

**Why ILO Convention 138 should not be referenced in the General Comment  
on the Rights of Adolescents:  
An argument from human rights principles**

September 2016

## **Preface**

In 2015 the UN Committee on the Rights of the Child was considering the adoption of a General Comment on the Rights of Adolescents that would include for the first time a direct reference to the Minimum Age Convention concerning the Minimum Age for Admission to Employment of the ILO C. 138, 1973. The General Comment would become part of the Convention on the Rights of the Child. A group of academics and practitioners involved with issues related to children's work and children's well-being came together to present arguments to the CRC Committee as to why including a reference to ILO C.138 would not be in children's best interests. Members of this group were invited as representatives of the larger group to meet with the CRC Committee in Geneva during May of 2016 and to present some of these arguments in person. Following the presentation the CRC Committee asked the representatives and through them the broader group of researchers and practitioners to prepare an argument based on human rights principles rather than experience and evidence as to why ILO C.138 should not be referenced in the General Comment on the Rights of Adolescents. The following document was developed through a collaborative effort of the broader group and submitted to the CRC Committee in September of 2016.

In addition to the principle argument a series of supplementary materials including several case studies were prepared and submitted to the CRC Committee in September of 2016.

The efforts to prevent the reference to ILO C. 138 in the General Comment on Adolescents were not successful however the informal group of researchers and practitioners decided to form the Children and Work Network and continue trying to influence children and work / child labour policies and programs.

## **Why ILO Convention 138 should not be referenced in the General Comment on the Rights of Adolescents: An argument from human rights principles**

Why general minimum-age prohibitions on employment are incompatible with basic principles of human and children's rights

This note has four parts:

- I. First, we argue that accountability to children means that attention to the reality of children's condition and lives is core to the Committee's mandate
- II. Second, we detail specific ways in which ILO C.138 does not comply with the Universal Declaration of Human Rights or the CRC
- III. Third, we explain why, when ILO C.138 or other conventions conflict with the UDHR or CRC, the UDHR and CRC should have precedence
- IV. And finally we provide recommendations for the initiation of a process aiming to bring ILO conventions 138 and 182 in line with the CRC

### **Part I. Accountability to children means that attention to the reality of children's condition and lives is core to the Committee's mandate**

**Article 43** of the UNCRC establishes the Committee on the Rights of the Child "for the purpose of examining the progress made by States Parties in achieving the realization of the obligations undertaken in the present Convention". This use of the word "realization" makes clear that the Committee's mandate necessarily involves direct accountability to children, as manifested through its obligation to ensure fulfilment of the articles and principles embodied in the CRC. Such accountability goes beyond scrutiny of policies, legal norms and standards to focus on their impact on children's lives, in all cases ensuring that children's rights and best interests prevail. Accountability to children necessitates a child-centred perspective.

Where necessary, achieving this principle may mean overriding both pressures from, or the interests of, other parties, along with international treaties and instruments that are not in conformity. Some have argued that distorting the original child well-being and development intents of the CRC to benefit the particular agenda of a given government agency or other organization itself constitutes a form of exploitation that violates UNCRC **Article 36**.

In the case of children's work, a child-centred perspective entails recognition and facilitation of work that is developmental and beneficial to children's wellbeing and social integration as well as protection from work that is detrimental. This makes it important to consider potential work hazards in the context of a wider assessment of children's situation, the social and developmental value placed on their work, the alternatives available to them and their families, as well as their realistic long-term prospects. It means nurturing and not

undermining the resilience children show in very difficult circumstances, respecting the dignity and pride they gain from supporting themselves and their families and not inadvertently dismantling the important protective and enabling structures that children depend on.

In defining detrimental work, **Article 32** of the CRC cites the right of the child 'to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development'. Addressing hazardous and exploitative work undertaken by children of all ages is therefore the priority.

