

China's Rising Impact in Sub-Saharan Africa and the Use of Child Labour: Is there Room for Corporate Social Responsibility?

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Abstract: China's increasing rise in Africa has been the topic of many studies and debates in recent years. How Chinese investments and multinational enterprises (MNEs) presence on the continent impact child labour, particularly children's right to be free from economic exploitation, and in general African labour standards, have, however, received little attention. Drawing on the insights of a country case-study of Chinese mining companies in Katanga, Democratic Republic of Congo (DRC), where evidence of child labour exploitation has been found, this thesis will start by providing a brief and broad overview of the Sino-African engagement and its main features to contextualize the motives of much of the critique, followed herein by elaborated considerations on the importance of considering labour rights as human rights. This thesis also intends to shed some light on the issue of child labour itself, through an analysis of the international legal protection, instruments and concerns on the issue.

Finally, the aim of this study is to examine whether or not there is a role for corporate social responsibility (CSR) to play in Sino-African economic partnership. The already existing conceptions of CSR will probably need to be adjusted in order to reflect the real Sino-African context and include prominent issues, such as child labour. In this context, a non-exhaustive analysis of possible codes of conduct will be identified to emphasise the trends with regard to CSR, especially those in relation to children. Initiatives and standards that may be used as a basis for Chinese companies to further adhere or ground their activities will also be highlighted.

Moreover, it will be concluded that Chinese 'business culture' needs to develop more responsible *standards and a higher understanding to uptake CSR standards and practices when operating in Africa.*

Keywords: China, Africa, Chinese investments in Sub-Saharan Africa, Democratic Republic of Congo, Child Labour, International Labour Organization, Human Rights, Child Rights, Corporate Social Responsibility.

I. Introduction

With the rampant proliferation of Chinese investments in Sub-Saharan Africa, significant questions and debates about pernicious effects on human rights started being raised. However, the spotlight of these queries has not yet sufficiently addressed their potential impact on children in Africa, and specifically seen the issue from a labour and human rights perspective, ie, the impact on child labour. In this sense, the aim of this thesis is to start from a broad overview of Sino-African main features and implications and elaborate further on the importance to focus our concern on labour rights and human rights and, therefore, attempt to grasp to what extent has child labour been (nationally and internationally) combated or prevented.

An analysis of a case-study of Chinese mining companies in the Democratic Republic of Congo (DRC) will exemplify how have Chinese companies dealt with and addressed the issue of child labour, and to what extent have children's rights been ensured, protected or rather neglected, while shedding some light on Chinese companies degree of compliance with national and international laws and standards on the matter.

It is this thesis purpose to conclude whether or not there is indeed a role for corporate social responsibility (CSR) and, taking into consideration the already existing conceptions of CSR, how could Chinese investors

eventually make their business more socially responsible and reflective of the current realities of the Sino-African context.

This thesis does not seek to provide though an exhaustive and definitive analysis of the impact of Chinese investments on child labour in Africa, as it is a very vast topic that should be subject to future research, but mainly to identify important areas of study that urge further attention, such as CSR, and yet to emphasise some of the concerns about the social impact of Chinese presence in the African continent. Finally, thoughts and considerations will be summed up in the conclusion.

II. The Rise of Sino-African Relations – Background and Context

'A new wind from the East is blowing across Africa'¹ with a striking impact all over the continent and attracting notable attention from the West. Throughout the 1990s, China went through a process of industrialisation and became one of the fastest rising economies in the World. The economic growth allied to a population of more than one billion demanded more energy supplies and other natural resources since China's domestic production could not keep path with the increasingly growing demand.² China established itself as an influential player³ in the African continent and its investments in the region became a boon and an opportunity to meet its raw materials needs to nourish its economy, while supporting with infrastructure some of the most despotic and corrupt African regimes, challenged by the international scrutiny and criticism.

Between 2000 and 2005, China was the most important and influential source of foreign direct investment (FDI) in Sub-Saharan Africa,⁴ according to the European Parliament's Report on Chinese Resources and Energy Policy in Sub-Saharan Africa (2007).⁵ China's consumption of aluminium, copper, nickel and iron ore increased from 7 to 20 percent⁶ from 1990 to 2005, which is indeed exemplificative of China's economic interests in resource-rich countries like DRC, a fact that has raised special concerns due to an alleged use of child labour, as it will be analysed in chapter IV of this thesis.

