

MULTINATIONAL CORPORATIONS, HUMAN RIGHTS AND CHILD LABOUR IN GHANA

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PLAGIARISM DECLARATION

I, **Deborah Grace Awulira Mukhwana Wangusa**, Student number **26270740**, declare that the work presented in this mini-dissertation is original. It has never been presented to any other university or institution. Where other works have been used, references have been provided. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfillment of a Master of law in Multidisciplinary Human Rights Law (LLM Multidisciplinary Human Rights).

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List of Acronyms

ACHPR- African Charter on Human and Peoples' Rights

ADM- Archer Daniels Midland Company

COCOBOD- Ghana Cocoa Board

CPC- Cocoa Processing Company

CRC- Convention on the Rights of the Child

CSR- Corporate Social Responsibility

ECOSOC- Economic and Social Council

EU- European Union

GAWU- General Agricultural Workers' Union

GCLMS- Ghana Child Labour Monitoring System

HRC- Human Rights Council

ICC- International Criminal Court

ICCPR- International Convention on Civil and Political Rights

ICESCR- International Convention on Economic, Social and Cultural Rights

ICJ- International Court of Justice

ICSID- International Centre for Settlement of Investment Disputes

ILO- International Labour Organisation

IMF- International Monetary Fund

MDGs- Millennium Development Goals

MNCs- Multinational Corporations

NGOs- Nongovernmental Organisations

NSCCL- National Steering Committee on Child Labour

OECD- Organisation for Economic Cooperation and Development

SAP- Structural Adjustment Programs

TNCs- Transnational Corporations

UDHR- Universal Declaration of Human Rights

USAID- United States Agency for International Development

USDOL- United States Department of Labour

WAMCO- West African Mills Company

WFCL- Worst Forms of Child Labour

Chapter 1

1.1 Introduction

Child labour in Ghana is a central and highly profitable sector of the criminal labour market.¹ However, besides decriminalising it, one aspect that is ignored and should be addressed is the need for human rights to be incorporated into the business that these corporations conduct whilst in Africa. Various industries (both foreign and local) have violated human rights for which they should have been called to account.²

Cocoa demand has been increasing by an average of 3 per cent a year for the past 100 years.³ In an August 26, 2011 press release, a Ghanaian state entity known as the Ghana Cocoa Board (“COCOBOD”) announced that Ghana had yielded 1.1 million tons for 2010-2011.⁴ Production is projected to rise by 6 per cent between 2009 and 2013 to 3.98 million tonnes. Nonetheless, industry representatives estimate that the sector will need an annual production of at least 4.5 million tonnes of cocoa by 2020 to satisfy the growing demand, driven by rising incomes in emerging economies. Cocoa has historically been a highly volatile commodity, which has significant consequences for those who depend on it for their livelihood. Despite improvements, a recent report says boys from Ghana, among other West African countries, continue to be trafficked for forced labour on agricultural plantations including cocoa farms. Many are trafficked from rural to urban areas while some from one rural area to another usually by internal traffickers who are known to the source community of such children. Child labour remains widespread in the cocoa sector with a quarter of children aged between 5 and 17

¹ E Fronza & K Summerer ‘Implementation of ILO child labour standards in Domestic legal systems: the role of criminal law’ in N Giuseppe, N Luca & Marco P *Child labour in a globalized world* (2008) 297

² SL Bachman ‘The political economy of child labor and its impact on international business.’ Available at: http://findarticles.com/p/articles/mi_m1094/is_3_35/ai_64396571/pg_3/?tag=content:col1 [Accessed 23 November, 2011]

³ ‘Fairtrade and cocoa.’ Available at: http://www.fairtrade.org.uk/includes/documents/cm_docs/2011/C/Cocoa%20Briefing%20FINAL%20Sept11.pdf [Accessed 19 November, 2012]

⁴ http://www.fpif.org/articles/food_of_the_gods [Accessed 26 March, 2012]

living in cocoa-growing regions involved in its production, mainly on family farms or working with parents. Most of these children undergo exposure to hazardous conditions such as using dangerous tools (94 per cent) and carrying heavy loads (80 per cent) with 51 per cent reporting injuries while at work.⁵

The cocoa sector is currently a multi-billion dollar industry with objectionable labour issues. The figure below illustrates the plethora of companies involved in the cocoa sector in Ghana. Consequently it comes as no surprise that in poverty-stricken developing countries such as Ghana, it is seldom a child’s choice to work but rather a decision born out of economic necessity and labour.⁶

Figure 1: Cocoa supply chain in Ghana



*Local grinding in Ghana is very limited.

**These companies are not just involved in the grinding stage of the supply chain: Barry Callebaut, Cargill and ADM sell small amounts of individual chocolate: Blommer and Barry Callebaut manufacture chocolate for consumers.

***Some chocolate companies also have their own grinding capacity, but this is limited.⁷

⁵See n 3 above

⁶ M Sackett 'Forced child labour and cocoa production in West Africa.' Available at <http://www.du.edu/korbel/hrhw/researchdigest/slavery/africa.pdf> [Accessed 26 March, 2012]

⁷ n 3 above.

The above figure illustrates the cocoa supply chain in Ghana. Cocoa farmers and cooperatives sell the cocoa beans to licensed buying companies that in turn sell such beans to the industry regulator also known as the COCOBOD. Companies in Ghana, such as the partially State-run Cocoa Processing Company (CPC),⁸ process some of the beans into semi-finished products such as cocoa liquor, cocoa butter and cocoa powder, which exporters and international traders of cocoa beans and semi-processed products buy. Grinders and chocolate manufacturers are next in the chain of manufacture of chocolate. Just three companies – Cargill, ADM, and Barry Callebaut – grind 40 percent of the world’s cocoa amounting to nearly 1.5 million tonnes a year. Chocolate companies such as Hersheys, one of many MNCs, process cocoa liquor, cocoa butter and cocoa powder to produce a range of cocoa and liquid chocolate products for the baking, confectionery and speciality chocolate industries as well as block chocolate for private brands and supermarket own-label products. Switzerland-based Barry Callebaut makes chocolate for groups such as Nestlé, Kraft and Hershey and dominates world production. Distributors, retailers, caterers and specialised markets purchase from the grinders and chocolate manufacturers and thereafter distribute them to the consumer.⁹

Due to a high demand by multinationals for cocoa, and because hired labour is costly, farmers tend to resort to the use of child labour on the cocoa farms in order to increase the output while paying little to nothing for labour. This is not to say that child labour is the only kind of labour used on such plantations but exists alongside adult labourers to cut down on costs. Multinationals further up in the supply chain, due to their high demand for cocoa, tend to pay less attention to the labour concerns and focus more on the quantity and quality of cocoa that they receive from the farmers in Ghana. Child labour therefore comes to the fore

⁸ http://www.ide.go.jp/English/Data/Africa_file/Company/ghana05.html [Accessed 26 April 2013];
<http://www.modernghana.com/news/160970/1/ghana-reassures-grinders-over-cocoa-crop-sale.html>
[Accesses 26 April 2013]

⁹ See n 3 above.

because the demand by multinational corporations has a ripple effect right down to the lower levels as farmers strive to increase produce by using cheap child labour.¹⁰

More recently, the Hershey Company has come under a lot of pressure for accusations regarding the use of child labour. The lawsuit by the Louisiana Municipal Police Employees' Retirement System, a Hershey shareholder, seeks documents, which could determine if the candy maker knew its suppliers in Ghana and Ivory Coast used child labour. *"By producing chocolate at its Pennsylvania factory that is the product of child and forced labour in West Africa, Hershey has flouted domestic and foreign law and placed at risk its century old brand and reputation,"* said the complaint.

Furthermore, a 2011 study by Tulane University found that 1.8 million children in the Ivory Coast and Ghana work in the cocoa industry and that the vast majority of them are unpaid. The study also found evidence of child-trafficking, forced labour and other violations of internationally accepted labour practices.¹¹

It is therefore imperative that human rights form a part of the work of corporations to avoid gross human rights violations. Furthermore, it is important that human rights are conceived simultaneously with business particularly legal systems in Africa.

1.2 Problem statement

Child labour is an unbridled practice in the Ghana cocoa industry. The purpose of this study is to illustrate how businesses may be complicit in the exploitation of children in the cocoa industry in Ghana.

The research focuses on the increasing demand for human rights to form a part of the work of multinational and transnational corporations. This is because some multinational corporations condone and perpetrate the use of child labour in the

¹⁰ n 3 above.

¹¹ <http://www.timeslive.co.za/lifestyle/2012/11/02/hershey-sued-for-info-on-use-of-child-labor-in-cocoa-supplies> [Accessed 29 November, 2012]

cocoa industry in Ghana and a handful of multinational corporations control the world cocoa and chocolate processing and distribution.¹² The proposed research emphasizes the need to incorporate human rights among other measures in the wake of increased awareness by the public of the effects that foreign investment can have on children and development. The role of civil society is also of importance in this regard in order to further advance socio-economic rights.

The reason for focus on this topic is that the work of foreign multinational and transnational corporations has led to gross violations of children's rights over the years.¹³ Therefore, steps have to be taken to ensure that corporations carry on their work responsibly such that children are not exploited and Ghana's economy grows.

1.3 Research objectives

The aim of the research is to answer the following questions:

1. How can multinational corporations in the cocoa industry in Ghana in particular and other countries be made more beneficial to communities especially their workers more particularly vulnerable young people they employ?
2. Can corporate complicity, in human rights violations in the course of producing and processing cocoa, be curbed with specific reference to Ghana?
3. How can children be made aware of their rights?
4. African and other legal systems compared and how regional and global mechanisms can protect against children's rights.

¹² n 3 above; See figure 1 above.

¹³ Social and Economic Rights Centre (SERAC) and Another v Nigeria (2001) AHRLR 60 (ACHPR 2001); Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya [Communication 276/2003]

1.4 Literature review

In order to remedy the child labour debacle, various approaches have come up over the years. Anderson opts for a Western and legal approach to prevention of forced labour. He focuses on strengthening legislation as a means of preventing child labour and respecting human rights since the codes of conduct that are implemented by such multinationals are usually accepted as the preventive measures for forced labour with no consideration towards the plight of those that are mistreated at the expense of such multinationals. He further proposes that states should revoke the corporate charters of multinationals that fail to impose a duty on multinationals to respect human rights. In addition, he emphasizes an empowerment approach whereby states should take a stand and ensure that multinationals respect human rights.¹⁴

Bachman, as is the case with Anderson, takes a Western approach to remedying child labour speaking of measures such as labelling and codes of conduct that are in place and are usually effective in the Western world.¹⁵ He also notes that *'the problem is the political will at the end of the day. If the political will is stagnant, then child labour eradication will be as stagnant.'* A possible way to curb this could be through focusing regulation at the national level.¹⁶ He however believes that all forms of child labour should be eradicated totally. However, not all forms of child labour are harmful to a child so there should be some distinction between harmful child labour and child labour that is not harmful to children because at the end of the day, this labour may be a source of income to the families to which these children belong.¹⁷

Donaldson attempts to identify ethical as opposed to prudential or legal dimension of the issues and to estimate the prospects for increased improvement. He suggests that technical management skills, ethical awareness and the propagation of

¹⁴JC Anderson 'Respecting human rights: Multinational corporations strike out.' Available at: [http://www.law.upenn.edu/journals/jbl/articles/volume2/issue3/Anderson2U.Pa.J.Lab.&Emp.L.463\(2000\).pdf](http://www.law.upenn.edu/journals/jbl/articles/volume2/issue3/Anderson2U.Pa.J.Lab.&Emp.L.463(2000).pdf) [Accessed 7 June, 2012]

¹⁵ n 2 above.

¹⁶ R Mares *The dynamics of Corporate Social Responsibility* (2008)13

¹⁷ D Weissbrodt 'Business and human rights' in Kinley D (ed) *Human Rights and Corporations* (2009) 106

international standards together are not enough. Inclusion of customers tends to be rudimentary. Discussions of other relevant persons in the “stakeholder” debate have yielded little practical application.¹⁸ The presence of values is, however, not sufficient. Even if a practice is believed to be the “lesser of two evils,” it can still be held to be wrong, and the merits or otherwise of an action can be debated, and sometimes agreed upon.¹⁹

Kolk and Van Tulder believe that although an active policy on an issue such as child labour involves many dilemmas, an open dialogue and a clear choice for stakeholders values can be expected to bring many positive spin-offs as well, and avoid risks that a more passive approach to ethics might entail. Case study research, which includes a typical stakeholder-oriented company with a shareholder-oriented company, could be helpful to shed more light on these issues.