Safe and appropriate work in line with children's development is sanctioned in various articles of the CRC. **Article 29**, which refers to education directed to "the development of the child's personality, talents, and mental and physical abilities to their fullest potential", is not restricted to formal schooling but also allows for informal learning of life, pro-social and emotional skills through work in familial and community contexts. Children themselves often refer to their work as providing nutrition (physical development), skills (mental development), opportunity to express compassion (the key attribute associated with spiritual development), help to the family in solidarity with parents and siblings (the essence of moral development) and social knowledge and connections (social development). Further, children's participation in the household economy is an integral feature of child rearing in many indigenous and ethnic minority cultures in particular, and thus conserving safe and appropriate work as a right is entirely consistent with **Article 30**.

The right to undertake work that enhances children's development and wellbeing is also enshrined in **Article 27**, which recognizes "the right of every child to a standard of living adequate for the child's mental, spiritual, moral, and social development". If parents and families cannot alone provide this standard of living, and States Parties do not provide it, then the child, by default, has the right to help achieve such a standard. **Article 32** endorses this principle in highlighting the right to protection against work that is harmful to these same dimensions of children's development; the corollary being that work NOT harmful in those dimensions and in alignment with the rights provided in **Article 27** is both acceptable and indeed beneficial. Thus, the rationale underlying **Articles 27** and **32**, taken together, is that children have both a right to this broad-based development plus a right not to have it undermined by harmful work.

In further pursuance of children's right to work, **Article 5** provides scope and legitimacy for parents in deciding on and supervising the work of their children, which can have economic, learning and protective motives. **Article 15** confers on working children the right to organize and put pressure on trade unions to accept, include and defend them as workers or, in the absence of formal trade union membership, to form their own organizations. Accordingly, if there is insufficient legal reason to intervene in children's lives to ban them from working, then such unwarranted intervention may be regarded as constituting "arbitrary or unlawful interference", which is prohibited under **Article 16**.

## Part II. Specific ways in which C.138 does not comply with the Universal Declaration of Human Rights or the CRC

When considering the appropriateness of including reference to ILO C.138 in the General Comment, the key question is whether, or the extent to which, C.138 complies with the principles of the Universal Declaration of Human Rights and the CRC (particularly the Preamble, General Principles and **Article 32**, but also other articles as indicated above). Similarly, it is important to ask whether C.138 is more protective of children than ILO C. 182, which addresses the Worst Forms of Child Labour. ILO C.182, which was drafted after the UNCRC came into force, explicitly took the UNCRC into account, whereas C.138 preceded the UNCRC and does not.

Convention C.138 differs from the ILO's earlier minimum-age conventions in one fundamental respect. Having been mandated in 1919 to impose "such limitations on the labour of young persons as shall permit the continuation of their education and assure their proper physical development"<sup>1</sup>, the ILO conventions prior to C.138 targeted specific employment sectors thought to be harmful or hazardous to children: large-scale industry (1919), employment at sea (1920), large-scale agriculture (1921) and so on. These Conventions did not aim to exclude children from all forms of work, or earning money. C.138 in contrast imposes a minimum age (15) for admission to "employment or work in any occupation".

Although C.138 allows for children to undertake "light work", this is supposed to be specifically designated and governments rarely attend to this kind of detail, more often instituting a total ban. Light work is sanctioned for only two years below the age at which school is compulsory, automatically excluding younger children who could benefit from such work. In many parts of the world work contributes directly to children's development, as we have indicated. Learning values and participating in cultural activities through work generally starts at a much younger age than C.138 allows, accommodating children's natural propensity to mimic and join in family work as part of their own developmental initiatives.

The view of ILO and others that C.138 (and national laws and regulations complying with it) is the most effective means of protecting children rests on the assumption that younger children are inherently more vulnerable to harms from work than are older children. This justifies excluding them from work, often with the additional claim that work impedes their right to school education and play, and that a simple ban is a more straightforward and effective means for keeping children safe than are the alternatives. However, evidence from research and practice across diverse contexts<sup>2</sup>, not just in low and middle income countries but also in Europe, the USA and other industrialised settings, brings all of these assumptions

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<sup>1</sup> Treaty of Versailles Article 427, 1919

<sup>2</sup> See Annex 1

into question, highlighting that C.138 is not only out of step with the Universal Declaration of Human Rights and the CRC,<sup>3</sup> but also with the current state of scientific understanding and knowledge on these issues.