In 2009, China became the World's second largest net importer of oil, behind the US and overcoming Japan, helped by its strong ties with oil-rich Sudan. It is projected that China's needs for energy will increase 150 percent by 2030⁷ and, therefore, it is very likely that Chinese companies⁸ will continue to invest in resource-rich countries in the future. In short time, China has notably expanded its business beyond borders and attracted the interest of other foreign investors in the region. China found in Sub-Saharan Africa a key-region⁹ for its thirst for 'energy security',¹⁰ which became a prominent, instrumental and strategic goal, enabling its economy to grow even faster and achieve a stance as a world power.¹¹

Since the end of the Cold War and the reinforcement of Deng Xiaoping reforms, in late 70s, that China-Africa relations and foreign policy evolved, shifting thus from an ideological (spread of Communism ideology) to a pragmatic and profit-oriented approach,¹² in order to meet its voracious energy demand and booming economy. In this sense, China's position within the world economy has suffered a drastic transformation, which

¹ Cooley, *East Wind over Africa: Red China's African Offensive*, 1965, 3.

² Bahgat, *Gawdat, Africa's Oil: Potential and Implications*, 2007, 91-105.

³ Tull, *China's engagement in Africa: scope, significance and consequences*, 2006, 44: 459-479.

⁴ Jonathan Holslag et al, *Chinese resources and energy policy in Sub-Saharan Africa*, Report for the European Parliament, 2007, 32-49.

⁵ *ibid* 34-37.

⁶ Zweing, Jianhai, *China's Global Hunt for Energy*, 2005.

⁷ Bahgat (n 2) 95.

⁸ Very often the reference to Chinese companies is done in a simplistic way ignoring all different types of business practices and objectives of state-owned enterprises (SOEs), large, non-state-owned private companies, and small and medium private enterprises (SMEs). The government's influence differs on whether is SOEs (these are invested by State assets or when the State takes more than 50 percent share), a large private company, and SMEs. An important distinction in light with the fact that in DRC there are many small Chinese mining operators accused of contributing to corruption and human rights abuses. These differences should be considered in order to enhance a more responsible behaviour within the Sino-African context. See *Business for Social Responsibility (BSR)*. Available at: <<http://www.bsr.org>>.

⁹ Holslag (n 4).

¹⁰ Tull (n 3) 44: 459-479.

¹¹ Cheng & Zhang, *Patterns and Dynamics of China's International Strategic behavior*, 2002, 11 (31): 235-260.

¹² Servant, *La Chine à l'Assaut du Marché Africain*, 2005.

affected its image in the international scene and its relations with other countries, namely due to its controversial method of business based on 'non-interference' with local governments. This was also seen as one of the 'Five Principles of Coexistence'¹³ used by China in Africa. A very criticised approach by many scholars,¹⁴ who argue that it may represent an unfortunate step-backwards in terms of human rights, transparency and good governance¹⁵ with serious implications for the welfare and livelihood of the African population. As we will have opportunity to analyse below, Chinese presence in Africa has also had consequences on labour relations. A good example of that are the cases recorded in some African countries, such as Zimbabwe,¹⁶ and on child labour the case of the DRC.¹⁷

Thus, the objectives of China in Africa seem astutely obvious. China aims at maintaining economic growth and political stability, which mirrors somehow its domestic priorities and self-interest, rather than its altruistic willingness in implementing development and, therefore, help the African countries' economy. This assumed ambivalent goal, based on political and economic interests, was also allied to diplomatic aspirations, or to its goal in seeking African countries' support within the international organisations, eg United Nations (UN); as well as to avoid that these same countries would recognise Taiwan as a sovereign state (part of the 'One-China policy').

For African governing elites, China's presence represents an opportunity to develop their economy and a chance to import skills and technology.¹⁸ Also a way to obtain supplying credit lines and infrastructure (damps, communication networks, railroads, bridges, airports, schools, among others) in exchange for natural resources.¹⁹ For these countries, China may also act as their 'protection shield' against international sanctions and embargoes, thereby guaranteed by a possible Chinese veto at the UN Security Council (UNSC) or through the UN General Assembly Resolutions.