²⁰ As Donaldson put it, *‘In this grey zone, there are no tight prescriptions for a company’s behaviour. Managers must chart their own course.’* This moral free space is likely to be issue-specific as well. Child labour is such a topic where host-country and home-country (international) norms sometimes diverge, with different perceptions of what constitutes child labour, the position of children in society and the standards that must be adopted. Donaldson also states that views of ‘minimally sufficient education’ for children depend on countries’ levels of economic development.²¹

Hughes²² states in his article that the African point of view is lacking regarding the issue of human rights violations. The African perspective is ignored and the Western approach preferred. Therein is the problem. In addition, governments have attempted to control activities of multinationals but this has proved to be

¹⁸ J Donaldson ‘Multinational enterprises, employment relations and ethics.’ Available at: <http://www.prdata.com/Documents/DBA/Globalisation/Articles/MN%20enterprises.%20employment%20relations%20and%20ethics.pdf> [Accessed 22 August, 2011]

¹⁹ n 18 above

²⁰ A Kolk & R Van Tulder ‘Ethics in international business: multinational approaches to child labour’ (2004) *Journal of World Business* 54

²¹ “Ethics in international business.” Available at: <http://wase.urz.unimagdeburg.de/evans/Journal%20Library/Ethical%20Management%20and%20Trust/Ethics%20and%20Child%20Labour.pdf> [Accessed 23 November, 2011]

²² A Hughes ‘Is business everybody’s business?’ (1995) *Alternative law Journal* 71

difficult due to the massive wealth that these multinationals have and as such, governments tend to suppress rights in favour of the work of multinationals and ignore sanctions and penalties imposed for human rights violations.²³ Despite the notion that multinationals lead to economic development, it seems that suppression of human rights only leads to an inescapable cycle of repression. Thus, it is only through respect for human rights standards that economic investment will be facilitated and subsequently child labour will be eliminated.²⁴

From an African point of view, George Clerk²⁵ points to the fact that the Ghanaian government has focused on adoption of a rights-based approach in order to eradicate child labour. He states in his article that, article 20 of the Convention on the Rights of the Child (CRC) imposes a duty on a State to provide alternative care arrangements for children undergoing economic exploitation. However, *‘the implementation of a rights-based child protection agenda requires financial resources and the UN Committee on the Rights of the Child in their response to Ghana’s 2005 report expressed concern about the lack of adequate financial and human resources for a successful realisation of these rights.’*²⁶ Clerk, therefore, speaks of Social mobility through education as the standard for protection children to combat child labour in Ghana.

For instance, in November 2009, Trading Visions and Kuapa Kokoo ran a “Kids Camp” in Kumasi that focused on child labour, with around 70 young teenagers from several villages taking part in a facilitated discussion on the subject. The context of a child-focused kids camp at which the children were encouraged to speak out, after months or even years of work building up their capacity and confidence, meant that the facilitators responded to them as real social individuals, negotiating actively with their parents and peers as best they could. This suggests a

²³ n 22 above at 72

²⁴ n 22 above at 73

²⁵ G Klerk ‘Child labour in Ghana: Global concern and local reality’ in RK Ame, DL Agbenyiga & NA Apt (Eds) *Children’s rights in Ghana: Rhetoric or reality?* (2011) 109

²⁶ n 25 above; A Twum-Danso ‘Assessing the progress of the 1998 Children’s Act of Ghana: Achievements, opportunities and challenges of the first ten years’ in RK Ame, DL Agbenyiga & NA Apt (Eds) *Children’s rights in Ghana: Rhetoric or reality?* (2011) 158

more subtle reading of children's rights that respects what the children themselves actually think and might be a productive approach to tackling child labour issues in cocoa farming.²⁷

In addition, like Anderson and Bachman, Afua Twum-Danso, focuses on the Children's Act of Ghana towards the protection of the rights of children.²⁸

However, due to the close link between the CRC and the Ghana Children's Act, some believe that the latter is simply a domestication of the former.²⁹ However, Twum-Danso points to the fact that involvement of local communities in the interpretation and implementation of the Act and CRC may promote respect for the rights of the children. His approach therefore merges the law and culture to enhance protection of the rights of children and neglects all other approaches.

From the above literature, it is evident that there are literature gaps and they are as follows:

1. There is a gap between the law, education, culture and the Western approach versus the African approach.
2. Implementation of legislation such as the Ghana Children's Act becomes more problematic and combating child labour remains a challenge due to the gaps in the various approaches.
3. Majority of the literature has focused on one theory or another but not the theories in combination. An integrated approach should be more advantageous in order to achieve full realization of the rights of children.

²⁷ <http://www.tradingvisions.org/content/report-child-labour-workshop-ghana> [accessed 31 May 2012]

²⁸ n 26 above at 154

²⁹ n 26 above at 155

1.5 Outline of chapters

Chapter 1 sets out the introduction, problem, and outline of the chapters, research objectives and literature review. Chapter 2 focuses on the context of Multinational Corporations in Ghana. Chapter 3 will look at whether corporate complicity can be curbed. Chapter 4 will elaborate on whether children are aware of their rights. Chapter 5 will look at African and regional and international instruments with reference to child labour, human rights and multinational corporations. Chapter 6 provides possible remedies to the child labour debacle and recommendations

Chapter 2

The context of Multinational Corporations in the cocoa industry in Ghana

The term ‘multinational’ in relation to a corporation can be attributed to David E Lilienthal who defined MNCs as ‘*corporations...which have their home in one country but which operate and live under the laws and customs of other countries as well.*’³⁰

Neil Hood, Stephen Young³¹ and Beth Stephens,³² define a multinational corporation as ‘*any firm which owns (in whole or in part), controls and manages income generating assets in more than one country.*’ John Dunning provides a more compact definition of MNCs. He states that MNCs are enterprises that own or control value-added activities in two or more countries.³³

Whereas the United Nations (UN) made a distinction between ‘multinational corporations’ (MNCs) and ‘transnational corporations’ (TNCs), it was argued by several representatives of the Economic and Social Council (ECOSOC) in 1974 in its Fifty-Seventh Session that ‘*transnational corporation*’ is the favoured term. Such term was adopted for the purposes of the UN programme in MNCs. However, in practice, this distinction is irrelevant.³⁴

Despite the varying definitions of an MNC, it is apparent that they carry out their activities in more than one country for making a profit.³⁵

The cocoa industry in Ghana was initially a COCOBOD monopoly. However, The World Bank and IMF through the structural agreements with Ghana led to liberalization of the cocoa sector in 1992 to 1993 by introducing quasi-private

³⁰ P Muchlinski *Multinational enterprises and the law* (2007) 5.

³¹ n 30 above.

³² B Stephens ‘Amorality of Profit’ in Kinley D (ed) *Human Rights and Corporations* (2009) 47.

³³ FP Van der Putten, G Crijns and H Hummels ‘The ability of corporations to protect human rights in developing countries’ in R Sullivan (Ed) *Business and human rights: Dilemmas and solutions* (2003) 85.

³⁴ n 30 above at 9

³⁵ PT Muchlinski ‘Human rights and Multinationals: is there a problem?’ in Kinley D (ed) *Human Rights and Corporations* (2009) 7

exporting firms. Such liberalization moreover led to increased private sector involvement in the cocoa sector and consequently cocoa production increased.³⁶

With cocoa is one of the three largest industries in Ghana,³⁷ seven firms account for 85% of cocoa production and exports: Cocoa Processing Company Limited, West African Mills Company, Barry Callebaut Ghana Limited, ADM Cocoa (Ghana) Limited, Cargill Ghana Limited, Plot Enterprise Ghana Limited and Cadbury–Kraft Ghana Limited.³⁸

It is worth noting that West African Mills Company (WAMCO) is a joint venture between the Ghana Cocoa Board and Schroeder (part of the Hosta group of companies in Germany).³⁹ Furthermore, Barry Callebaut Ghana Limited is a Free Zones enterprise with the headquarters of the company is in Switzerland. The company was incorporated in August 1998 to process cocoa beans into roasted nibs and cocoa liquor. In addition, Cadbury is a UK-based multinational.⁴⁰

Cadbury–Kraft Foods Ghana Limited is a subsidiary of the above multinational food and beverage manufacturer Kraft Foods Incorporated. The company has operated in Ghana for over 100 years. What is more, ADM Cocoa (Ghana) Limited is one of the world’s largest cocoa and chocolate manufacturers. The headquarters are in Illinois in the US and a subsidiary of Archer Daniels Midland Group. Plot Enterprise Ghana Limited is registered in Ghana. However, the origin of this company is a turnkey project by Buhler Barth of Germany. Additionally, Cargill Incorporated is a US-based private company that has been operating in the cocoa processing business for over 100 years. Cargill Ghana Limited a subsidiary of the multinational group Cargill, is the country’s largest exporter of processed

³⁶ K Larsen et al eds ‘Agribusiness and Innovation Systems in Africa,’ in S Grossman-Greene & C Bayer *A brief history of cocoa in Ghana and Cote d’Ivoire* (2009) 11

³⁷ J Sutton & B Kpentey *Enterprise map of Ghana* (2012)1

³⁸ n 37 above at 3

³⁹ n 37 above at 15

⁴⁰ n 37 above at 16

cocoa products. Cargill has a workforce of 200 permanent staff and 200 contract/support staff.⁴¹

Other companies that also contribute to cocoa production include Real Products, which is a recently established foreign-owned Free Zones company originally from Ecuador, set up to process about 50,000 metric tonnes of cocoa beans into finished and semi-finished products, largely for export.⁴²

As was pointed out earlier, Cargill, ADM and Barry Callebaut are responsible for 40% of the world's cocoa processing.⁴³ Furthermore, the other companies responsible for cocoa production happen to be foreign owned. This shows a trend of foreign multinational corporations playing a big role in the cocoa industry in Ghana.

MNCs are not the explicit subjects of international human rights law. This is because international human rights law primarily addresses national governments and nation-states. They are the primary holders of the duties to implement international human rights law.⁴⁴ This obviously raises the question of what responsibilities MNCs have regarding such human rights.⁴⁵ Human rights are fundamental principles allowing individuals to live a free and dignified life. The Universal Declaration of Human Rights (UDHR) is the most widely accepted codification of human rights in existence. However, because the UDHR is in the form of a declaration, it is as such not legally binding. Nonetheless, other covenants adopted by the United Nations (UN) are legally binding. These include the International Covenant on Civil and Political Rights (ICCPR) as well as the International Covenant on Economic Social and Cultural Rights (ICESCR).⁴⁶ The

⁴¹ n 37 above at 15-24

⁴² n 37 above at 17

⁴³ See figure 1 above

⁴⁴ R Sullivan (Ed) *Business and human rights: Dilemmas and solutions* (2003) 16

⁴⁵ n 44 above

⁴⁶ n 44 above at 15

latter covenant is of relevance especially in this context as it touches on socio-economic rights that form the crux of the matter at hand.

States that promote human rights violations have created a booming business for MNCs. Such states include China, where human rights are not on the top of the priority list but the economy is booming to a level where MNCs flourish in China mostly because they thrive on child labour thus abusing their rights.⁴⁷

In recent years, there has been a growing concern regarding human rights and the work of MNCs. Many corporations have been involved in gross human rights violation such as the work of Shell in Nigeria.⁴⁸ Such concerns, however, have always been in existence such as the use of slave labour in the Nazi regime in Germany, or even during apartheid in South Africa.⁴⁹ The initial idea that only states were liable for violations of human rights has begun to change in the wake of a global economy and the power that the MNCs have over states.⁵⁰

Muchlinski states that *MNCs can affect the economic welfare of the communities in which they operate and, given the indivisibility of human rights, this means they have a direct impact on the extent that economic and social rights, especially labour rights in the workplace, can be enjoyed.*⁵¹

However, despite their negative aspects, the very corporations that are being accused of human rights violations do have some positive aspects such as bringing new jobs, capital, improving living conditions and enhancing technology, which could improve working conditions and as such, MNCs do benefit children to some extent.⁵² For instance in Ghana, at the micro level, cocoa contributes to poverty reduction. The sector provides livelihood for more than 700,000 farmers. In the

⁴⁷ A Dieng (2012 July) “*Natural resources and civil conflict-An African perspective to human rights and business*” Speech presented at Africa Legal Aid Human Rights and Business Conference, Webber Wentzel, Johannesburg. 5 July 2012

⁴⁸ Social and Economic Rights Centre (SERAC) and Another v Nigeria (2001) AHRLR 60 (ACHPR 2001)

⁴⁹ n 35 above at 3.

