http://www.ilo.org/global/What_we_do/InternationalLabourStandards/ApplyingandpromotingInternationalLabourStandards/CommitteeofExperts/lang--en/index.htm). The Committee of Expert was set in place facing the high number of reports over the first years of existence of the ILO. See also *Osieke*, supra note 28.

<sup>276</sup> See Individual Observation on Central African Republic, 2008: "It notes in this respect that the national legislation does not appear to contain provisions prohibiting and penalizing the forced recruitment of young persons under 18 years of age for use in armed conflict"; see also Individual Observation on Congo, 2008: "The Committee notes that section 345, 354 and 356 of the Penal Code lay down penalties for anyone found guilty of the forcible or fraudulent abduction of [...] young persons under 18 years of age" see also Individual Observation on Pakistan, 2008: "[The Committee] also once again requests the Government to provide information on the practical application of the laws, including the number of infringements reported of the abovementioned provisions, investigations, prosecutions, convictions and **penal sanctions applied**" (Bold added by author); see also Individual Observation, Russian Federation, 2008: "The Committee once again requests the Government to take the necessary measures [...] to ensure that persons who traffic children [...] are in practice prosecuted and that sufficiently effective and dissuasive penalties are imposed", available at < <http://www.ilo.org/ilolex/>>.

Convention, such as the existence of penal sanctions for the use of forced labour or the use of forced labour for public works. The CEACR had to repeat its comments every year from 1991 to 1998, without any reply on behalf of the Government of Liberia. In 1999, it still had not received a report, but changed its request and finally received a report the consequent year, in 2000. Again though, the observation adopted by the CEACR remained unanswered for the four following years, leaving the Committee to repeat once again past comments from 2001 to 2006. This is only one of the few examples where the Committee of Experts of the ILO has limited power in supervising the ILO Conventions. For this reason, the ILO has in place a special procedure to deal with cases of faulty Member States.

### 3.1.2 *The Special Procedures*

The ILO has a second way of monitoring the progress achieved by a government in its implementation of a ratified Convention. Articles 24 to 36 of the ILO Constitution provide for the right to forward representations or individual complaints to the organisation in order to activate a supplementary supervision mechanism.

#### a) *Representations*

Under Articles 24 and 25, a workers' or employers' organisation can present a representation to the ILO's Governing Body when it considers a Member State has not respected a Convention<sup>277</sup>. The concerned Government will then get the chance to reply to the representation. The Governing body can set up a committee to study the representation, which will bring recommendations to the Governing Body.

An example that ties in very well with this section of our study is the case of the non-compliance of Myanmar with the *ILO Forced Labour Convention (no.29)*. In 1993, the International Confederation of Free Trade Unions (ICFTU) made a representation under

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<sup>277</sup> *ILO Constitution*, supra note 14, at Article 24.

Article 24 of the ILO Constitution, making allegations of non-compliance of the Government of Myanmar with the *ILO Forced Labour Convention (no.29)*.<sup>278</sup> Upon receipt of the representation, the Governing Body decided, at its 255<sup>th</sup> session, to set up a Committee in order to examine the claim. The latter concluded in violations of the rights protected under the *ILO Forced Labour Convention (no.29)*. Therefore, the Governing Body urged the Government to bring its legislation in line with the Convention and to report the changes in its next report under Article 22 of the *ILO Constitution*<sup>279</sup>.

b) *Complaints*

A second option lies in the possibility to present a complaint to the International Labour Office. A Member of the ILO has the right to file complaints with the International Labour Office if it is not satisfied that any other Member is securing the effective observance of any Convention, which they have, both ratified.<sup>280</sup> It will then be of the discretion of the Governing Body to ask the concerned Government for a statement of to refer the matter to a Commission of Inquiry.<sup>281</sup>

Coming back to our example of Myanmar, there were very little efforts and changes made by that government to alleviate the situation of forced labour in the country after the recommendations of the Governing Body in 1993. Therefore, in 1996, a complaint was filed in front of the Governing Body of the ILO against the Government of

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<sup>278</sup> Representation available at <http://www.ilo.org/ilolex/cgi-lex/pdconv.pl?host=status01&textbase=iloeng&document=51&chapter=16&query=%28C029%29+%40ref&highlight=&querytype=bool&context=0>.

<sup>279</sup> See International Labour Office, *Forced Labour in Myanmar (Burma): Report of the Commission of Inquiry appointed under Article 26 of the Constitution of the International Labour Organisation to examine the observance by Myanmar of the Forced Labour Convention, 1930 (No.29)*, Official Bulletin, Vol. LXXXI, Series B, Special Supplement, Geneva, 2 July 1998, [Report of the Commission of Inquiry, Myanmar].