Notwithstanding, the disadvantages for African countries are also quite notorious, Chinese companies normally do not hire local labour, that is a fact; and instead they bring their own workers.²⁰ Hence, what could be a good chance to generate local jobs is, in practice, misused. China has also taken advantage of this opportunity to enter in Africa countries' local market and sell cheap products, constituting this a threat to local industry. This seemingly social dumping environment²¹ has increased unemployment and some local factories were even forced to close in some countries.²² China's loans, such as the case of Angola, have also frustrated efforts of associating development aid to human rights and good governance and, therefore, decreased African countries eligibility to international financial institutions²³. If China's aim was to establish a 'win-win' partnership²⁴, then it should have been greatly more focused on the population well-being. As we will see in the case-study below, China – DRC relations are a clear example of a nexus where Chinese energy security interests, human rights and geopolitics intersect to produce a tragic result, rather than a 'win-win partnership'.²⁵

¹³ China and India created the 'Five Principles of Peaceful Coexistence' (mutual respect for sovereignty and territorial integrity, mutual non-aggression, mutual non-interference in internal affairs, equality and mutual benefits, peaceful coexistence), which guide China's foreign policy in Africa. See Kim S Samuel, 1994 and also Ian Taylor, 68.

¹⁴ See Taylor, China in Africa, 2006; Van Dijk, The New Presence of China in Africa, 2009, Alden, China in Africa, 2007, Kitissou, Africa in China's Global Strategy, 2007.

¹⁵ Hilsum, Re-enter the Dragon: China's New Mission in Africa, 2005, 32 (104-105): 419-25.

¹⁶ Chinese companies are engaged in the "gross violation" of labour rules in Zimbabwe, Zimbabwe metro, 10 November 2010. At <<http://www.zimbabwemetro.com/news/chinese-companies-are-engaged-in-the-gross-violation-of-labour-rules-in-zimbabwe/>>.

¹⁷ Clark, Smith and Wild, China Lets Child Workers Die Digging in Congo Mines for Copper, Bloomberg, 23 July 2008, at

<<http://www.bloomberg.com/apps/news?pid=newsarchive&refer=australia&sid=aW8xVLQ4Xhr8>>.

¹⁸ Alden, China in Africa, 2007.

¹⁹ Schiller, The China development Model, Open Democracy, 2005, 20.

²⁰ Jauch, Chinese Investments in Africa, Twenty-First Century Colonialism?, 2011, 51-53.

²¹ European Parliament, 2008, 24.

²² See China in Africa: the real story. At <<http://www.chinaafricarealstory.com>>.

²³ Schiller (n 19).

²⁴ Also known as 'South-South cooperation'.

²⁵ Brautigam, The Dragon's Gift, 2009.

Yet, China's 'cultural diversity', 'sovereignty of states', 'no-strings-attached'²⁶ and 'non-interference' discourse²⁷ has hitherto attained African countries sympathy and friendship, who welcome China's flexible and less intrusive and economically beneficial presence.²⁸ The 'right' partner and a good alternative model to the western development agenda, focused on democracy, good governance and human rights.²⁹ Contrarily, China is seen by others (mainly western countries) as a potential threat fuelling conflicts with arms and ammunitions exports and ignoring human rights violations and exploiting child labour, as in the case of the DRC.³⁰

China's benefits seem undeniable. However the main question is if this 'South-South' cooperation is that progressive, selfless and mutually beneficial: a truly win-win beneficial partnership? Based on what has been said, when weighting benefits and harms, it is difficult to conclude that both China and African countries benefit equally. In fact this partnership seems rather far from mutually beneficial.³¹ One should not forget though that these Chinese investments in Africa take place in some of the poorest and most vulnerable countries in the world, countries with a great need for investment and a critical economic and social situation. Some of them with a heinous past of conflict, welcoming whatsoever way and help to escape from western sanctions and thus easily obtaining credit lines and infrastructure, in exchange of their natural resources.

Finally, there is some evidence that Chinese investments are not yet resulting in livelihood opportunities for the African population and development and they may even have great impact on child labour. An important point to take into account, as that is the cornerstone of this thesis and it will be thereafter analysed. As it will be seen further, a truly 'South-South' cooperation should help to increasingly promote action against child labour and not otherwise, as recently emphasised in the ILO Global Report 'Accelerating action against child labour'.³²

III. Chinese Investments in Africa and Labour Rights

A. Are Labour Rights Human Rights?

1. Labour Rights as a Human Rights Debate

As previously noted, the main aim of this thesis is to analyse Chinese investments in Africa from a labour perspective, mainly focused on the impact such investments have on human rights, specifically on children's right to be free and protected from child labour and, consequentially, their right to education.³³ Preliminary, before further developments on child labour itself and through a more general approach, rather than specifically focused on China-Africa relations, it would be useful to shed some light on the debate 'labour rights as human rights', in order to better understand to what extent labour rights and human rights converge. As well as the respective differences between both categories.