⁵⁰ As above

⁵¹ n 35 above at 15.

⁵² n 17 above at 106.

southern forest region where cocoa is produced, households engaged in cocoa farming together with those engaged in mining and other export-oriented activities experienced improvements in their living conditions compared with food crop farmers.⁵³

⁵³ Economic report on Africa 2013 http://www.uneca.org/sites/default/files/uploaded-documents/era2013_casestudy_eng_ghana.pdf [Accessed 6 May 2013]

Chapter 3

Can corporate complicity, in human rights violations in the course of producing and processing cocoa, be curbed with specific reference to Ghana?

The virtual disappearance of communism brought radical change to the world scene. There was an acceleration of the world economy coupled with privatisation and foreign investment. With the opportunities of this new world came risks such as corruption, and human rights violations amongst other things. The human rights movement came late in seeking positive engagement with business, regarding governments as the traditional target. They were slow to attempt to recruit the influence of the corporate world for the protection of human rights.⁵⁴

Corporate complicity therefore arose because of MNCs' failure to abide by the human rights standards.⁵⁵ Complicity is used in a multi-layered colloquial manner to mean conduct that someone became caught up and implicated in something that is negative and unacceptable.⁵⁶ Thus, corporate complicity denotes corporate conduct that is negative and unacceptable.

To curb the corporate complicity, CSR was born. The climate of awareness about CSR grew rapidly in the late 1990s. Prior to CSR were corporate voluntary initiatives, which were merely policy statements with no serious implementation mechanisms and no outside monitoring.⁵⁷ New initiatives and codes of conduct set out to define CSR as well as to encourage companies to implement them. Of significance was the UN Global Compact, which Kofi Annan initiated in 1999. Such Compact requires companies to address human rights, labour standards and

⁵⁴ n 44 above at 24

⁵⁵ n 30 above at 84

⁵⁶ International Commission of Jurists 'Corporate complicity and legal accountability: Facing the facts and charting a legal path' (2008) 3

⁵⁷ R Mares *The dynamics of Corporate Social Responsibility* (2008) 169

environmental protection. It is however apparent that lip service is paid to such codes as opposed to practical application of such codes.⁵⁸

The corporate world has an inexorable impact on human rights and therefore a responsibility for them. Workplace and supply chain issues such as labour conditions, the health and safety of employees are examples of human rights issues for which companies have responsibility.⁵⁹

Various CSR issues relevant to human rights have attracted attention in the recent years. Thus in labour intensive industries there are documented violations of human rights.⁶⁰ For instance, in West Africa, *'Hershey, the leading chocolate retailer in the United States of America, has been singled out for using almost 300,000 children to perform hazardous work on the cocoa farms, many of them trafficked from Mali and Burkina Faso in conditions of bonded labour.'*⁶¹

CSR can mean different things and the obligations can be drawn rather widely. For instance, the Draft UN code for Transnational Corporations contained obligations ranging from respect for sovereignty and political system of the host state, respect for human rights, absence from corruption laws, to obligations not to abuse economic powers in a manner damaging to the economic well-being of the countries the MNCs operate.⁶²

Equally, the revised OECD Guidelines for MNCs, contain an extensive range of obligations for MNCs including, inter alia, duties to contribute to the sustainable development of countries in which they operate, to respect human rights, to encourage local capacity-building, and to refrain from seeking or accepting

⁵⁸ n 44 above at 26; n 57 above at 169

⁵⁹ n 44 above at 22

⁶⁰ n 57 above at 1

⁶¹ <http://uk.oneworld.net/guides/childlabour?qclid=CKOQIODU4qoCFSUKtAodF3peMA#Laws> [Accessed 22 August 2011]

⁶² P Muchlinski 'The development of human rights responsibilities for multinational enterprises' in R Sullivan (Ed) *Business and human rights: Dilemmas and solutions* (2003) 34

exemptions to local regulatory frameworks in the areas of environment, health, safety, labour, taxation, financial incentives or other issues.⁶³

In contrast, the UN Global Compact⁶⁴ focuses on just a few areas on which world business should act by upholding the major international instruments in each field. These are:⁶⁵

1. Respect for human rights as defined in the Universal Declaration of Human Rights (UDHR).⁶⁶
2. The International Labour Organisation (ILO) Declaration on Fundamental Principles and Rights at Work, which provides for the effective abolition of child labour among others.⁶⁷ This mechanism is available for trade Unions including General Agricultural Workers' Union (GAWU) of which Ghana cocoa farmers form a part. Through such trade unions, communications can be submitted to the ILO. Regrettably, the communications to the ILO are not maximized because in spite of the solid framework for the realization of workers' hopes and aspirations, informal sector workers in Ghana, regardless of their numerical strength in relation to the entire workforce, lack representation in the policy process and have no presence in the corridors of decision-making and power. They have neither the facilities nor the possibilities to influence the conditions and decisions that affect them in any systematic manner, nor do they have any access to the services they need to operate effectively and efficiently.⁶⁸

Friedman gives his own definition of CSR. He states that *'there is only one social responsibility of business-to use its resources and engage in activities designed to increase its profits*

⁶³ n 62 above at 35

⁶⁴ http://human-rights.unglobalcompact.org/doc/UNGC_Dilemmas_Working_Paper_3_v1.pdf [Accessed 22 October, 2012]

⁶⁵ N 62 above at 35

⁶⁶ As above

⁶⁷ As above

⁶⁸ Trade Unions in the informal sector, Labour education 1999/3 No. 116. P.7 available at www.ilo.org/.../wcms_111494.pdf [Accessed 1 May 2013]

*so long as it stays within the rules of the game, which is to say, engages in open and free competition, without deception or fraud.*⁶⁹

MNCs should observe socially responsible standards.⁷⁰ This ILO ‘Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy of 1977’ for instance reflects the above aspect. The problem with such an instrument is that it is not binding on any MNC.⁷¹ How then would one determine a standard by which social responsibility was part of an MNC’s agenda? Therein is the predicament.

In addition, discussions regarding the role of business in society use CSR in two ways. In the one hand, CSR refers to the managerial strategy through which managers voluntarily respond to social expectations and pressures. CSR as ‘voluntarism’ is therefore a shortcut for the strategies of proactive business. On the other hand, CSR highlights fundamental concerns about accountability of corporations to society. CSR as ‘accountability’ focuses on corporate responsibilities that lawmakers should define and impose on all companies.⁷²

There are a few success schemes such as the Good Weave label, which protects the carpet industry and focuses largely on child labour issues, including rehabilitation. Good Weave International claims that more than half a million weaving jobs previously occupied by children in South Asia have been replaced with adult labour⁷³ Good Weave International is only one of many that claims that child labour is not being utilised. However, numerous other industries do not care about the use of child labour.⁷⁴

Within Africa, the African Charter on Human and Peoples’ Rights (ACHPR) is of significance as it spells out the socio-economic rights the MNCs affect. Such rights

⁶⁹ n 57 above at 76

⁷⁰ n 35 above at 8-9.

⁷¹ n 61 above

⁷² n 57 above at 3.

⁷³ As above

⁷⁴ As above

are contained in articles 15 to 18 of the ACHPR. Furthermore, the African Charter on the Rights and Welfare of the Child (African Children's Charter) exclusively deals with rights of children in the African context. The principles of non-discrimination and best interest of the child are the standards emphasized in this instrument and are directly applicable in the Ghanaian context. These rights include rights to education (article 11); leisure, recreation and cultural activities (article 12); health and health services (article 14); child labour (article 15); protection against child abuse and torture (article 16); protection against harmful social and cultural practices (article 21); sale, trafficking and abduction (article 29).

MNCs can affect the economic welfare of the communities in which they operate such as the free zones in Ghana where numerous foreign companies take part in cocoa processing and production. They therefore have an impact on socio-economic and labour rights in a specific community.⁷⁵ Such MNCs also influence the right to development in article 22 of the ACHPR, which connects to the Socio-economic rights as stated above.

A much less convincing example is the cocoa industry in West Africa. As long ago as 2001, US Senators Harkin and Engel drew up an agreed programme to certify chocolate products but the deadlines were missed repeatedly.⁷⁶ The 2001 Harkin-Engel Protocol (HEP) called for action by various stakeholders in the cocoa industry to address the Worst Forms of Child Labour (WFCL) in Côte d'Ivoire and Ghana. Nevertheless, by February 2005, Senator Tom Harkin was expressing dismay that the chocolate industry had failed to implement a voluntary public certification system to eliminate WFCL in West Africa⁷⁷

The UN sub-commission on Human Rights issued Draft Norms on responsibilities of companies with regard to human rights. Such sub-commission

⁷⁵ n 35 above at 15

⁷⁶ <http://ipsnews.net/news.esp?indnews=52871> [Accessed 31 November, 2011]

⁷⁷ n 4 above

recognised that even though states have the primary responsibility to protect and promote human rights, companies, as organs of society, are also responsible for promoting and securing the human rights set forth in the UDHR.⁷⁸ Therefore, companies must respect and promote the rights of workers amongst other rights. These obligations apply to the company itself, contractors, subcontractors, suppliers and licensees.⁷⁹

Corporate complicity in Ghana, in addition to the above legislation, can be curbed through meta-regulation, which could be seen as legal regulation of corporate conscience.⁸⁰ It could entail any form of regulation, whether by tools of State law or other mechanisms, which regulates any other form of regulation. The law would work by holding people accountable for meeting ‘threshold criteria of good performance or conduct’ after the fact. Legal regulation imposes liability for conduct that has an impact or manifestation external to the business that fails to meet the legal standard. The law would have to be aimed at regulating the internal self-regulation of business. One of the problems with meta-regulation is that it focuses on CSR processes in a way that allows companies to avoid accountability for substance. Companies will implement management systems to the extent necessary to ensure legitimacy, but will make no substantive change to their ordinary *modus operandi*.⁸¹ In addition, meta-regulation leaves it up to the businesses to define the details of the responsibility processes, and then leaves it to the processes to define the appropriate outcomes or goals.⁸² Thus, surrounding law needs to be examined in order to determine whether substantive and procedural rights are adequately specified or able to be adequately debated and determined in

⁷⁸ n 44 above

⁷⁹ n 44 above at 17

⁸⁰ C Parker ‘Meta-regulation: legal accountability for corporate social responsibility.’ in Kinley D (ed) *Human Rights and Corporations* (2009) 339

⁸¹ n 80 above at 352.

⁸² n 80 above at 359.

democratically legitimate ways before it can be said that that meta-regulatory value is achieved.⁸³

MNCs affect the economic interests of communities especially labour rights in the workplace. In addition, observing human rights will enable MNCs to set standards for their subcontractors and to refuse to accept the benefits of governmental measures that seek to improve the business climate at the expense of fundamental human rights. Furthermore, all firms should and can develop internal human rights policies, which ensure that such human rights concerns are considered in management decision-making and which may find expression in a corporate code of conduct.