In light of sound and clear research evidence, we conclude that ILO C.138, is inherently in contradiction with many principles of the CRC, including the principles of the best interest of the child and the right of the child to have his or her views taken into account. It equally omits full consideration of human rights principles of indivisibility of rights and the right to self-determination. Moreover, ILO Convention 182, relating to the Worst Forms of Child Labour, is intended to protect children against harmful work much more completely than does C.138. Therefore, the net contribution of C.138 is primarily to prohibit children from work that is safe. This indicates that instead of focusing on C.138, other regulatory interpretations of Labour and Human Rights Instruments can effectively protect children from harmful and exploitative work in ways that are in line with CRC **Article 32** and other articles mentioned above.

Specific ways in which C.138 does not comply with the Universal Declaration of Human Rights or the CRC are as follows:

1. There is no evidence that a general minimum age prohibition is inherently protective of children's rights and wellbeing, and plenty of evidence indicating that it can undermine children's best interests.
  - a) It ignores that learning through supervised engagement in work is one of the most fundamental mechanisms of human development and that children normally seek it, starting as early as they begin to imitate adult behaviours. It overlooks children's multiple contributions to family, economy and social life as it does the positive functions that safe work can play in children's lives. For many children, initiation into work comprises a core feature of their learning and social integration, as well as contributing to family survival. Moreover, learning, play and work are frequently intermingled in children's behaviour and lives, defying the discrete categories that arise from artificial spatial and institutional separation of these activities.
  - b) Enforcing a minimum working age places working children under that age in a legal vacuum and excludes them both (i) from exercising a normal human development process and (ii) when entering labour markets, from protections, benefits and services that should be accessible by all workers as a matter of right.
  - c) Work, especially in the company of parents or other guardians, sometimes enables the supervision and protection of children who would otherwise be alone and unoccupied, perhaps in hazardous situations. Enforcing a minimum working age removes such protection.

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<sup>3</sup> This is hardly surprising since the principles behind C.138 were developed almost three decades ahead of the first human rights instrument (Declaration of Human Rights, 1948) and 70 years ahead of the CRC (1989).

2. **In focusing on removing younger children from work (which, as indicated, in practice includes even light work), C.138 infringes children's other rights as outlined in the Universal Declaration of Human Rights and the CRC.**

- a) **Article 41** states that the UNCRC should not impede the realization of other rights granted children through national or international law. UDHR and the 1966 **Covenants** clearly articulate everyone's right, without qualification by age, to work and to join workers' associations or to form their own associations. Abbreviation of these human rights to children below a specified age is legitimate only if demonstrated to be necessary (in the absence of other protective alternatives) and effective in providing protection. There is no evidence that C.138 fulfils either criteria. In fact, it violates the principle of non-discrimination and the right of everyone to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment, as laid out in the **Preamble and Article 2 (General Principles) of the CRC and in Articles 2 and 23 of The Universal Declaration of Human Rights.**

Denial to children of the fundamental human right of workers to organize is an egregious violation of their rights that has no basis in human rights law and contravenes children's participation rights (CRC **Articles 12-15** inclusive). This is also in contravention of **ILO Conventions 87 and 98.**

- b) Mechanisms for monitoring of C.138 focus on the numbers of children removed from work and general attendance at school and do not include effects on children's well-being and development, which is necessary to determine whether or not these interventions served the best interests of the child or other General Principles of the CRC.
- c) As indicated, children's work may be essential to maintaining a standard of living that is conducive to their development (as mandated in **Article 27**) as well as to the integrity of the family insofar as their work contributes to individual and family survival, or improved quality of life. Therefore, removing children from work simply because of their age can endanger family livelihood strategies necessary to fulfilling their obligations to the child under **Article 27** and in some circumstances may even threaten the child's right to life and survival (**Article 6**).
- d) Work can contribute to developing a variety of social and technical skills, and so to children's development to their fullest potential (as provided in CRC **Articles 27, 29, and 32**).
- e) Where income from children's work is indispensable for their continued school enrolment, removing children from work undermines realisation of their right to education (**Article 29**).