<sup>280</sup> See *ILO Constitution*, supra note 14, at Article 26.

<sup>281</sup> See *ILO Constitution*, supra note 14, at Article 26 (2) and (3).

Myanmar<sup>282</sup>, for non-compliance with the *ILO Forced Labour Convention* (no.29)<sup>283</sup>. It stated the numerous critics made to the Government of Myanmar by the ILO's supervisory bodies and the refusal of the Government to collaborate in modifying laws or in providing information to the ILO as well as the growing number of forced labourers in the country caused directly by the actions of the authorities of Myanmar.

Under Article 26 of the Constitution of the ILO<sup>284</sup>, any Member to the convention in question can file a complaint to the Governing Body if it is unsatisfied with the compliance of another Member. The Governing body may then refer the complaint to a Commission of Inquiry.<sup>285</sup> In March 1997, this is the route the Governing Body decided to take.

c) *Commission of Inquiry*

A Commission of Inquiry is set in place to consider a complaint, after which it will write a report containing recommendations to be followed in order to resolve the issue<sup>286</sup>. There are no official rules of procedure for the functioning of a Commission of Inquiry. Therefore, the Commission establishes its own procedure,<sup>287</sup> based on the terms of the

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<sup>282</sup> Complaint available at <http://www.ilo.org/ilolex/cgi-lex/pdconv.pl?host=status01&textbase=iloeng&document=8&chapter=15&query=%28C029%29+%40ref+%2B+%28Myanmar%29+%40ref&highlight=&querytype=bool&context=0>.

<sup>283</sup> *Report of the Commission of Inquiry, Myanmar*, supra note 279. The complaint was presented by a letter dated 20 June 1996, from 25 worker's delegates, to the Director General of the ILO.

<sup>284</sup> *ILO Constitution*, supra note 14, at Article 26. Any of the Members shall have the right to file a complaint with the International Labour Office if it is not satisfied that any other Member is securing the effective observance of any Convention which both have ratified in accordance with the foregoing Article.

<sup>285</sup> *ILO Constitution*, supra note 14, at Article 26 (2) and (3).

<sup>286</sup> *ILO Constitution*, supra note 14, at Article 28.

<sup>287</sup> International Labour Conference, *Report of the Commission Appointed under Article 26 of the Constitution of the International Labour Organisation to Examine the Complaint Filed by the Government of Ghana concerning the Observance by the Government of Portugal of the Abolition of Forced Labour Convention, 1957 (No. 105)*, (1962) *Official Bulletin*, Vol. XLV, No. 2, Supplement II, at Para. 15 [*Report of the Commission of Inquiry, Portugal*].

ILO Constitution and of previous Commissions of Inquiry<sup>288</sup>. Thus, at the establishment of the first Commission of Inquiry, in 1962, the members of the Commission recognized three basic principles that govern their task: the Commission's procedure is of judicial nature, the Commission shall make use of all necessary measures to obtain further information than the information provided in front of it, and the process must be done in a timely manner<sup>289</sup>.

Once the Commission of Inquiry adopts its recommendations, the latter shall be forwarded to the Governing Body and concerned Governments, by the Director General, for their acceptance and recommendations.<sup>290</sup>

Going back once again to our case of Myanmar, a Commission of Inquiry was created in 1998 to examine the compliance of the Government with the *ILO Forced Labour Convention (no.29)*. The Commission concluded that the said Convention had been "violated in national law [...] as well as in actual practice in a widespread and systematic manner"<sup>291</sup>. The Commission recommended that the Government bring its national legislation in line with the *ILO Forced Labour Convention (no.29)*, that no more forced or compulsory labour be imposed in practice and that the penalties in place be enforced strictly.

Unfortunately, the Government of Myanmar did not follow the Commission's recommendations. Hence, how could the ILO secure the application of the Convention without delay in such a case, seeing the Convention is part of international criminal law? The ILO has asked itself such a question in 2006 as regards to the non-compliance to

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<sup>288</sup> International Labour Conference, *Report of the Commission of Inquiry appointed under Article 26 of the Constitution of the International Labour Organisation to examine the observance by Romania of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111)*, (1991) *Official Bulletin*, Vol. LXXIV, Supplement 3, Series B, at Para. 51.

<sup>289</sup> See *Report of the Commission of Inquiry, Portugal*, supra note 87, at Para. 15.

<sup>290</sup> *ILO Constitution*, supra note 14, at Article 29.

<sup>291</sup> *Report of the Commission of Inquiry, Myanmar*, supra note 279, at Para. 536.