Further, companies could be legally responsible for corporate complicity through the International Court of Justice (ICJ). The ICJ established the Expert Legal Panel on Corporate Complicity in International Crimes (hereafter called the Panel). The panel considers in what situations companies and/or their individual representatives are legally responsible under criminal and/or civil law when they are complicit with governments, armed groups, or other actors in gross human rights abuses.⁸⁴

What is more, product and process certification may remedy corporate complicity to some extent. Product certification is an assessment of the attributes of the actual product itself. Process certification is a description of the process by which the product was manufactured. One such example is the Kimberly process that ensures that diamond trade does not support violent conflict, and certifies shipments of diamonds as ‘conflict free’. In the end, all process certifications also result in a meaningful communication to the consumer. *“Certification will provide a clear, statistically valid and representative view of labour conditions across the cocoa sectors of*

⁸³ As above

⁸⁴ n 56 above at 2

*Ghana on an annual basis. It uses this information to identify both problem areas and the actions required to address them.*⁸⁵

While there is growing consensus on what the specific human rights responsibilities of companies should be, it is also necessary to recognise that the ability to exert influence restricts the degree of responsibility of a company. It also has a degree of responsibility for situations that it does not control but can influence, although determining that degree will be difficult.⁸⁶ Therefore, MNCs can and should observe human rights and thus curb corporate complicity.⁸⁷

⁸⁵ <http://www.laborrights.org/sites/default/files/publications-and-resources/Cocoa%20Protocol%20Success%20or%20Failure%20June%202008.pdf> [Accessed 27 March, 2012]

⁸⁶ n 44 above at 16

⁸⁷ n 35 above at 15

Chapter 4

How can children be made aware of their rights?

Child trafficking is one of many forms of illicit trade of which child labour forms a part. The concept of child labour has varying definitions. According to the United Nations trafficking Protocol, child trafficking is:

*(a) “Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, **forced labour or services**,⁸⁸ slavery or practices similar to slavery, servitude or the removal of organs.⁸⁹*

Furthermore, subparagraph (c) of the above article states that *‘the recruitment, transportation, transfer, harbouring, or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth in subparagraph (a) of this article.’*⁹⁰ The above definition implies that child labour is therefore a form of exploitation falling within the ambit of child trafficking.

There is considerable debate regarding the definition of a child. The United Nations Trafficking Protocol, African Charter on the Rights and Welfare of the Child (African Children’s Charter) and Ghana Children’s Act define a child as *‘any person under 18 years of age.’*⁹¹ In addition, ILO Conventions 138 and ILO Convention 182, state that a child is anyone below the age of 18 years.⁹² The CRC, however, does not prohibit child work below a certain age per se and includes only

⁸⁸ My emphasis

⁸⁹ Article 3 Palermo Protocol of 2000; Inter Parliamentary Union and United Nations International Children’s Emergency Fund *Combating Child Trafficking* (2005) 11

⁹⁰ As above

⁹¹ Article 3(d) of the Palermo Protocol; section 1 of the Ghana Children’s Act of 1998

⁹² Article 2 of Convention 182.

an obligation to provide for a minimum age without setting such a standard. However, reference to other international instruments that set a minimum age, rectifies this age debacle.⁹³ Moreover, many countries make a distinction between light and hazardous work, with the minimum age for the former generally being 12, for the latter usually varying between 16 and 18. ILO conventions adopt this approach, allowing light work at age 12 or 13, but hazardous work not before 18. The ILO establishes a general minimum age of 15 years, provided 15 is not less than the age of completion of compulsory schooling. This is the most widely used yardstick when establishing how many children are currently working around the world.⁹⁴ In addition, there is no uniform understanding of ‘childhood’ worldwide. In some countries, the child is involved in decisions in the family and is therefore an active figure in the family or community while in others the child is passive. There are also different religious and cultural definitions of a child. This age can however be varied from 12 or 13 years accordingly but strict adherence to whether the work is non-detrimental in nature is to be ensured. The age of work in dangerous activities remains at 18 years.⁹⁵

Despite the varying definitions of a child, the key focus is the protection of children against exploitation in the form of child labour. Child labour is one of the harsh realities currently. In 2008 there were 215 million children working illegally in the eyes of international law, almost 14% of all the world’s children under 18. In sub-Saharan Africa, this proportion rises to 25%. Countries with a particularly high incidence of child labour include Nigeria and Malawi for instance.⁹⁶ Almost all child labour occurs in developing countries, with about 60% engaged in

⁹³ A Fodella ‘Freedom from child labour as a human right: the role of the UN system in implementing ILO child labour standards’ in N Giuseppe, N Luca & Marco P *Child labour in a globalized world* (2008) 210

⁹⁴ United Nations and Child labour. Available at <http://www.un.org/cyberschoolbus/briefing/labour/labour.pdf> [Accessed 27 March, 2012]

⁹⁵ D Brown, A Deardorff & R Stern ‘Determinants of child labour: Theory and evidence’ Available at: www.umich.edu/rsie/working_papers/Papers476-500/r486.pdf [Accessed 30 October, 2012]

⁹⁶ n 61 above

agriculture.⁹⁷ It is of import to note that children as young as 5 years to 17 years work on the cocoa plantations at the cost of their physical, emotional, cognitive and moral wellbeing⁹⁸

Child labour became an issue of debate in the mid 1980s.⁹⁹ The initial reactions were rather ill coordinated and private initiatives such as codes of conduct received with little support upon initiation.¹⁰⁰ ILO thus developed a leadership in the field of child labour.¹⁰¹ Prior to the ILO conventions, however, there were numerous other sources of legislation on child labour such as the Forced Labour Convention No. 29 of 1930, Labour Inspection Convention No.129 of 1969, Private Employment Agencies Convention No.181 of 1997 and numerous others.

However, the ILO further reinforced legislation against child labour. The ILO introduced Convention 138 on the minimum age for admission to employment.¹⁰² Convention 138 introduced a general age limit as well as flexibility clauses that favoured ratification be less-developed countries. Unfortunately, Convention 138 was subject to slow ratification and the fight against child labour seemed to arrive at a sort of impasse.¹⁰³ In 1999, the ILO introduced Convention 182 on the Worst Forms of Child Labour, which complemented Convention 138 by introducing four categories of the worst forms of child labour. The categorisation of the worst forms of child labour however run the risk of creating child labour practices that were non priorities and others that were priorities. However, the Convention 182 created a common core of child labour and revitalised activities of the ILO in the

⁹⁷ n 61 above; <http://www.hrw.org/en/news/2009/02/10/indonesia-protect-child-domestic-workers> [Accessed 31 August 2012]

⁹⁸ Available at: www.globalmarch.org/content/child-labour-cocoa-farms-ivory-coast-and-ghana [Accessed 31 July 2013]; www.ergononline.net/?p=636&option=com_wordpress&Itemid=161#more-636 [Accessed 14 August 2013]

⁹⁹ M Pertile 'Introduction: the fight against child labour in a globalized world' in N Giuseppe , N Luca & P Marco (Eds) *Child labour in a globalized world* (2008) 1

¹⁰⁰ n 20 above at 54

¹⁰¹ n 99 above

¹⁰² As above

¹⁰³ n 99 above at 6.

field of child labour. Unlike Convention 183, majority of the membership of the ILO rapidly ratified and unanimously adopted the Convention 182.¹⁰⁴

It is worth noting that International law does not give a clear definition of child labour.¹⁰⁵ Various legal instruments in international law have together defined child labour, organisations such as the ILO, European Union and the UN among others.¹⁰⁶ The ILO conventions 138 and 182 provide that child labour is any kind of employment or work carried out by children without complying with the abovementioned conventions.¹⁰⁷

Convention 138 prohibits economic activity performed by children below the age of 13 (12 in developing countries) and sets the minimum age for admission to employment at 15 (14 in developing countries) or in any case the age corresponding to the end of compulsory schooling.¹⁰⁸

Convention 182 on the other hand provides a wider scope. It comprises four categories of worst forms of child labour. They are as follows:

- All forms of slavery or practices similar to slavery such as 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;¹⁰⁹
- The use, procuring or offering of children for prostitution, for the production of pornography or for pornographic performances;¹¹⁰
- 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;¹¹¹

¹⁰⁴ n 99 above at 3.

¹⁰⁵ n 99 above at 8

¹⁰⁶ n 99 above at 9.

¹⁰⁷ n 99 above at 10.

¹⁰⁸ As above

¹⁰⁹ Article 3(a) of the ILO Convention 182

¹¹⁰ Article 3(b) of the ILO Convention 182

¹¹¹ Article 3 (c) of the ILO Convention 182

- 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.¹¹²

The first three categories are unconditional, as they are per se unacceptable as they affect the health and development of children. The fourth category is conditional as it depends on the situation and the environment in which the work is carried out.¹¹³ The above categories are beyond the reach of statistical surveys but the numbers are likely to be over 10 million. Together with hazardous work, they are the "worst forms of child labour" (WFCL).¹¹⁴ WFCL correspond largely with most of the classes of economic exploitation in the UN Convention on the Rights of the Child (CRC).¹¹⁵ WFCL may be seen as a contemporary form of slavery. Thus, the categories of child labour as defined in Convention 182 also amount to practices similar to slavery.¹¹⁶ It is worth noting that Ghana ratified ILO Convention No. 182 on the worst forms of child labour in 2000. Moreover, the Ghanaian Government of Ghana signed a Memorandum of Understanding with the ILO in 2000 to request assistance in implementing this convention. Only recently did Ghana ratify ILO Convention 138 in 2011. Furthermore, Ghana ratified the two conventions prohibiting forced labour, ILO Convention No. 29 and No. 105 in the late 1950s.¹¹⁷

‘Worst forms of child labour’ is akin to slavery. The definition of slavery has evolved from the 1926 Slavery Convention which defined slavery as *‘the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.’*¹¹⁸ More recently, the Rome Statute of the International Criminal Court (ICC) has qualified some of the worst forms of child labour as international

¹¹² n 99 above at 10; Article 3(d) of ILO Convention 182; n 14 above, 490.

¹¹³ n 99 above at 11.

¹¹⁴ n 61 above.

¹¹⁵ S Sanna ‘Slavery and practices similar to slavery as worst forms of child labour: a comment on article 3(a) of ILO Convention 182’ in N Giuseppe, N Luca & P Marco (Eds) *Child labour in a globalized world* (2008) 103; n 2 above.

¹¹⁶ n 115 above at 105

¹¹⁷ N 85 above.

¹¹⁸ Article 1(1) of the Slavery Convention of 1926; http://www.hrea.org/index.php?doc_id=430 [Accessed 28 March, 2012]

crimes.¹¹⁹ Rome Statute of the ICC condemns enslavement and defines it as, *'exercise of all or any of the powers attaching to the right of ownership over a person including the exercise of such power in the course of trafficking in persons, in particular women and children.'*¹²⁰ It is thus evident that Convention 182 incorporated slavery and enslavement into the concept of exploitation as one of the worst forms of child labour.

Notwithstanding the lack of a clear definition for child labour, article 32 of the CRC is directly relevant. It obliges State parties to *'recognise the right of the child to be protected from economic exploitation and performing any work that is likely to be hazardous or interfere with the child's education or to be harmful to the child's health or physical, mental, spiritual, moral or social development.'*¹²¹

All factors above considered the lingering question is thus whether children know their rights. Children are generally not aware of their rights despite all the possible measures that are in place.¹²²

What is more, the existing weak laws make it that much easier for children to be used as labour.¹²³ Weak laws coupled with poor governance¹²⁴ imply that nations are unable to combat child labour let alone provide for rights such as education so that children are get to know their rights. Corruption is usually a factor that exacerbates such poor governance in turn increases child labour. In addition, some national laws include exemptions. For instance in Kenya, the minimum age for most work is 16 but work on plantations does not contain a minimum age.¹²⁵

In addition to the above factors, workers' rights are repressed¹²⁶ yet in terms of the ICESCR, the right to work includes the right to join and form trade unions. This

¹¹⁹ Article 8 (2)(b), xxii, xxvi, article 8(2)(d), vi, vii.

¹²⁰ Article 7 (1)(c) and 7(2)(c) of the Rome Statute of the ICC

¹²¹ n 99 above, 9.

¹²² n 26 above, 161.

¹²³ 'Causes of child labour' Available at:

http://www.continuetolearn.uiowa.edu/laborctr/child_labor/about/causes.html [Accessed 31 August, 2011]

¹²⁴ M Naim *Illicit* (2006) 104; n 6 above: n 6 above.