- f) For all the above reasons, imposition of a general minimum working age can be contrary to the best interest of the child (**Article 3**).
  - g) CRC **Article 32**, Clause 2 (a) requiring States Parties to “provide for a minimum age or minimum ages for admission to employment” was intentionally phrased in this way rather than as a general universal minimum age for admission to all kinds of employment or work. It is therefore consistent with the principles of targeted minimum-age measures restricted to specific sectors, or conditions and relations of work that are hazardous to younger children (as originally recognised in ILO’s sector specific minimum age conventions prior to C.138, and in ILO Convention 182). The CRC wording thus facilitates and endorses the principle that targeted rather than general minimum ages can be necessary and effective.
3. C.138 and national laws and regulations complying with it do not address root causes of harmful child work and are inherently punitive, and thus can inadvertently harm the children they intend to protect.
- a) Prohibiting harmful practices does not address their root causes. Consequently, rather than reducing demand, banning harmful work for children and penalties for infractions risks driving children into less visible and more dangerous activities where they enjoy even less protection. Elimination of children’s work in easily monitored sectors has often led to children becoming involved in the most detrimental forms of work (including those forms listed under ILO Convention 182).
  - b) Advances in child protection measures, community work and other approaches in the field, conforming to the CRC and its spirit but outside the standards demanded by C.138, have proved that peaceful and sustainable solutions can be very effective and welcomed by children, parents and communities. The social objective of measures regulating children’s work should be viewed as ensuring human rights for the most vulnerable individuals, families and communities rather than the narrower objective of simply conforming with labour standards.

### **Part III. Why the CRC should take precedence over ILO conventions when these conflict with basic principles of the CRC**

Since international law by custom prioritizes the core international human rights treaties over other conventions and instruments, the CRC does, and indeed should, take precedence over all other treaties and instruments concerning children’s rights and well-being, for the following reasons among others:

- a) As well as reiterating that children are subjects of all Human Rights (Preamble), the UNCRC was promulgated on the basis that children are entitled to special care and



assistance (Preamble and **Article 3**). It is supplementary to the Universal Declaration of Human Rights and built on the same essential values and principles. In conferring rights of provision, protection and participation to every human being below the age of 18 years (unless under the law applicable to the child, majority is attained earlier) it is the paramount treaty internationally that concerns children.

- b) It is also the most widely ratified international human rights treaty in history,<sup>4</sup> as well as being legally binding on all States Parties.
- c) Finally, it provides (**Article 3**) that in matters of children's rights, the best interests of children should be given primary consideration, this principle giving an underpinning for all international agreements that concern children, including (and in particular) those that are not human rights instruments. Children should play a part in all deliberations concerning their best interests.

When reviewing the extent to which other treaties and instruments are compliant with the CRC, it is important to acknowledge the underlying features and principles of the CRC, as follows:

**a) The CRC is notable in considering children's rights in the wider contexts of children's lives, which in itself is protective.**

The CRC stands out from many other instruments and treaties in its appreciation that the most effective way to realise children's rights is to enable and facilitate, rather than to enforce, social change. It makes clear that this goal is achieved by respecting, supporting and working with the structures, institutions, norms and values that support children in the contexts in which they live and by ensuring that children are able to be active members of their societies. Thus, the treaty takes 'due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child' as well as confirming that 'the child should be fully prepared to live an individual life in society' (Preamble).

The CRC also recognises the prominent roles played by parents and families in children's lives and makes clear that supporting them in these roles is essential to the realisation of children's rights. The **Preamble** refers to the family as the 'fundamental group of society and the natural environment for the growth and wellbeing... of children' and states that the family should be 'afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community'. Similarly, **Article 5** asserts that States Parties 'shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the

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<sup>4</sup> Currently 196 countries are parties to the treaty, some with stated reservations or interpretations

present Convention'. This is not to condone rights violations simply because certain values and practices are acceptable in specific cultural communities and contexts. Rather, it is to highlight that peers, families and others have a crucial protective role in relation to children and that measures that build on cultural consensus are more likely to have positive outcomes for children than are those that ignore, or unduly dismiss or Currently 196 countries are parties to the treaty, some with stated reservations or interpretations stigmatise, local values and understandings. The approach of conscientization has shown that critical reflection and analysis can effectively and more safely bring about change from within local cultures and contexts.