Myanmar to the Commission's recommendation. It came up with two main avenues: (1) referral to the International Court of Justice (2) utilizing international criminal law mechanisms. We shall explore how those two options could work in the case of a violation of *Convention (no.182) on the Worst Forms of Child Labour*.

d) *Referral to the International Court of Justice*

If a recommendation of the Commission of Inquiry is not respected, another option is available through the ILO supervisory mechanisms to bring the faulty Government to respect its obligations under ratified Conventions: call on the International Court of Justice.

Under Article 29 of the ILO Constitution, the Organisation could refer the matter to the International Court of Justice (ICJ)<sup>292</sup>. According to Article IX of the Agreement between the United Nations and the International Labour Organisation, the ILO could ask the ICJ for an Advisory Opinion<sup>293</sup>. Such Advisory Opinion could concern the legal consequence of the violation of a Convention, such as the *ILO Convention (no.182) on the Worst Forms of Child Labour* for instance. In 2003, the International Court of Justice repeated its mandate, which is to “identify the existing principles and rules, interpret them and apply them”<sup>294</sup>. In an Advisory Opinion of 1950, the Court stated that the consent of States is a necessary element in order to obtain jurisdiction over a contentious case but not for an advisory opinion. It added that the “Court’s reply is only of an advisory character: as such, it has no binding force.”<sup>295</sup> It further added that the Court’s opinion is not given to the country but rather to the requiring organisation. Thus, the ILO could ask for an Advisory Opinion on judicial consequence of the violation of a Convention by a

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<sup>292</sup> *ILO Constitution*, supra note 14, At Article 29 and 31.

<sup>293</sup> United Nations General Assembly, *Statute of the International Court of Justice*, 26 June 1045, San Francisco, available at < <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>>

<sup>294</sup> See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion [1996] I.C.J Reports, 226, at 234. [*Legality of the Treat or Use of Nuclear Weapons*].

<sup>295</sup> *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase*, Advisory Opinion [1950] ICJ Reports, 65, at 7; See also *Western Sahara*, Advisory Opinions, ICJ Reports [1975] 12, at 24.

Member State, for instance the violation of *ILO Convention (no.182) on the Worst Forms of Child Labour*. However, the Court's opinion would be given solely to the ILO, which would then have to enforce it. Such opinion would not be binding, but would simply offer "juridical weight"<sup>296</sup>.

A second option would be possible under Article 37 of the ILO Constitution. A Member State could independently seek a binding ruling from the International Court of Justice on the interpretation of a Convention.<sup>297</sup> In such instance, the Member State could seek the ILO's assistance, but would remain the prime responsible of the proceedings. The drawback of such an option would be that the ILO would then have no power in deciding the way in which the complaint would be approached and therefore less control over the result.<sup>298</sup>

What would be the purpose then of such a mechanism? According to the ICJ, "Advisory Opinions have the purpose of furnishing to the requesting organs the elements of law necessary for them in their action"<sup>299</sup> The court, in *Legality of the Use or Threat of Nuclear Weapons* stated that its task is to "engage in its normal judicial function of ascertaining the existence or otherwise of legal principles and rules applicable [...]"<sup>300</sup>. Therefore, the International Court of Justice could help in interpreting a Convention and

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<sup>296</sup> International Labour Conference, *Provisional Record*, 95<sup>th</sup> Sess., 2006, Geneva, at Para. 24.

<sup>297</sup> ILO Constitution, supra note 14. Article 37 states that "Any question or dispute relating to the interpretation of this Constitution or of any subsequent Convention concluded by the Members in pursuance of the provisions of this Constitution shall be referred for decision to the International Court of Justice."

<sup>298</sup> A third option exist, but does not involve directly the ICJ. Under Article 37(2) of the *ILO Constitution*, (supra note 14) the Organisation can establish an Ad Hoc tribunal for the interpretation of a Convention (supra note 157). The benefit would lie in the fact that the ILO itself could control the case. However, there would not be a secure method of enforcement and it could take years to establish such an Ad Hoc tribunal.

<sup>299</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] I.C.J Rep. 126, at 162.; See also *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion [1951] I.C.J Rep. 15, at 19; See also *Legal Consequence for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276*, Advisory Opinion, [1971] ICJ Reports 16, at 24; See also *Western Sahara*, supra note 295, at 37.

<sup>300</sup> See *Legality of the Threat or Use of Nuclear Weapons*, supra note 294, at 237.

its legal consequences, when faced with a non-contentious case. Could the ILO make use of such a mechanism in the case of a criminal violation of the *ILO Convention (no.182) on the Worst Forms of Child Labour*? This avenue does not offer the chance to prosecute an offender nor to bind the responsibility of a State.