¹²⁵ n 123 above

¹²⁶ As above

makes it difficult to improve labour standards and living standards in order to eliminate child labour.¹²⁷

From a cultural point of view, West African farmers view child labour as culturally acceptable. In general, it is seen as a way for children to learn a skill, and to sustain a community's farming culture.¹²⁸ While great emphasis is placed on the importance of training children to ensure a better future, it is generally accepted that labour should not rob children of the right to attend school, nor put them in danger.¹²⁹ Thus, in traditional societies, some forms of child labour often play a role in education, socialization and rites of passage.¹³⁰ It is unlikely that the 1998 Children's Act of Ghana will make any impact if the rest of the Ghanaian system remains the same. How does one impose westernized values on rural populations in Ghana and expect such human rights standards to work? Children's rights should be conceptualised as a series of 'concentric circles of increasing responsiveness or flexibility to cultural factors rather than the central and less flexible norms.'¹³¹ It is therefore imperative that there is a careful assessment and discussion of cultural and moral implications of the fight against child labour.¹³² The latter will enhance universal legitimacy of human rights through cross-cultural dialogue, and cultural discourse.¹³³

Moreover, globalisation catalyses child labour.¹³⁴ As such MNCs expand across borders in a context where there seem to be no cross-border laws enacted as fast as the corporation activities. Thus, countries often compete for jobs, investment and industry. This competition sometimes slows child labour reform by encouraging corporations and governments to seek low labour costs by resisting

¹²⁷ n 123 above

¹²⁸ n 26 above, 162.

¹²⁹ n 6 above.

¹³⁰ n 99 above, 5.

¹³¹ <http://bjsw.oxfordjournals.org/content/32/7/893.full.pdf> [Accessed March 28 2012]

¹³² n 99 above

¹³³ n 26 above, 162.

¹³⁴ n 123 above; F Pantano & R Salomone 'Trade, ILO child labour standards and the social clause: definitions, doubts and (some) answers' in N Giuseppe, N Luca & P Marco (Eds) *Child labour in a globalized world* (2008) 324

international standards. The large interest payments on development loans as well as ruthless traders exploiting the markets for quick profits worsen the effects of poverty.¹³⁵ The World Bank structural adjustment policies associated with these loans often require governments to cut education, health, and other public programs, further harming children and increasing pressure on them to become child labourers.¹³⁶

Additionally, debt especially external debt servicing diverts resources from social services, which exacerbates child labour. While debt payments soar, Sub-Saharan Africa pays \$40 million in debt each day, educational opportunities are as few as 40% of Sub-Saharan African children receive little to no education and such education opportunities are getting fewer.¹³⁷

Furthermore, World Bank and International Monetary Fund (IMF) structural adjustment programs (SAP) instituted in the 1990s required the privatization of cocoa boards in exchange for debt forgiveness. Previously, governments regulated the market, guaranteeing farmers a minimum price regardless of the true market price. Following the new policy implementation, market prices fell. Unprepared and receiving no instruction on the new market workings, the price drop had a detrimental effect on farmers. Each country's economy was also negatively affected due to its lack of diversification.¹³⁸

There is extremely high demand for child labourers. Developing countries usually fall prey to high demand due to the abovementioned factors as well as the high demand for child labourers. MNCs target children because they are unaware of their rights. What is more, ignorance on the part of both the parents and children regarding the dangers associated with child labour aggravates such demand.¹³⁹

¹³⁵ n 124 above, 19-20.

¹³⁶ n 123 above.

¹³⁷ n 123 above; L McMillan 'Ghana's education system: Where rhetoric meets reform' in RK Ame, DL Agbenyiga & NA Apt (Eds) *Children's rights in Ghana: Rhetoric or reality?* (2011) 210

¹³⁸ n 6 above.

¹³⁹ United Nations Educational Scientific and Cultural Organisation *Human Trafficking in South Africa: Root causes and Recommendations* (2007) 35

Various other factors have a role to play in catalysing child labour such as poverty, political unrest and war, natural disasters, family breakdown and some cultures that dictate that children should work in order to supplement the family's income.¹⁴⁰

What is even more disconcerting is that many of the children are working on commercial farms producing for export to developed countries' markets. Either these farms in turn are managed by or directly source to large multinational agribusiness corporations engaged in multi-billion dollar trade. Unfortunately, when world prices of commodities fluctuate or are already very low, such as in cocoa, farmers in developing countries are pitched against each other to compete to produce for the lowest costs. Consequently, children replace adult workers for cheaper labour or are simply used as slave labour.¹⁴¹

However, many of the root causes of child labour go beyond detection and enforcement. Ms Gakpleazi admits that, *"Poverty, lack of economic opportunities, social mobilisation, and other macroeconomic and demographic issues are all major factors. But this does not mean that we should relinquish improvements in the enforcement of the law."*¹⁴²

In order to combat child labour, children need education.¹⁴³ The Ghana Children's Act of 1998 in section 8 states that *'no person shall deprive a child access to education.'* Furthermore, section 12 of the same Act provides that, *'no person shall be subject to exploitative labour.'* The problem, however, is that education is not as accessible as it should be. As such, child labour continues to exist despite various efforts to curb it. This is because of factors such as shortage of necessities due to extreme poverty and unemployment.¹⁴⁴ Child labour may be the only way to obtain a source of income available to some families in order for them to meet their basic needs and therefore education becomes less of a priority for such families and child labour

¹⁴⁰ AC LoBaido "Sex Slave Trade Flourishes in Thailand." *World Net Daily* Saturday, January 10, 2009.

¹⁴¹ Child labour in agriculture. Available at <http://laborrights.org/sites/default/files/publications-and-resources/COCOA05Update.pdf>. [Accessed 11 January, 2012]; n 6 above.

¹⁴² <http://www.afrol.com/articles/29375> [Accessed 27 March, 2012]

¹⁴³ A Eide, C Krause & A Rosas (Eds) *Economic, Social And Cultural Rights: A textbook* (2001) 189

¹⁴⁴ n 123 above; n 61 above; n 134 above, 324; <http://www.tigweb.org/youth-media/panorama/article.html?ContentID=14253> [Accessed 9 March 2012]

becomes more acceptable.¹⁴⁵ Furthermore, ICESCR in article 12 provides for compulsory primary education for children. Nevertheless, it comes as no surprise that many children, due to lack of access to such schools, face exclusion.¹⁴⁶ Some children live in such remote locations that the distance to the nearest school is too far. Even with the UN Millennium Development Goal (MDG) of Universal education, there are still many children out of school and engaged in all forms of labour. Between 1999 and 2005, the number of children enrolled in primary school for the first time grew by 4 % from 130 million to 135.¹⁴⁷ In sub-Saharan Africa, the increase was by 36%. Governments have increased their education spending because of increased enrolment. Overall participation in primary Schooling worldwide grew by 6.4 % with the fastest growth registered in Asia and sub-Saharan Africa but the infrastructure did not increase in tandem with enrolment! Enrolment is one factor and is not sufficient to make a case for retention and transfer of knowledge. “...*To learn to know, how to be, to do and to live to work is the treasure within learning...*” thus, the importance of cognitive skills, basic competencies, life skills as well as values and principles.”¹⁴⁸ Retention and completion rate in Africa is only 63% compared to the global one, which is 87%. Asia is at 79%.¹⁴⁹ As a result children drop out of school and in countries emerging from conflict, only a few are enrolled into the universal education system.¹⁵⁰ The fact that the children are often not aware of their right to education let alone universal education under the MDGs further exacerbates their situation.

What is ironic is that the right to an education is an inalienable right of which children are beneficiaries but governments always plead lack of resources as their excuse as to why children are not enrolled in schools. Plantation owners and even

¹⁴⁵ n 131 above.

¹⁴⁶ n 123 above

¹⁴⁷ UN Chronicle No 4, 2007; www.un.org/wcm/content/site/chronicle/home/archive/issues2007 [Accessed 20 October, 2012]

¹⁴⁸ n 147 above.

¹⁴⁹ http://www.aco.org/ministry/un/resources/docs/MDG_goals_on_education.pdf [Accessed 20 November, 2012]

¹⁵⁰ <http://consultation.dfid.gov.uk/education2010/files/2010/04/learning-for-all-strategy.pdf> [Accessed 20 November, 2012]

their own families therefore prey on children who force them into child labour.¹⁵¹

In 2009, Ghana's Deputy Minister for Employment and Social Welfare commented that although slavery-like practices in the country's cocoa sector are not widespread, nonetheless *"it is worrying to know that over 50 percent of children in cocoa growing communities engage in at least one hazardous activity which does not auger [sic] well for their health and education."*¹⁵²

The welfare principle as provided for in section 2 of the Children's Act of Ghana states that 'the best interest of the child shall be paramount in any matter concerning a child.' However, this principle must take into account the socio-economic and cultural context of the child. The belief systems and social circumstances have to be addressed through interventions, which engage both the traditional norms and economic realities and in so doing, Ghana's Children's Act will be effectively implemented.¹⁵³ Governments and organisations should step in to educate children on their human rights and the dangers of being unaware of their rights.

¹⁵¹ n 123 above; n 89 above, 17; n 6 above

¹⁵² n 4 above.

¹⁵³ n 131 above.

Chapter 5

Comparison of the African and other legal systems towards prevention of child labour

‘Child labour is both a cause and symptom of poverty. In its worst forms, it robs children of their health, their education and even their lives. As long as poverty pushes some families to send their children to work, the next generation is condemned to the same fates.’¹⁵⁴

Within the African context, a number of instruments are applicable to child labour. These include but are not limited to the African Children’s Charter, the African Charter on Human and Peoples’ Rights, Protocol Establishing the African Human Rights Court as well as the Protocol on Women’s Rights in Africa, which specifically caters for the girl child.

Article 15 of the African Children’s Charter compels state parties to protect children from ‘all forms of economic exploitation’. State parties are to *‘take all appropriate legislative and administrative measures to ensure the full implementation of this article’*.

In addition, the African Children’s Charter speaks of the best interests of the child. The African Children’s Charter uses a subtly different wording from the CRC regarding best interests of a child: ‘the primary consideration’. The difference amounts to only one small word: *‘the,’* but it creates a significant difference in how to give weight to the principle. Whilst ‘*a* primary consideration’ leaves best interests competing equally with other rights on the same footing, *‘the* primary consideration’ suggests that children’s best interests must be given a heavier weighting where there are competing rights.¹⁵⁵ In comparison to the African Children’s Charter, the CRC, which Ghana has ratified, refers to best interests as

¹⁵⁴ A Trebilcock & G Raimondi ‘The ILO’s legal activities towards the eradication of child labour: an overview’ in N Giuseppe, N Luca & P Marco (Eds) *Child labour in a globalized world* (2008) 37; n 137 above, 206.

¹⁵⁵ A Skeleton ‘The development of a fledgling child rights jurisprudence in Eastern and Southern Africa based on international and regional instruments.’ 2009 *African Human Rights Law Journal* 486

being ‘a primary consideration’ in matters concerning the child. However, despite the best interests of the child bearing weight, according to general comment 16 of 2013 regarding the CRC, paragraph 4 (c) points towards the challenge children face regarding obtaining a remedy— *whether in the courts or through other mechanisms – when their rights are infringed upon, even more so by business enterprises. Children often lack legal standing, knowledge of remedy mechanisms, financial resources and adequate legal representation. Furthermore, there are particular difficulties for children in obtaining remedy for abuses that occur in the context of businesses’ global operations.* This is definitely an issue in Ghana since numerous children lack the access to legal redress or are unaware of the avenues to seek redress.

The ACHPR contains various rights that cater for the protection of children. Articles 15 to 18 as well as article 22 cater for the needs of children.