Before elaborating further on the 'labour rights as human rights' issue, it is important to firstly stress that the International Labour Organisation (ILO) plays a central and important role within this debate. At the heart of attention are the core labour standards³⁴ that have been enshrined in the ILO Declaration on Principles and Rights at Work (The Declaration).³⁵ These referred core labour standards consist in a set of comprehensive and

²⁶ The Chinese policy 'no-strings attached' means that financial and technical aid is free of political conditions and with no interference of whatsoever nature in internal affairs. Thompson, *China's Soft Power in Africa: From the 'Beijing Consensus' to Health Diplomacy*, 2005, 2.

²⁷ Holslag, *Commerce and Prudence: Revising China's Evolving Africa Policy*, 2008, 8 (3): 325-52.

²⁸ The so called principles with 'Chinese characteristics' are also known as 'Beijing Consensus' and have led to a different type of development from the one proposed by the 'Washington Consensus'. See Thompson, *Economic Growth and Soft Power: China's Africa Strategy*, 2008, 15.

²⁹ Hilsun (n 15) 419-25.

³⁰ Holslag, *China's Diplomatic Manoeuvring on the Question of Darfur*, 2008, 71-84.

³¹ Jauch (n 20) 55.

³² ILO Global Report *Accelerating Action Against Child Labour*, 2010, 28.

³³ Right to education is enshrined in Article 26 of UDHR and Article 13 and 14 of ICESCR.

³⁴ See ILO Declaration on Fundamental Principles and Rights at Work 1998, Article 2.

³⁵ International Labour Organization, *ILO Declaration on Fundamental Principles and Rights at Work (1998)*, available at <<http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm>>.

widely accepted international and fundamental instruments to protect basic human rights at work. These standards correlate broadly to certain 'fundamental' ILO Conventions³⁶ and Recommendations. Hence, the prioritisation of few Conventions is relatively recent and the selection of these standards is basically a benchmark for policy-making in the international community.³⁷ The ILO has been recognised as 'the competent body to set and deal with such standards'.³⁸ This substance of ILO constitutional norms, conventions and recommendations have long been reflected in instruments adopted by the UN, such as the International Covenant on Civil and Political Rights, 1966 (ICCPR)³⁹ and the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR)⁴⁰.

ILO's tripartite structure is a modern and unique system within the UN, where workers, employers and states have equal voice in the decision-making process. For the purpose of this thesis are of great relevance the Convention 138 on the Minimum Age for Admission to Employment, 1973 (Convention 138)⁴¹ and Convention 182 on the Worst Forms of Child Labour, 1999 (Convention 182)⁴². These Conventions are international treaties *per se*, meaning that when a country ratifies them, it also agrees on the application of their provisions in law and in practice and consequentially accepts international supervision. China has ratified both Conventions and, therefore, should ensure that both Conventions' provisions on child labour are fully fulfilled and respected by all Chinese companies, whether operating within China's territory or abroad.

In the context of this thesis, it is extremely relevant to understand why labour rights are approached from a human rights spectrum and not seen instead as an unspecified or separate category of rights without grounds on the human rights discourse. A question that has been under many controversies. For the past years, some scholars have indeed argued that labour rights should be recognised as human rights and, therefore, 'constitutionalised' or statutorily considered as such.⁴³ In theory, human rights establish boundaries and set what society is allowed (or not) to do to individuals.⁴⁴ For some, human rights are basically legal rights and duties identifiable and enshrined in international human rights treaties and laws, while for others human rights are simply a product of moral, identifiable through an ethical and philosophical criteria.⁴⁵

As a matter of fact, human rights are universal,⁴⁶ or may be consider as such, and all human beings are entitled to them in virtue of their humanity; while, on the other hand, labour rights are rather addressed to all humans in virtue of their status as workers.⁴⁷ A labour rights' holder, however, can see its rights restricted to his/her certain function as a worker.⁴⁸ Likewise, Human rights should limit states' power, while labour rights should limit private actors' power. In sum, human rights are addressed to individuals and labour rights are 'collectively-oriented'.⁴⁹

³⁶ Conventions 87 and 98 on Freedom of Association and Collective Bargaining, Conventions 29 and 105 on the Elimination of All Forms of Forced and Compulsory Labour, Convention 138 on the Minimum Age for Admission to Employment, Convention 182 on the Worst Forms of Child Labour and ILO Conventions 100 and 111 on the Elimination of Discrimination in Respect of Employment and Occupation.