### 3.1.3 Limitations of the ILO Mechanisms

The first element to keep in mind, when examining the ILO's monitoring system, is that it is limited to the supervision of ratified Conventions<sup>301</sup>. Therefore, the ILO can only use its mechanisms to supervise States that have explicitly decided to hand some of their power to the Organisation. Relating back to the worst forms of child labour, Bozena Maria Celek mentions that some States will refuse to adopt a convention linked to child labour because their priority lies in economic gains rather than on basic human rights. Even though very few States have not ratified the *Convention (no.182) on the Worst Forms of Child Labour* to this date, it is still a limitation in the supervision of those States. However, as added by Celek, "even if the states ratify the conventions dealing with child labor, the burden to adhere to and enforce them lies with individual member states<sup>302</sup> " This said, the ratification in itself is not sufficient to provide the expected outcome, and each Member State has the prime responsibility to implement the rights protected by the ratified Convention on their own territory.

Such limitation, linked to the principle of the sovereignty of the state, is common in international law, but should not be an obstacle to the application of core human rights, mostly when their violation represent an international crime.

The lack of proper enforcement mechanisms for the violation of children's rights under practices assimilated to unconditional worst forms of child labour might undermine the

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<sup>301</sup> See for example *Cooney*, supra note 270; see also CELEK, Bozena Maria. "The International Response to Child Labor in the Developing World: Why Are We Ineffective?" 11, *Georgetown Journal on Poverty Law and Policy*, 87, Winter 2004, [Celek].

<sup>302</sup> See *Celek*, supra note 303, at 104.

seriousness of the issue. The ILO has tempted to circumvent this challenge with the adoption of the *Declaration on Fundamental Principles and Rights at Work*.<sup>303</sup> Under this Declaration, Member States to the ILO have to submit annual reports on Fundamental Conventions<sup>304</sup>, even if not ratified by the State. The reports have to illustrate how the Government is acting in a way which promotes the spirit of the Convention, with an aim to encourage ratification. For example, in 2008, Eritrea provided information to the ILO on the ways in which it respects the spirit of the *Convention (no.182) on the Worst Forms of Child Labour*, stating that the minimum age was set at 18 years old for hazardous work under national law<sup>305</sup>. The same year, India provided information regarding the same question, stating that special initiatives have been adopted to combat the trafficking of women and children and that it has been examining the possible amendment of national legislation in order to prohibit the worst forms of child labour.<sup>306</sup>

This new instrument adds a boost to the ILO's supervisory mechanisms, but is it sufficient to monitor an international criminal convention? The ILO plays an important role in the monitoring of the worst forms of child labour, but it might benefit from an outside helping hand. In this last section, we shall explore the possibilities of having recourse to international criminal law mechanisms in order to ensure the most protection to children subjected to the worst forms of child labour.

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<sup>303</sup> *Declaration on Fundamental Principles and Rights at Work*, supra note 22.

<sup>304</sup> The Fundamental Conventions are: *ILO Forced Labour Convention* (no.29), supra note 33; *ILO Convention (no.105) for the Abolition of Forced Labour*, supra note 40 ; *ILO Convention (no.182) on the Worst Forms of Child Labour*, supra note 3; *ILO Minimum Age Convention (no.138)*, supra note 56, International Labour Conference, *Convention concerning Freedom of Association and Protection of the Right to Organise*, 9 July 1948, (entry into force 4 July 1950), Geneva; International Labour Conference, *Convention concerning the Application of the Principle of the Right to Organise and to Bargain Collectively*, 1 July 1949, (entry into force 18 July 1951), Geneva; International Labour Conference, *Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value*, 26 June 1951, (entry into force 23 May 1953), Geneva; International Labour Conference, *Convention concerning Discrimination in Respect of Employment and Occupation*, 25 June 1958, (entry into force 15 June 1960), Geneva.

<sup>305</sup> Country Baseline under the ILO Declaration Annual Review (2000-2008), Eritrea. The Government of Eritrea however states that the worst forms of child labour do not exist in the country.

<sup>306</sup> Available at < <http://www.ilo.org/declaration/follow-up/annualreview/ratificationstatus/lang-en/index.htm>>.