Furthermore, the Protocol of the ACHPR on the Establishment of an African Court on Human and Peoples’ Rights¹⁵⁶ establishes a court. However, according to article 34(6) of the above Protocol, a State-party has to sign a declaration accepting the competence of the court before individuals and NGOs can approach the court. Five states, Burkina Faso, Malawi, Mali, Rwanda and Tanzania, have made declarations under article 34(6) of the Protocol allowing for individuals and NGOs to approach the court. Ghana is sixth state to sign the declaration in terms of article 34(6) of the abovementioned protocol and as such, victims of human rights violations, in this case child labour, can bypass the lengthy procedure before the African Commission.¹⁵⁷

Despite the establishment of the African Court, there have been hardly any cases brought before the court regarding child labour. This is because socio-economic rights fall within a category that is not enforceable by numerous courts of law. For instance, within the Ghanaian context, the abovementioned rights are categorized

¹⁵⁶ Protocol on the African Human Rights Court 1998/2004

¹⁵⁷ www.chr.up.ac.za/index.php/human-rights-news.html [Accessed 25 September, 2012]

as directive principles of state policy. Moreover, socio-economic rights are considered to be of less import than civil and political rights and as such, they do not receive as much attention and resources as the latter rights. Such a discrepancy, however, could be rectified by judicial activism, as is the case in India¹⁵⁸ or domestication of the socio-economic rights as is the case in South Africa.¹⁵⁹ In addition, the judges could make use of civil and political rights to enforce socio-economic rights as was the case in *Republic v. Chief Administrative Officer, La Polyclinic, La-Accra, Minister of Health, Attorney General, and Minister of Justice*¹⁶⁰ where the right to health was advanced using article 14 of the Constitution, which caters for personal liberty. Consequently, the mother and child in casu were able to seek redress based on their right to personal liberty and their right to health was subsequently achieved.

It is worth noting that Ghana has a dualist system implying that domestic law takes preference after which international law may be applied.¹⁶¹ The plethora of international instruments has not been domesticated into the Ghanaian legislation despite Ghana ratifying international treaties. There are a number of international instruments that deal with matters of human rights and business and are listed below.

The Harkin-Engel protocol was put into action as a result of child labour escalating. It was a United States initiative to combat child labour in the abovementioned countries. Signed on September 19th 2001, the Harkin-Engel Protocol, also known as the Cocoa Protocol, proposed guidelines for producing cocoa in adherence with ILO Convention 182, which calls for the eradication of the worst forms of child labour. While supported by various governments,

¹⁵⁸ R Chongwe (2012 July) "South North aspects of human rights and business" Speech presented at Africa Legal Aid Human Rights and Business Conference, Webber Wentzel, Johannesburg. 5 July 2012.

¹⁵⁹ n 158 above.

¹⁶⁰ M Ocran, 'Socioeconomic rights in the African context: problems with concept and enforcement' *Volume 5, Issue 1 Loyola University Chicago International, Law Review* 8.

¹⁶¹ As above

manufacturers, and human rights organizations, the Protocol is not legally binding. However, Ghana has not paid attention to the protocol. Moreover, the Harkin-Engel Protocol is failing to produce any real effective change on the ground. The multinational corporations (MNCs) continue to lack transparency and a real commitment to change their business practices.¹⁶² In 2011 Ghana took steps to implement its commitment to the 2010 Declaration of Joint Action to support the implementation of the Harkin-Engel Protocol (2010 Declaration) with an accompanying Framework of Action. Under the 2010 Declaration, Ghana agreed to provide appropriate resources and coordinate with key stakeholders such as United States Department of Labour (USDOL) and the international chocolate and cocoa industry on efforts to reduce worst forms of child labour in cocoa-producing areas.¹⁶³ What remains to be seen is whether the government of Ghana, through monitoring all projects and efforts implemented under the framework promote coherence and are indeed sustainable.

Moreover, the United States Agency for International Development (USAID) started the Child Labour Regional Project in 2002 as part of the Sustainable Tree Crop Program. Their aim was to raise social and economic standards through agricultural and child labour training programs. To achieve this, Farmer Field Schools were set up in Ghana among other countries. The labour training focused on changing local perceptions regarding production tasks that are considered the worst forms of child labour. Aspiring to end hazardous child labour, the West African Cocoa/Commercial Agriculture Program was run by the United States Department of Labour (USDOL) and the ILO from 2003 to 2006. Accomplishments included the installation of the Child Labour Monitoring System in five countries, and the removal of several thousand children at risk of child labour or engaged in child labour. The lack of continued financial support,

¹⁶² <http://laborrights.org/sites/default/files/publications-and-resources/COCOA05Update.pdf> [Accessed 26 March, 2012]

¹⁶³ United States Department of Labour *2011 Findings on the Worst forms of Child Labor* (2011) 256

however, raised concerns about the fate of the children rescued.¹⁶⁴ Moreover, the government of Ghana completed the pilot phase of the Ghana Child Labour Monitoring System (GCLMS) - a database concerning forced child labour and trafficking at the community level- in 60 cocoa-producing communities across six districts. However, no arrests or prosecutions resulted from this effort. This reflects the lack of an instrument to implement the 2005 Human trafficking Act as well as training for police and prosecutors and resources to prosecute trafficking offences effectively.¹⁶⁵

Within Europe, the European Union Guidelines constitute the framework of intervention for the protection of human rights in third party countries. In June 2004, the European Union (EU) adopted Guidelines on Human Rights Defenders. These guidelines concretise the affirmed will of the European Union and its Member States to promote the principles of the United Nations Declaration concerning Human Rights Defenders in their relations with countries outside the EU.¹⁶⁶ As such, Ghana can benefit from this

The ICCPR provides a general provision for the protection of the child. Article 24(1) provides that, *'every child shall have...the right to such measures of protection as are required by his status as a minor, on part of his family, society and the State.'* This provision, together with the monitoring system for the ICCPR, some of the worst forms of child labour could be curbed. In this regard, the committee, in General comment 17 regarding the rights of the child in article 24, state that the rights provided for in article 24 are not the only ones that the covenant recognizes for children and that, as individuals, children benefit from all civil rights enunciated in the covenant. Moreover, in enunciating a right, some provisions of the Covenant expressly indicate to States measures to be adopted with a view to affording minors greater protection than adults. Since the general comment does not specify the measures,

¹⁶⁴ n 85 above.

¹⁶⁵ www.refworld.org/country,,,GHA,,51c2f3bc53,0.html [Accessed 5 August 2013]

¹⁶⁶ <http://ue.eu.int/uedocs/cmsUpload/GuidelinesDefenders.pdf> [Accessed 25 September, 2012]

it is up to the government of Ghana to specify the measures to be put in place in order to cater for protection of children.

Additionally, the ICESCR in sections 10(3), 12 and 13, provides for protection from exploitations, an attainable standard of health and the right to education respectively. The challenge is that implementation is progressive due to available resources. However, the prohibition by the ICESCR is wider in its ambit than that in the ILO standards and thus is supplementary to the ILO standards in this regard.¹⁶⁷ General comment 13, regarding the right to education, points to the fact that education plays a vital role in empowering children and safeguarding against exploitation, which is one of the issues that Ghana is facing regarding child labour. Furthermore, in terms of the above general comment, such education includes the elements of availability, accessibility, acceptability and adaptability. Accessibility and availability have proven to be issues in the Ghanaian context with parents unable to tap into the educational system and as such, children end up forming part of the labour force in order to fight against poverty. Statistically speaking, 47% of Ghanaian children aged 5 to 17 years of age are assessed to have worked in cocoa sometime during 2009.¹⁶⁸ Furthermore, State parties, implying Ghana among others, have an obligation to ensure that communities and families are not dependent on child labour. The committee especially affirms the importance of education in eliminating child labour and obligations set out in article 7(2) of the Worst Forms of Child Labour Convention. Because of this section, Ghana has the huge burden of ensuring that child labour does not impede education, health, the right to food or lead to discrimination and vice versa. What is more, in terms of General comment 14 of 2000 regarding the right to the highest attainable standard of health, it is noted by the committee that such right is closely linked to the right to education and is dependent upon the realisation of the latter right. With regard to the right to food, the committee affirms that food is important for a person's

¹⁶⁷ n 93 above, 207.

¹⁶⁸ n 98 above.

dignity and important for the fulfilment of other rights such as health and education. However, in terms of General Comment 12 of 1999, there is still a gap between the right and the situation in several countries. Ghana experiences abject poverty and as such, children are forced into labour in order to provide food for their families, a right that is guaranteed in the ICESCR but is without implementation in Ghana and leading to continued child labour.

Furthermore, the ILO has sponsored the two key instruments of international law. First, the 1973 Minimum Age Convention 138 establishes the obligation for countries to work towards a minimum age of 15 for legal employment.

Unfortunately, Ghana has not yet ratified this Convention, a convention that would ensure the protection of children and prevent child labour. Secondly, the 1999 Convention 182 for the Elimination of the Worst Forms of Child Labour calls on governments to identify and quantify the incidence of such child labour, backed by national plans for its elimination.¹⁶⁹ Since Ghana ratified this convention on 13 June 2000, it plays a major role in combating child labour. The ILO aims to achieve this goal of quantifying incidence of child labour by 2016, backed by its ten-year Global Action Plan drawn up in 2006.¹⁷⁰ Interestingly enough, as of 2012, Ghana had not yet submitted the latest report to the ILO regarding Convention 182 despite a request sent to Ghana regarding the report. This illustrates a lack of commitment on the part of Ghana since regular reports are of the utmost import in order to eliminate the Worst Forms of Child Labour.¹⁷¹ In terms of the general observation adopted by the International Labour Convention in the 101st session, the Government representative of Ghana in an effort to defend Ghana gave the excuse that the main challenge in reporting was the bureaucratic procedure through which the reports had to pass. All reports due should have been submitted well before the commencement of the conference.

¹⁶⁹ <http://www.globalmarch.org/campaigns/conventioncampaign/convention182.php> [Accessed 25 September, 2012]

¹⁷⁰ n 61 above

¹⁷¹ www.ilo.org/dyn/normlex/en/f?p=1000:14000:0::NO:14000:P14000_COUNTRY_ID:103231 [Accessed 14 August 2013]

The representative further stated that the another challenge Ghana was facing was that the officers currently responsible for reporting were new and the office's assistance was requested in this respect to build their capacity.¹⁷² This further slows down the process of reporting and makes implementation of Convention even slower in Ghana

Moreover, in 2011 the United Nations Human Rights Council (HRC) endorsed the Guiding Principles on Business and Human Rights (also known as the Guiding Principles) unanimously. This was the first time that normative standards on business and human rights were adopted at a global level making the Guiding Principles an authority and reference point for human rights and business. The Guiding Principles do not create any new legal obligations. They elaborate on existing obligations and practices for business and human rights. Of course a set of soft law guidelines do not make hard law. However, being derived from having exhaustively looked at the core UN treaties and a host of other documents, the Guiding Principles elaborate for States what the duty to protect against infringement of human rights entail or what the duty to protect when negotiating bilateral investment treaties entails. The Guiding Principles are a global reference point as well as a common standard and benchmark for action and accountability. They build upon known and accepted concepts of legal standards including standards from corporate law in the context of developing the Guiding Principles. The Guiding Principles apply to all companies in every sector in every country.¹⁷³

The Guiding Principles are very relevant in the African context and particularly in Ghana. They provide a level playing field for rights holders in Africa and for companies operating in Africa. They also “unpack” and provide guidance on legal and policy implications relating to e.g. outsourcing of services, negotiating investment agreements, business & conflict, overcoming barriers to legal accountability and they also focus on role of home states of MNCs to the extent

¹⁷² As above.

¹⁷³ L Wendland (2012 July) “*South-North aspects of human rights and business*” Speech presented at Africa Legal Aid Human Rights and Business Conference, Webber Wentzel, Johannesburg. 5 July 2012.

that foreign companies operate in Africa. It addresses both the role and responsibility of the host State.¹⁷⁴

Regional and international mechanisms can protect children's rights. However, some individuals argue that the reason why MNCs do not observe human rights is that their sole responsibility is to make profit.¹⁷⁵ However, MNCs should observe socially responsible standards thus the rise of various codes of conduct.¹⁷⁶ Others are of the view that due to the private nature of MNCs, they do not have a positive duty to observe human rights. Their only duty is to obey the law. Of import is the fact that despite the private nature of MNCs, human rights are to be observed nonetheless. The private legal status is irrelevant with regard to observing human rights.¹⁷⁷ What is more, some still insist that MNCs do not know which exact human rights to observe. They view human rights protection as a duty of the state as they cannot observe rights direct to state action. On the other hand, as Muchlinski stated, MNCs affect enjoyment of rights by directly affecting economic welfare of those communities.¹⁷⁸ While some still argue that unfairness will be exacerbated by the selective and politically driven activities of NGOs, whose principal concern may be to maintain a high profile for their particular campaign and not to ensure that all corporations are held equally to account, MNCs are big enough to take care of themselves¹⁷⁹

However, since child labour is a multidimensional issue, it requires multidimensional solutions. Furthermore, child labour is largely determined by economic factors and as such, the solutions need to be connected to the enhancement of economic development of a given region and to the elimination of poverty.¹⁸⁰

¹⁷⁴ As above

¹⁷⁵ n 35 above, 7.