³⁷ Novitz, *The European Union and International Labour Standards: The Dynamics of Dialogue between the EU and the ILO*, 2005, 214-241.

³⁸ Singapore Ministerial WTO Declaration, WT/MIN96/DEC/W/, 1996, 4.

³⁹ As regards children's protection, article 24 ICCPR;

⁴⁰ Article 7 and 10 (3) ICESCR.

⁴¹ See ILO Convention 138. Available at <http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_INSTRUMENT_ID:312283>.

⁴² See ILO Convention 182. Available at <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:C182>.

⁴³ Compa, *Trade Unions and Human Rights*, 2008 and Compa, *Labor's New Opening to International Human Rights Standards*, 2008, and Fudge, *The New Discourse of Labor Rights: From Social to Fundamental Rights?*, 2007.

⁴⁴ Louis Henkin, *The Age of Rights*, 1990, 2.

⁴⁵ See Amartya Sen, *Development as Freedom*, 1999 ('Human rights are a set of ethical claims') and Shue, *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy*, 1980 ('From a moral basis point of view, human rights are those necessary to enjoy other rights').

⁴⁶ UN Vienna Declaration and Programme of Action, 25 June 1993. World Conference on Human Rights, A/CONF 157/23, point 5.

⁴⁷ Mundlak, *Industrial Citizenship, Social Citizenship, Corporate Citizenship: I Just Want My Wages*, 2007, 730.

⁴⁸ Fudge, *The New Discourse of Labor Rights: From Social to Fundamental Rights?*, 2007.

⁴⁹ Kolben, *Labour Rights as Human Rights?*, 2009, 453.

Moreover, when attempting to grasp some sort of differentiation or convergence between labour rights and human rights, a dichotomy between 'public sphere' *versus* 'private sphere' should also be considered. An important difference between labour and human rights lies precisely in the fact that labour rights affect mainly private actors, while human rights affect primarily states.⁵⁰ Human rights regulate and apply to the relationship between states and individuals,⁵¹ despite some authors' arguments on the application of human rights to non-state actors.⁵² In contrast, labour rights imply states' intervention into the private sphere. Meaning that labour rights request the implementation and enforcement of laws and regulations by the states to discipline and guide private actor's (employers and employees) conduct. Labour rights have an important role within the private sphere, particularly when protecting and limiting workers (and giving them guarantees) in their economic relationships with employers (where there is always an unbalance and unequal power). In this sense, labour law has somehow developed as a guarantee of prevention against detrimental social and economic outcomes of liberal labour market relations.⁵³ Secondly, labour rights should provide workers with solid guarantees to fairly engage with their employers within the market economy.⁵⁴ In relation to the abolition of child labour, employers are required to employ adult workers (instead of children), who are less likely to be exploited and have more capacity to negotiate their employment terms and are more aware of their rights. Nevertheless, human rights are not addressed to this private market sphere, which may perhaps be related to the fact that human rights laws do not provide essential elements to get into private market relationships;⁵⁵ instead, they may even harm such relations.

The question on what are labour rights and whether or not they are all universal human rights has however been object of many debates. In 1998, the ILO adopted the Declaration,⁵⁶ which has helped to demystify this question, making it clear that labour rights are universal and applicable to all individuals in all member states, regardless the nature and stage of their national economic development situation. The Declaration tried to reach a level of moral, political and legal consensus on what exactly is universally recognised as labour rights and it has also designed four categories of rights. Those are designated as 'core labour rights': freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective elimination of child labour; and the elimination of discrimination in respect of employment and occupation.⁵⁷ As a core labour standard, the elimination of child labour, will serve as an 'enabling right'. I.e, it will create all necessary conditions to allow access to other rights, such as children's right to primary education.⁵⁸ A worldwide central factor and a giant step towards child labour eradication. Noteworthy is also the fact that the right to a primary education is one of the UN Millennium Goals (MDG 2).⁵⁹