## 3.2 International Criminal Law Mechanisms

### 3.2.1 National criminalization

It is important to recall that international instruments creating crimes require the ratifying States to criminalize a conduct and to adopt sanctions in order to ensure the enforcement of the prohibition. Thus, the prime responsibility lies on the ratifying State to prosecute perpetrators of criminal offences nationally<sup>307</sup>. Therefore, the international criminal law “system” as it might be referred to, represents in fact the national responsibility to criminalize based on an international or universal consensus. Since the Nuremberg trial, there has been a more global approach to criminal law; unifying the jurisdiction for certain crimes under centralized bodies (such as Ad Hoc tribunals) and giving a higher value to international customary law<sup>308</sup>. However, the principle of the sovereignty of the state still prevails and therefore, the jurisdiction of such courts will only apply to consenting States, which limits its scope. Also, national jurisdiction will always hold precedence on any other jurisdiction, including an international jurisdiction, as long as it is willing and able to do so.<sup>309</sup> This illustrates the reason behind the inclusion of an obligation to criminalize in international criminal instruments.

Article 7(1) of the *ILO Convention (182) on the Worst Forms of Child Labour* requires the ratifying Member State to take all necessary measures to ensure the proper application of the Convention, including penal sanctions. Also, the *Recommendation (no.190) on the Worst Forms of Child Labour*<sup>310</sup> contains numerous Articles referring to

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<sup>307</sup> A State could possibly prosecute the author of a crime even outside its own territory if the situation meets certain criteria. Under the principles of non-territorial jurisdiction, a State could prosecute a perpetrator when the perpetrator is a citizen who committed a crime overseas (nationality jurisdiction). Second, a State could prosecute the perpetrator when the victim of the crime is a national (passive personality jurisdiction). Finally, a State could prosecute a perpetrator for a crime committed outside its borders when its national security is threatened (protective jurisdiction). This extension of the territorial jurisdiction opens up the possibilities of national prosecution of crimes.

<sup>308</sup> See ROPER, Steven D. and Lilian A. Barria. *Designing Criminal Tribunals: Sovereignty and International Concerns in the Protection of Human Rights*, Ashgate Publishing Limited, 2006, at 2.

<sup>309</sup> See for example *Rome Statute*, supra note 49, at Article 1.

<sup>310</sup> *Recommendation (no.190) on the Worst Forms of Child Labour*, supra note 16.

criminal law and prosecution of perpetrators of the worst forms of child labour<sup>311</sup>. Article 12 explicitly states that “Members should provide that the following worst forms of child labour are criminal offences” when referring to the unconditional worst forms of child labour included in paragraphs 3 (a) to (c) of the Convention. Even though this Recommendation is non-binding to Members, it provides for guidelines in the application of the Convention<sup>312</sup>.

While there are limits in the prosecutions possible by a State under the general jurisdiction principles, could it be an avenue to reach out to the International Criminal Court. Thus, when a Member State is in breach of the obligation under Article 1 of the Convention (no.182) on the Worst Forms of Child Labour, and that such breach concerns the unconditional worst forms of child labour, it could be an interesting avenue to explore. This next section will explore the conditions under which a prosecution in front of the International Criminal Court could be possible and the limitations of the Court when it comes to the worst forms of child labour.

### 3.2.2 *International Criminal Court*

The International Criminal Court (ICC) was created under the *Rome Statute of the International Criminal Court*, in 1998, as the permanent institution with international criminal jurisdiction<sup>313</sup>. Thus, the ICC’s jurisdiction is limited to only most serious crimes of international concerns<sup>314</sup> as stated under Article 5 of the *Rome Statute of the*

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<sup>311</sup> *Recommendation (no.190) on the Worst Forms of Child Labour*, supra note 16. Article 10 states that national laws should enable the identification of a responsible person for offences related to the worst forms of child labour; Article 11 promotes the international cooperation for the detection and prosecution of those involved in trafficking, prostitution, pornography and illicit activities including children; Article 13 requires the application of penalties, including criminal penalties for the hazardous work, Article 14 calls for other remedies, including criminal remedies, to ensure the prohibition; Article 15 suggests that measures could include the prosecution of nationals who commit offences overseas.

<sup>312</sup> *Recommendation (no.190) on the Worst Forms of Child Labour*, supra note 16, at Article 12.

<sup>313</sup> See *Rome Statute*, supra note 49.

<sup>314</sup> See *Rome Statute*, supra note 49, at Article 1.

*International Criminal Court: Crime of Genocide, Crime against Humanity, War Crimes and the Crime of Aggression*<sup>315</sup>. The jurisdiction of the Court is also complementary to national law and therefore cannot be used if the State has the power and the will to prosecute a criminal<sup>316</sup>.

As previously examined, there exists a close link between the crimes contained in the *Convention (no.182) on the Worst Forms of Child Labour* and the crimes which fall under the jurisdiction of the International Criminal Court. Thus, all the crimes of the worst forms of child labour could be included in the definition of crime against humanity as understood under the Rome Statute.<sup>317</sup> The text defines a crime against humanity as a crime committed as part “of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”<sup>318</sup>. In theory, recourse to the International Criminal Court for crimes of the worst forms of child labour would thus be possible.