¹⁷⁶ n 30 above, 516.

¹⁷⁷ n 30 above, 516.

¹⁷⁸ n 30 above, 517.

¹⁷⁹ As above

¹⁸⁰ n 99 above, 6.

Children in Ghana need to be aware of their rights as early as possible. This should be done through safe channels in order to prevent them from being vulnerable to exploitation due to lack of knowledge of their rights and insecure circumstances.¹⁸¹ Education is therefore the key that will unlock the doors to development and it will inform children about their rights.¹⁸² Furthermore, such education should start at the grassroots level so that everyone is aware of his or her rights and the application of the law in a given situation.

Since Ghana is an AU member, its citizens and NGOs may file complaints to the African Commission on Human and Peoples' Rights¹⁸³ and the African court and the Committee of Experts on the Rights of the Child. Furthermore, in terms of article 55 of the African Charter on Human and Peoples' Rights, an individual may file a complaint to the abovementioned commission. Alternatively, since Ghana has signed the article 34(6) declaration in terms of the Protocol establishing the African Court on Human and Peoples' Rights, victims may approach such court to obtain redress for the violations of their rights.

In addition, in terms of article 44 of the African Children's Charter, the committee of experts on the rights and welfare of the child may receive communications from any person, group or NGO recognised by the AU or the UN. Thus, an aggrieved party may approach the committee to file a complaint for violations of rights contained in the African Children's Charter. Unlike the African Children's Charter, individual complaints cannot be filed to the Committee on the Rights of the Child

In terms of the Children's Act of Ghana, labour officers or inspectors assist in monitoring child labour in the formal sector.¹⁸⁴ The Legal Resources Centre holds that more and better labour inspectors must be put in place to address the problem. "We either need a far greater number of labour inspectors or the current

¹⁸¹ n 89 above, 24.

¹⁸² n 143 above.

¹⁸³ <http://www.claiminghumanrights.org/ghana.html> [Accessed 27 March, 2012]

¹⁸⁴ Section 95 of the Ghana Children's Act of 1998

labour inspectors must do a better job. The status quo is unacceptable. Labour inspectors must be made accountable. When problems continue to exist in regions, the labour inspectors of those specific areas must be evaluated and held accountable."¹⁸⁵ In addition, child panels in terms of section 27 of the Ghana Children's Act may be approached where there is a violation of human rights. Such panels have non-judicial functions and work to mediate in criminal and civil matters pertaining to children in the above Act.

The UN system comprises the conventional implementation mechanism and the non-conventional mechanism for protection of rights. Within the conventional system, the reporting system comes into play. NGOs, in addition to state reports, may submit shadow reports to provide information regarding lacunae in the state report and the state of human rights in a specific state.¹⁸⁶ The dilemma with state party reports is that the concluding observations are not legally binding on a state so all the various committees can do is hope that there will be compliance. However, states might be compelled on their own to follow the concluding observations recommended by the various committees in order to preserve their reputations.¹⁸⁷ In addition, with regard to the conventional system in Article 18 of the ICESCR, special agencies that work together with the Committee of the ICESCR are appointed.¹⁸⁸ Such agencies also have powers to implements economic, social and cultural rights to a certain extent.¹⁸⁹ CRC is one of two UN instruments that make provision for special agencies. The other UN instruments do not refer to this kind of provision. 'Individual complaints' is another route for implementation of violated rights. However, the CRC does not make provision for such complaints.

¹⁸⁵ n 142 above.

¹⁸⁶ <http://www.communitylawcentre.org.za/cia-projects/spcio-economic-rights/2nd-ed-of-resource-book/chapter%203.pdf> [Accessed 11 June, 2011].

¹⁸⁷ As above.

¹⁸⁸ Agencies include Food and Agricultural Organisation (FAO) and United Nations Education and Scientific Organisation (UNESCO)

¹⁸⁹ n 186 above

With regard to the non-conventional system in the UN, the Human Rights Council (HRC)¹⁹⁰ oversees instances of systematic and gross violations of human rights. The HRC (which is currently a subsidiary of the General Assembly), together with the General Assembly are responsible for establishing special procedures. These entail special rapporteurs, special representatives, working groups and 1235 procedure, which have the authority to take effective action after making a thorough study of violations of human rights. Rapporteurs may visit countries based on invitation and prepare annual reports to the HRC.¹⁹¹ Special rapporteurs are of two kinds, thematic where specific rights and its violations are dealt with, or country specific rapporteurs that focus on all violations of rights in a specific country.¹⁹²

UN 1235 procedure allows for public debate on human rights situations in any part of the world showing consistent patterns of gross violations of human rights. This procedure may end in an examination being carried out such as the appointment of special rapporteurs of the HRC or a special representative of the UN secretary-General.¹⁹³ In addition, the procedure for bringing such complaints before the HRC is in terms of Economic and Social Council (ECOSOC) Resolution 1503, which can be used by both NGOs and individuals in order to bring complaints directly to the HRC.¹⁹⁴ Therefore, a victim of human rights violations in Ghana may approach the HRC and invoke the 1503 procedure.¹⁹⁵ Unfortunately, individual complaints cannot be filed in terms of the ICESCR because the Optional Protocol establishing the Committee on Economic, Social and Cultural Rights has not yet come into force.

¹⁹⁰ <http://www.ohchr.org/civilsocietyhandbook/> [Accessed 25 September, 2012]

¹⁹¹ P Matsheza & L Zulu *Human rights enforcement and implementation mechanisms* (2001) 35

¹⁹² n 191 above, 36.

¹⁹³ n 191 above, 23.

¹⁹⁴ n 191 above, 24.

¹⁹⁵ n 183 above

Unlike the ICESCR, the ICCPR has an optional mechanism of inter-state complaints and individual redress that child victims may use to present their individual complaints before the HRC and seek redress for child labour.¹⁹⁶

Furthermore, the aggrieved party may use the UNESCO procedure to invoke a violation of article 26 of the UDHR.¹⁹⁷ Individuals, groups of individuals and NGOs can submit an individual complaint to the Committee on Conventions and Recommendations of UNESCO if they are direct victims or if they have a sufficient connection to the claimed violation. The protected persons are teachers, students, researchers, artists, writers and journalists. The procedure is confidential from the beginning to the end.¹⁹⁸

Additionally, Employers' or workers' and certain other organizations of Ghana may file complaints through the ILO Procedure in the cases of those conventions that Ghana has ratified.¹⁹⁹ An individual, however, cannot file the complaint. Countries represented at the ILO by trade unions mostly do it. If a State refuses to comply with recommendations of the Commission of Inquiry, the Governing Body can take measures in virtue of Article 33 of the ILO Constitution. It is worth noting that both the UN and ILO do not have enforcing bodies. The CRC, unlike the African Children's Charter, does not have a monitoring system and does not allow for individual complaints. This therefore makes such treaties weak in the scope of their application.²⁰⁰

They may also file complaints according to the EU guidelines on Human Rights Defenders, Death Penalty and Torture²⁰¹ to Embassies of EU Member States and the Delegations of the European Commission. In cases of human rights violations

¹⁹⁶ n 93 above, 214.

¹⁹⁷ n 183 above

¹⁹⁸ As above.

¹⁹⁹ As above; Article 26 to 34 of the ILO Constitution regarding procedure in terms of which a complaint can be brought against a Member State

²⁰⁰ n 115 above, 119.

²⁰¹ n 183 above.

by multinational enterprises, they may also invoke the National Contact Point in an OECD member State.²⁰²

²⁰² As above.

Chapter 6

6.1 Possible remedies against activities of MNCs and the way forward

Ghana can be assigned responsibility for failure to prevent corporate abuses or for failure to offer redress following abuses. This is because of the positive obligations that a state has towards its citizenry to promote, protect and fulfil human rights, thus activating positive obligations of states to regulate private actors within their jurisdictions.²⁰³ Despite this being a plausible solution, problems arise when developing countries such as Ghana and Cote d'Ivoire compete amongst each other in order to attract foreign direct investment. More is the pity that home states are under no international legal obligation to regulate controlling entities operating within their jurisdiction and hold them liable for human rights abuses overseas perpetrated by their business partners. New treaty provisions that hold states accountable before international monitoring bodies, however, could remedy this.²⁰⁴

Furthermore, developed states could open up their judicial system and allow compensation claims be brought against the parent company for its own wrongdoing or those of business partners such as through Alien Tort Act in the United States of America, which has seen companies such as Hersheys pay for crimes committed in West Africa.²⁰⁵

From a regulatory point of view, disclosure laws and reliance on constituencies to act upon the information may enhance corporate transparency. Both home and host states can pass binding regulations demanding disclosure of various kinds of information. Such is the case in the French law, which mandates social and environmental reports for companies listed on the French Stock exchange for

²⁰³ R Mares *The dynamics of Corporate Social Responsibility* (2008) 5

²⁰⁴ n 16 above, 5; n 85 above.

²⁰⁵ n 16 above, 6.

instance.²⁰⁶ Ghana will be able to monitor the activities of MNCs, as it is quite evident that there is an abundance of resources on the African continent and such resources are worth monitoring to prevent African nations from exploitation by MNCs among other actors.

Further, companies could incorporate child labour into staff training and individual performance assessment. In addition, procedures and systems could be put in place where a company could audit its suppliers to ensure that credible means of age verification are in place. Such procedures would also ensure that young workers are employed under formal employee contracts, are not exposed to hazardous work, receive cash payment and are not paid in kind, and payment is made directly to such minor. International standards do say that children 15 years and up work but there are several conditions in order for such work to be in line with international standards. Another recommendation relates to access to remedy. Companies should implement a grievance mechanism that ensures that reports of suspected or confirmed child labour reach their attention of management. This mechanism should be available to all workers as well as members of community and allow filing of grievances to anonymously.²⁰⁷

Use of judicial activism to curb child labour. Examples of this include Public Interest Litigation in which the Supreme Court of India has been involved in an effort to widen the scope of locus standi of persons appearing before that court. Judicial activism is the key instrument that is available. We can ensure that at least those corporations who have responsibility in the commission of grave violation of human rights are held to account. In any given society, when the State is not capable of ensuring the protection of the rights of its community, when the law

²⁰⁶ As above

²⁰⁷ P Leon (2012 July) "Human rights and business accountability-the role of the youth" Speech presented at Africa Legal Aid Human Rights and Business Conference, Webber Wentzel, Johannesburg. 5 July 2012.

passed by parliament is not able to protect, what is left is for the court to play its role in interpreting the law.²⁰⁸

Another alternative could be to have an African regional court with a new division dealing with criminal matters in such a way that those persons and corporations as well as our African corporations that affect communities at a large scale are tried. We have to be willing to address such issues of human right violations with vigour. In addition, the citizens of the host countries of such companies should boycott or ask such companies to be prosecuted among other things. We have to look at some of these principles and how they are translated into some kind of reality.²⁰⁹

At the level of national law, a non-binding code of conduct can acquire legal force in private law. Private law suits can be brought against the firm or organisation adopting a voluntary code by other firms or organisations, consumers, or other members of community. Failure to follow terms of a voluntary code could be evidence of a breach of contract, whether such adherence is an express or implied term of the agreement, or of an actionable misrepresentation. Therefore, voluntary sources of international or national corporate social responsibility standards are as important as any other sources of corporate social responsibility.²¹⁰

Another approach could be to use child labour free zones and the right to education.²¹¹ These are geographic zones where children are systematically withdrawn from work and reintegrated into formal, full-time schools. Such zones exist in India for instance. In Uganda for instance, there is the emergence of the organisation known as Kids in Need, which caters for children on the streets as

²⁰⁸ n 158 above; www.twocircles.net [Accessed 28 September, 2012]

²⁰⁹ R Amoussouga (2012 July) “*Corporate social responsibility v Corporate criminal responsibility*” Speech presented at Africa Legal Aid Human Rights and Business Conference, Webber Wentzel, Johannesburg. 5 July 2012.

²¹⁰ n 30 above, 111.