In their application to working children, these twin principles imply that decisions about what is safe and appropriate for the young should be arrived at through discussion and negotiation with local institutions and with the children themselves, rather than by enforcement of a universal, globalised age-based criterion. Moreover, they imply that laws or regulations that do not take account of the economic and social circumstances of parents and families may render children more vulnerable. Aside from the family, other institutions that may be invoked in the protection and enablement of children's rights include religious and civil society organisations, such as working children's organisations and similar bodies.

- b) **The CRC provides a holistic framework for the full realisation of all civil, social, political, economic and cultural rights for all children everywhere, thereby upholding the fundamental principle that children's rights are indivisible.** This means that to align with the CRC, all instruments and treaties concerning children, including those that focus on a single practice or circumstance like children's work, must be mindful of conserving all of the rights awarded in the CRC. The monitoring of any implementation of **Article 32**, therefore, should attend to whether a ban on children's work leads to serious violation of their other rights.
- c) The General Principles comprise a set of overarching rights that are essential for the realisation of all rights embodied in the CRC, as well as those bestowed in other treaties concerning children. Thus, the principles of non-discrimination (**Article 2**), best interest of the child (**Article 3**), right to life, survival and development (**Article 6**) and right to be heard (**Article 12**) *must* find expression in all other articles, treaties and instruments concerning children's rights.

#### **Part IV Recommendations to the Committee**

The CRC is both applicable universally to all children in all situations and settings, and attentive to local contexts. This presents a challenge for implementation, in that the standards and thresholds for children's rights and the most appropriate and effective means of achieving these standards and thresholds are open to interpretation. There is

widespread agreement, however, that no child should be engaged in hazardous or exploitative work and that children in poverty share the same right to protection from such work as do all other children. Given the lack of clear and established criteria for judging harm to children, together with the extensive evidence of (unintended) detrimental consequences of general minimum-age based bans for children and their families, positive measures that facilitate schooling and safe work by children are both more efficacious and more closely aligned with the requirement that children's rights be understood within the wider contexts of their lives (in the CRC Preamble and General Principles).

The arguments provided in sections I – III above suggest clearly that the most effective step towards bringing international labour standards (and national measures based on them) in line with the UNCRC would be the revocation by ILO of its Convention 138. Understanding that this is an unlikely prospect in the foreseeable future, we make the following concrete recommendations to the Committee.

1. The Committee should remove any endorsement or promotion of ILO C.138 from its General Comment on the Implementation of the Rights of the Child during Adolescence.
2. Reference to ILO Convention 182 in the General Comment should be explicitly coupled with the requirement to interpret and implement it with respect for children's rights, and with consideration for local contexts, to ensure that children's best interests are served and children are not harmed by it.
3. The Committee should advise States Parties that CRC **Article 32.2** (a) requiring States Parties to "provide for a minimum age or minimum ages for admission to employment" should not be interpreted as endorsement of general minimum-age legislation but rather as endorsement of targeted prohibitions, where necessary, to protect younger children in specific situations or sectors from specific harms.
4. The Committee should invite the ILO, in collaboration with the Committee and other qualified agencies and experts, to initiate a process of dialogue aimed at bringing the ILO's child labour standards into conformance with the CRC. This can be initiated during the period leading up to the ILO's 2017 Child Labour Conference, and continued thereafter with the various steps necessary to bring ILO standards into conformance with the CRC (including compiling existing information, identifying gaps, further data collection, analysis, workshops and consultations).
5. The Committee should make efforts to assist States Parties (through training and advisory services, and other means) to update or adapt their legislation relating to children's work so that they are in conformance with the CRC.

6. Finally, the Committee enquired about our position in relation to the legal framework adopted by the Bolivian government in relation to children's work. The Bolivian initiative stands out as having been developed in consultation with children and adolescents and cast firmly in a human and child rights framework, while also recognising that work and responsibility can have an important role in the full development of the child. Thus, it is the position of the group that the Bolivian initiative deserves attention and consideration as a more holistic attempt, explicitly aligned with child rights principles, to protect children from exploitative and harmful work.

We, as a group of researchers and practitioners, would be ready to assist the Committee in implementing these recommendations.

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## Annex I

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