A prosecution for crimes of the worst forms of child labour in front of the International Criminal Court would however be handicapped by a few restrictions. The main ones can be stated as such: (1) the limited jurisdiction of the Court based on a State’s ratification of the Rome Statute, (2) the existence of a widespread and systematic attack, (3) the existence of the multiple commissions of acts and (4) the possibility to prosecute a person or body in particular.

(1) *Limited by a State’s Ratification of the Rome Statute*

The ICC has great potential as it stands as the first international court to have the ability to prosecute crimes committed internationally. It however has limitations regarding when

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<sup>315</sup> See *Rome Statute*, supra note 49, at Article 5.

<sup>316</sup> See *Rome Statute*, supra note 49, at Article 1.

<sup>317</sup> See *Rome Statute*, supra note 49, at Article 7.

<sup>318</sup> See *Rome Statute*, supra note 49, at Article 7.

it can exercise its jurisdiction. Under Article 12 of the *Rome Statute*, the court can only exercise its jurisdiction when the offence is committed on the territory of a Member State or when it is committed by a national of a State Member to the Rome Statute,<sup>319</sup> unless the Security Council refers a situation.<sup>320</sup> Thus, it cannot exercise universal jurisdiction and is limited by the will of countries to adhere to the Rome Statute.

Thus, in general cases, the International Criminal Court could not enable its jurisdiction if the perpetrator is the national of a State non Party to the Rome Statute and if the offence has taken place on the territory of a State non Party to the Rome Statute. Then again, it can only act as a complimentary court, which means if the State in question is unable or unwilling to prosecute the perpetrator.<sup>321</sup>

## (2) *Widespread and Systematic Attack*

The main limitation of the ICC's jurisdiction over crimes of unconditional worst forms of child labour is the proof of the existence of a *widespread* and *systematic* attack on a civilian population. The attack does not have to be military, but it has to be done in pursuance of a policy, whether a State or an organization's policy. Antonio Cassese affirms that the *Rome Statute*, on this specific point, is therefore narrower than customary international criminal law.<sup>322</sup> The term "attack" in Article 7, paragraph 2(a) of the *Rome Statute* is defined solely as acts "pursuant to or furtherance of a State or an organizational policy to commit such attack".<sup>323</sup> Hence, this definition might limit the scope of the

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<sup>319</sup> The *Rome Statute* (supra note 49) is often referred to as the main instrument enabling the prosecution of international crimes and therefore defining the sphere of core international criminal law. It establishes the International Criminal Court and states clearly what constitutes an international crime for which the court has the competence to hear. These are the crime of genocide, crimes against humanity, war crimes and crimes of aggression. Various authors argue that we must be cautious in defining criminal law on the sole base of the Rome Statute. Authors such as Goeff Guilbert emphasize on the fact that "the Statute of the ICC is not the complete measure of international criminal law".

<sup>320</sup> KAMMINGA, Menno T. "Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses", *Human Rights Quarterly*, Vol. 23, 940, 2001, at 950.

<sup>321</sup> See *Rome Statute*, supra note 49, at Article 17.

<sup>322</sup> See Cassese, supra note 80, at 123. See also Claire de Than and Edwin Shots, supra note 77, at 13.

offence by excluding the State or the organisation representative who simply tolerates and even condones criminal actions. A Government could then tolerate the private use of children to accomplish worst forms of child labour, and escape liability.

Finally, the jurisdiction of the Court would be limited to cases where the perpetration of unconditional worst forms of child labour has been *widespread* and *systemic*. Thus, to be *systematic*, the attack must be done in pursuance of a clear policy to “employ” children to perform unconditional worst forms of child labour. Therefore, could the CEO of a private company or the leader of an organisation, legal or illegal, be prosecuted under the *Rome Statute*? Following the logic of Nesi and the words of Article 7 (2)(a), all actors, whether State or non-State actors, could be prosecuted in front of the ICC as long as their attack was done in a systematic way, in pursuance of a policy.<sup>324</sup>

Finally, in order to satisfy the criteria of being *widespread*, the attack must represent a large breach in obligation and therefore, one must examine the “massiveness of the act”<sup>325</sup>. According to the UN War Crimes Commission, “isolated offences [do] not fall within the notion of crimes against humanity”.<sup>326</sup>

### (3) *Multiple Commission of Acts*

In the *Elements of Crime* annex, we define such attack as a conduct involving the multiple commission of acts included in Article 7(1) of the *Rome Statute*, pursuant of a policy aimed at such perpetration. Therefore, for a crime of unconditional worst forms of child labour to be of the jurisdiction of the ICC, there should be a multitude of acts of crime against humanity and they should all be aimed at accomplishing a specific policy.