²¹¹ www.indianet.nl/pdf/ChildLabourFreeZones-RightToEducation.pdf [Accessed 6 September, 2011]

well as for the rights of children caught in child labour.²¹² The above examples serve as proof that such a means of remedying child labour is plausible in Ghana.

Additionally, NGOs have recommended a number of steps that should be followed, including greater supply chain transparency, the guaranteed purchase of a set percentage of fair trade cocoa, the implementation of the Cocoa Protocol verification system, the development of cooperatives to increase cocoa growers bargaining power, and enhanced educational opportunities for rural West African children. Many NGOs like Anti-Slavery International and Free the Slaves have worked to raise awareness about forced child labour in the cocoa industry in Ghana. In addition, they are developing research and advocacy tools, and are lobbying governments and governmental agencies, to make child labour issues a priority. NGOs have also taken action through legal channels. In 2004, The International Labour Rights Fund, along with Global Exchange, pursued legal action in the International Trade Court. The suit sought the enforcement of customs rules, which prohibit the importation of goods produced by forced child labour. Industry members, however, moved to block the suit against the Customs Service, and the case was dismissed.²¹³

Furthermore, the main cocoa producing countries have undertaken measures to deal with the child labour issue to varying degrees. In addition, Côte d'Ivoire and Ghana have instituted laws regarding forced and exploitative labour, mandatory education, and legal minimum working age. However, these laws remain largely unenforced, especially in rural areas.²¹⁴ Thus, access to justice is a very critical issue. Pro bono work will enable that people in rural areas get justice and become aware of the laws and their rights.²¹⁵

²¹² As above.

²¹³ n 6 above.

²¹⁴ n 6 above.

²¹⁵ A Dieng (2012 July) "*Natural resources and civil conflict-An African perspective to human rights and business*" Speech presented at Africa Legal Aid Human Rights and Business Conference, Webber Wentzel, Johannesburg. 5 July 2012

Within Ghana, child labour laws are mainstreamed into national development agendas such as the National Social Protection Strategy, National Education Development Plan aimed to run from 2003-2015, National Plan of Action to Combat Trafficking: Trafficking in Persons Must End and the Ghana Shared Growth and Development Agenda. It has also introduced a number of social programs such as the Livelihood Empowerment Against Poverty, which makes monetary grants to households conditional upon children not engaging in child labour and attending school. As of 2011, the latter program had reached 45000 households in 83 districts. Furthermore, Ghana has received funding from USDOL in order to advance the objectives in the 2010 Declaration pertaining to the Harkin-Engel Protocol by providing direct services to communities such as educational services for children, conducting a child labour survey in 2011, which survey will enable assessment of social assistance in the future. However, the Ghanaian government acknowledges that the above efforts, although helpful are still insufficient to combat child labour.²¹⁶

There are several underlying causes hindering finding a solution to the problem of child labour. Poverty, which has crippled many African nations, is one of the causes of child labour in Ghana. This leads to the assumption that child labour is not a deliberate choice of children and their families but the outcome of necessity.²¹⁷

Although almost every country has laws prohibiting the employment of children below a certain age, legislation is difficult to draft and too often proves ineffective.²¹⁸ Furthermore, laws tend to be particularly impotent where the state itself is economically dependent on child labour as is the case in Ghana. Laws introduced under international pressure have failed to break up this institutionalised abuse of children.²¹⁹ Moreover, due to competition between

²¹⁶ n 163 above, 257.

²¹⁷ n 99 above, 5.

²¹⁸ Available at: <http://www.indiatogether.org/2011/feb/ksh-labour.htm> [Accessed 6 September, 2011]

²¹⁹ <http://www.eurasianet.org/node/62728> [Accessed 6 September, 2011]

Ghana and Cote d'Ivoire to attract foreign direct investment, they tend to relax enforcement of regulations giving way to child labour amongst other negative effects.²²⁰

Another setback in the protection of the rights of children is the varying definitions of a child. There is no consensus on a uniform age at which one is considered a child. This could create some technical problems when trying to implement the rights of children.²²¹ For instance, Malawi is dependent on the labour-intensive tobacco crop for most of its foreign exchange. Here too legislation for a minimum working age made little difference to widespread engagement of children on the farms.²²²

One of many obstacles is corporate self-regulation. It is far from developed. This remains a challenge as some consider it to be a controversy while others consider it to be a step too far as the MNCs will be required to become quasi-governmental organisations that would indeed engage in political decisions.²²³

Radu Mares points out that in as much as law oriented approaches such as host states protecting human rights are in place, a responsibility of home states to protect human rights oversees by regulating parent companies incorporated in their jurisdictions is not yet recognised under current international law. This implies that there is a lack of political will on the part of governments to ensure that the laws protecting children are enforced. This is but another hurdle that has to be overcome in the international arena.²²⁴ By relying so heavily on international treaties and on national regulation, law-oriented approaches depend on state action. Host states tend not to enforce such regulations or properly regulate business impact. These make enactment of strong deterrent legal frameworks particularly difficult.²²⁵ This was illustrated in the USDOL 2011 Findings on the

²²⁰ n 16 above, 5.

²²¹ See Chapter 4 regarding the definition of a child.

²²² n 61 above.

²²³ n 30 above, 525.

²²⁴ n 16 above, 13.

²²⁵ n 16 above, 15.

Worst Forms of child labour where it was stated that gaps remain in the enforcement of laws in Ghana pertaining to Worst forms of child labour.²²⁶

What is more, the law-oriented approach as a deterrent is challenging because it does not involve state action and much of what states do is not of a regulatory nature. Furthermore, lawmakers in developed countries increasingly rely on private enforcement due to budgetary constraints and international competitive pressures. Deterrent measures, in addition, do not allow for leading businesses that have done more than respect human rights.²²⁷

Additionally, social clauses try to connect labour standards with trade. They maintain fair competition by ensuring that those who respect minimum labour standards are not penalised. However, these clauses face opposition due to lack of reference to the broader problem of imbalances in the global free trade structure. Others claim those social clauses are nothing more than, a ‘protectionist wolf in social clothing’ so to speak. Moreover, some countries strongly support social clauses but have not ratified many of the ILO Conventions.²²⁸ Approaching child labour from the perspective of social clauses alone could be of little or no importance. A large-scale attack is a firm solution to the problem of child labour.²²⁹

The Ghana Children’s Act provides for a child panel. Such panel, which has the potential to deal with issues such as child labour but only if it were fully operationalized.²³⁰

NGOs propose the modification of company laws to expand director’s duties to include a *‘specific duty of care for both the community and the environment.’* This would ensure some level of accountability when the protections offered by regulations are

²²⁶ United States Department of Labour 2011 Findings on the Worst forms of Child Labor (2011) 253

²²⁷ n 16 above, 16.

²²⁸ n 134 above, 326.

²²⁹ n 134 above, 342.

²³⁰ n 26 above, 154.

lacking.²³¹ In addition, group liability makes the parent company automatically responsible for the subsidiary's behaviour, or for direct liability of the parent company for its own failings that resulted in harm overseas.²³²

The above possible solutions are but the tip of the iceberg. There are various other solutions and remedies to the child labour issue since it can be approached from several angles. Due to the evolving nature of the issues, it is important that we keep striving to ensure that we find effective solutions in order to curb child labour.

Ghana signed and ratified the Convention on Settlement of Investment Disputes in 1966, which allows for arbitration under the International Centre for Settlement of Investment Disputes (ICSID). In addition, it is a signatory to the UN Convention on the Recognition and Enforcement of Foreign Arbitratory Awards.

²³³These avenues could also be used as a source of remedy for child labour.

The National Steering Committee on Child Labour (NSCCL) in Ghana has the task to oversee coordination, implementation and monitoring of programs targeting the Worst Forms of Child labour. The Child Labour Unit of the Ministry of Employment and Social Welfare serves as the secretariat of the NSCCL. However, the secretariat has been unable to fulfil the mandate because of a lack of financial resources.²³⁴

²³¹ n 16 above, 8.

²³² n 16 above, 15.

²³³ Available at <http://www.state.gov/e/eb/rls/othr/ics/2012/191155.htm> [Accessed 8 August 2013]

²³⁴ United States Department of Labour *2011 Findings on the Worst Forms of Child Labor* (2011) 255

6.2 Conclusion and recommendations

A proper balance should be struck between state and MNC responsibility.²³⁵ Sole reliance on a state-centric approach is no longer adequate because it fails to reflect the full range of regulatory actions and responsibilities to which MNCs may be subject, or voluntarily undertake in a complex globalising environment. In addition, the state-centric approach does not allow for adequate examination of the full range of parties that may seek to exert regulatory influence upon these firms.²³⁶ What is more, in order to analyse the process of regulation, it is imperative to map out the variety of players involved in MNC regulation and to identify their respective roles and interests. Furthermore, it is also important to explain how the substantive content of any regulatory agenda is ascertained.²³⁷

One should take into account that elimination of child labour does not necessarily imply the enhancement of child welfare.²³⁸ The community and government should be partners in the process of eradicating child labour.²³⁹

There is also a need to design strategies for mobilizing all actors around the issue of child labour.²⁴⁰ Of importance also is the fact that the gender aspect is worth consideration. Often, the girl child is a victim to child labour even to the extent of being used as child labour.²⁴¹

A rights-based approach to child labour, relying on laws and their enforcement, is a necessary but insufficient solution to child labour. Broader human development interventions relevant to the underlying causes must play a role.²⁴² Progress towards education for all children is the development indicator most closely linked with

²³⁵ n 35 above, 16.

²³⁶ n 30 above, 81.

²³⁷ n 30 above, 81; n 35 above, 17.

²³⁸ n 99 above, 7

²³⁹ n 211 above; S Sanna 'Slavery and practices similar to slavery as worst forms of child labour: a comment on article 3(a) of ILO Convention 182' in N Giuseppe, N Luca & P Marco (Eds) *Child labour in a globalized world* (2008) 126

²⁴⁰ n 211 above.

²⁴¹ As above.

²⁴² n 61 above.

child labour. Every full-time student is one less potential child worker. There is correlation between those countries lagging behind in education targets and those in which child labour thrives, such as Pakistan and Nepal.²⁴³ The integration of child labour concerns into national development strategies, backed by effective legislation, is therefore the preferred route to a lasting solution.²⁴⁴

A prohibition on child labour will never be sufficient in itself to eliminate a problem rooted in economic and cultural factors and that the aim of legal measures cannot be to transform a child worker into a starving child. A blanket prohibition when not combined with measures aimed at addressing the very roots of the problem and assisting children, who leave child labour, is very frequently useless.²⁴⁵

There is no quick fix for the problem of forced child labour in Ghana. The complexity of the issue requires continued commitment from all parties.²⁴⁶ It would also be beneficial if the media played a major role in ensuring that issues of child labour are circulated in as many forms as possible in order to protect the rights of children. In addition, since children are at the centre of the debacle, I recommend they play a major role and contribute to improving their welfare and as such eliminating harmful practices emanating from child labour. They should have their voices heard and if possible form part of the child panel in Ghana. According to general comment 16 of 2013 regarding CRC, children have a specific right “*to be heard in any judicial and administrative proceedings affecting the child*” (art. 12, Para. 3, of the Convention). This includes judicial proceedings and mechanisms of conciliation and arbitration that concern abuses of children’s rights caused or contributed to by business enterprises. As set out in general comment No. 12, children should be allowed to voluntarily participate in such proceedings and be provided the opportunity to be heard directly or indirectly through the assistance of a representative or appropriate body that has sufficient knowledge and understanding

²⁴³ As above.

²⁴⁴ As above.

²⁴⁵ n 99 above, 7.

²⁴⁶ n 6 above.

of the various aspects of the decision-making process as well as experience in working with children. In addition, there may be instances when business consults communities that may be affected by a potential business project. In such circumstances, it can be critical for business to seek the views of children and consider them in decisions that affect them. Ghana should provide businesses with specific guidance emphasizing those processes must be accessible, inclusive and meaningful to children and take into account the evolving capacities of children and their best interests at all times. Moreover, legislation should reflect the input of children in Ghana. Laws need to be compatible with the Ghanaian situation. We need jurisprudence that reflects the African view on African rights and specifically children's rights with the participation of children.²⁴⁷

²⁴⁷ n 155 above, 483.

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