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<sup>323</sup> *Rome Statute*, supra note 49, at Article 7, para. 2(a).

<sup>324</sup> NESI, Giuseppe. *International Cooperation in Counter Terrorism: The United Nations and Regional Organizations in the Fight against Terrorism*, Ashgate Publishing, 2006, at 135. Article 7(2)(a) of the *Rome Statute* states that the “attack” has to be in pursuance of a State or an organizational policy.

<sup>325</sup> JORGENSEN, Nina H.B., *The Responsibility of States for International Crime*, Oxford, University Press, 2000, at 108.

<sup>326</sup> See Jorgensten, supra note 325, at 108.

Such a condition limits widely the jurisdiction of the International Criminal Court in the case of the unconditional worst forms of child labour. Unless done under the umbrella of a criminal organisation, many of the worst forms of child labour are done independently, in small scale and are specialized in only one form of worst forms of child labour. The private actors usually involved in such crimes are most of the time aiming economic profit (hence the relation with economic exploitation of children) rather than an attack on human dignity. This complexity of the offence leads to the last limitation of the ICC.

(4) *Prosecution of a physical person.*

Finally, under article 25 of the Rome Statute, the court must be able to prosecute a physical person for the perpetration of these acts<sup>327</sup>. Would we be targeting the private actors, who's is usually aiming only the accumulation of profit, or would we be targeting the governments who allows such practice? In order to be responsible for a crime against humanity, the offender has to be targeting humanity in general.<sup>328</sup> The complexity of the worst forms of child labour would therefore make it hard to find one liable actor. Referring back to the introduction of this thesis, the causes of the worst forms of child labour are multiple, which might make it seem more like a social and economical phenomenon than like a criminal act.

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<sup>327</sup> See Rome Statute, supra note 49, at Article 25

<sup>328</sup> See Jurovics, supra note 110, at 22.

### **3.3 Conclusion of Chapter III**

This last chapter was exploring the role of the ILO in supervising the compliance of States to the obligations contained in the *Convention (no.182) on the Worst Forms of Child Labour*. We have observed in the first part that the Organisation has a reputed system of controlling the implementation of its convention, which is composed of various different mechanisms, usually divided under regular and special procedure. The combined action of the regular supervision of the CEACR and the special supervision of the Governing Body enables the organisation to be well alert of any default in the implementation of a convention.

However, we also noted some expected gaps in the monitoring system of the ILO, mostly when it comes to the monitoring of international crimes. Without diminishing the work of the ILO, it is important to keep in mind that the supervisory mechanisms are based on diplomacy and tripartite interventions, which do not play as much of a role in the prosecution of international crimes. Indeed, international crimes require a prosecution by an independent and impartial tribunal, which the ILO for obvious reason, cannot offer.

Therefore, we examined the possibility of reaching outside the normal regulatory mechanisms of the ILO in order to cover more grounds and avoid gaps. The recourse to certain international criminal law mechanisms proves to be complicated but not impossible. If all conditions are assembled, a prosecution in front of a national or international jurisdiction could prove the importance of avoiding impunity, weather the crime is included in a criminal or a labour legislation. However, once again, by their nature, crimes of the worst forms of child labour might not be easy to prosecute and the national and international jurisdictions, such as the International Criminal Courts, also represent their own limitations. Therefore, it is the “human” side of the ILO’s supervisory mechanisms combined with the repressive side of international criminal law that could provide for a wider protection for children

## General Conclusion

The ILO has been one of the main international organisations working on the fight of child labour. Its recent strategy of prioritizing has raised as much excitement as concern over the possibilities and capabilities of the organisation to deal with such an exhaustive issue, in such a new way.

In 1930, the ILO took upon itself to help in the fight against forced labour, an evil largely recognized as an international crime. This first step of the ILO into international criminal law had been received with great enthusiasm and the *ILO Forced Labour Convention* (no.29) is up to nowadays quoted in international criminal proceedings<sup>329</sup>.

This thesis was studying the hypothesis that the ILO had ventured once more in the sphere of international criminal law, with the adoption of its *Convention (182) on the Worst Forms of Child Labour*, in order to extend the protection offered by international law to children victim of the worst forms of child labour.

As proven in the preliminary chapter, the ILO has indeed tackled forms of child labour that have largely been recognized as crimes under codified or customary law. All the unconditional worst forms of child labour have been defined as modern forms of slavery and therefore, international crimes.

However, as explored in the first chapter, it was not out of pure coincidence that the ILO decided to involve itself in the criminalization of certain forms of child labour. The ILO has had a history of dealing with child labour and throughout the years of standard setting, it has increased its expertise in the area. With the monitoring of the *ILO Forced Labour Convention* (no.29), the ILO had already developed an experience in exploitation of children and slavery-like practices<sup>330</sup>. Therefore, in our view and as explored in the

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<sup>329</sup> See *Kunarac*, supra note 122, at para 521 and following.

thesis, the ILO was recognized as the *default* organisation to deal with the aggravating forms of child labour, such as the ones outlined in the *ILO Convention (no.182) on the Worst Forms of Child Labour*.

As highlighted in the discussions leading to the adoption of the Convention, there was a perceived gap between international criminal law and labour rights. This Convention was developed in order to codify international customary law and bridge the gap between these two elements. It in fact managed to extend the interpretation of these crimes against children by explicitly providing more details to the definition of the unconditional worst forms of child labour.

The ILO has therefore played a leading role in the interpretation and comprehension of the notion of unconditional worst forms of child labour, and in the path to find a multifaceted solution involving social, political and judicial processes. The criminalization of the unconditional worst forms of child labour is only one of the facets in the fight against the phenomenon. For the purpose of this study, we had decided to focus solely on this criminal aspect of this battle. Indeed, the ILO has included, in an unusual way, this criminalization in a labour Convention. Thus, the mere inclusion of a progressive abolition of the worst forms of child labour could have undermined the criminal aspect of those acts, and played against customary law. On the other hand, the inclusion of a criminal aspect in a labour Convention could lead to the risk of an unsatisfactory supervision of the application on behalf of a labour organisation.

This is why we explored, in chapter III, the possibility for the ILO to seek further help outside its supervisory borders, if needed, in order to provide the best protection against criminal practices against children. Our conclusions lead us to believe that the ILO could seek the assistance of the International Court of Justice in cases of non-compliance, but

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<sup>330</sup> See Individual Observation of the CEACR concerning *ILO Forced Labour Convention (no.29)* for Bangladesh, 1990; See also Individual Observation of the CEACR concerning *ILO Forced Labour Convention (no.29)* for India, 1992; See also Individual Observation of the CEACR concerning *ILO Forced Labour Convention (no.29)* for Pakistan, 1993; See also Individual Observation of the CEACR concerning *ILO Forced Labour Convention (no.29)* for Haiti, 1996; See also Individual Observation of the CEACR concerning *ILO Forced Labour Convention (no.29)*, for Sudan, 1997.

that this avenue was limited to a mere Advisory Opinion. However, another member to the *ILO Convention (no.182) on the Worst Forms of Child Labour* could try the faulty State in front of the ICJ, which would already have a more valid answer.

However, we still examined the possibility for the ILO of seeking redress for the violation of the criminal obligations contained in the *ILO Convention (182) on the Worst Forms of Child Labour* through means of prosecution such as for war crimes or crimes of genocide. Through our analysis, we associated the crimes of unconditional worst forms of child labour to crimes of slavery, thus crimes against humanity.

The Convention and accompanying Recommendation requires national criminalization. However, if there is non-compliance of such obligation, and the State is unwilling or unable to perform prosecutions for these crimes, there would be a possibility to have recourse to the International Criminal Court. As explored in the last chapter, the ICC has however, limitations of its own, and only jurisprudence will tell us if the extra specifications included in *ILO Convention (182) on the Worst Forms of Child Labour* will make their way to the interpretation of the jurisdiction of the ICC. However, as a base point, we realize that many of the crimes embodied in the Convention already find themselves under the jurisdiction of the ICC.

This said, it is important to remind the reader that the ICC is not a magic recipe that might solve all evils. As explored in the Chapter III, there are many limitations that would not enable a prosecution for the worst forms of child labour.

Therefore, it is the combined efforts of the ILO and of international criminal mechanisms can play the most beneficial role in the fight against the unconditional worst forms of child labour. As the ILO works on the legislation, the practical application of the Convention, the progressive abolition and the overall social development of countries, the international criminal law mechanisms can complete with the prosecution of the worst cases of violation, which would be widespread and systematic.

Therefore, we conclude that the International Labour Organisation has indeed ventured in the realm of international criminal law by largely interpreting its mandate in order to tackle the multiple facets of child labour. By doing so, it has opened the door to other supervisory mechanisms, such as the ones of international criminal law. Although it has more or less created a law that it cannot manage fully on its own, it has repeated the experience of the *ILO Forced Labour Convention* (29) knowing the international mechanisms were in place to supplement wherever needed.

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