The ILO's objective though, when specifying these four different categories of rights, was to heighten that these rights are integral and undisputed core elements of the human rights *corpus*.⁶⁰ Each of these relevant standards or principles is recognised as a human right in the Universal Declaration of Human Rights (UDHR), in ICESCR and in a very large body of several other international legal standards.⁶¹ These rights are different from a broader conception of labour rights, as they do not require a degree of economic advancement. The ILO member states, as referred, when ratifying one or more of the core Conventions, are hereafter bound to 'pro-

⁵⁰ Henkin (n 42) 730.

⁵¹ Sen (n 43) 52.

⁵² Claupham, Human Rights Obligations of Non-State Actors, 2006.

⁵³ Hyde, What is Labour Law?, 2006, 37-53.

⁵⁴ Sen (n 43) 39-40.

⁵⁵ UN Vienna Declaration and Programme of Action (n 44) 470.

⁵⁶ ILO Declaration on Fundamental Principles and Rights at Work, 1998, available at <<http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm>>.

⁵⁷ Article 2 of the Declaration. ILO Declaration on Fundamental Principles and Rights at Work (1998) (n 35) 214-241.

⁵⁸ ILO Global Report Accelerating Action Against Child Labour (n 32), 52-53.

⁵⁹ See Millennium Development Goals 2011 Report (MDGs) at <[http://www.un.org/millenniumgoals/pdf/\(2011_E\)%20MDG%20Report%202011_Book%20LR.pdf](http://www.un.org/millenniumgoals/pdf/(2011_E)%20MDG%20Report%202011_Book%20LR.pdf)>.

⁶⁰ Héctor Bartolomei de La Cruz et al, The International Labour Organisation: the International Standards System and Basic Human Rights, 1996, 127-29.

⁶¹ Philip Alston, Labour Rights as Human Rights, 2005.

mote and realise' such fundamental rights.⁶² Therefore, since child labour is one of those core labour standards and a fundamental human right, the Chinese government, as a signatory member state of ILO Conventions 138 and 182, is bound to ensure that this right is fully protected and respected by all Chinese nationals.⁶³ The respect of the core labour standards enforces a more effective elimination of child labour, which is also closely linked with other labour standards, such as the freedom from forced labour and discrimination, as well as a living wage and conditions of health and safety at work, and absence of forced excessive overtime. Finally, child labour also puts at stake adult employment and their right to decent wages.⁶⁴

2. Child Labour as a Human Right

The 'effective elimination of child labour' has been considered as an issue of human rights at work, together with the other core labour rights. It is recognised as one of the core labour principles stated at the ILO Declaration and within ILO's grasp.⁶⁵ It consists also in the focal point of this thesis and further considerations on this issue will be drawn thereafter. According to all Conventions and legal instruments on children's rights, namely Conventions 138 and 182, and Convention on the Rights of the Child (CRC), all children are entitled to the same human rights accorded to all people, despite their unequal degree of knowledge, experience and physical development and incapability to defend their interests in a world ruled and run by adults.⁶⁶ Due to their age, underlying vulnerability, children have special rights and distinct protection. For example, the right to be free from economic exploitation and from hazardous work that may interfere with and hamper their health, moral and development.⁶⁷

The referred core principle implies an obligation to ensure that every child, whether boy or girl, has equal opportunities and the same right to fully develop their physical and mental potential. The aim of this principle is to eliminate all sort of work performed by children and that may jeopardise their normal and sustainable education and development. This principle does not aim though at stopping children from performing all kind of work. The international labour standards, through a prioritisation approach, recognise that certain (specific) types of work are acceptable for children,⁶⁸ regarding their age and stage of development. On the contrary, all other types of work, especially when hazardous, are completely unacceptable and should therefore be forbidden.

All Conventions on child labour have, however, failed to define what is considered permissible child labour.⁶⁹ This principle's scope is normally extended from formal employment to informal economy, where the higher percentage of unacceptable forms of child labour is indeed found. This includes family-based enterprises, agricultural, domestic and unpaid work, under family or customary arrangements and performed by children in exchange for their keep. The Chinese government, as every government, has thus an important key-role in the effective abolition of child labour within their national context. In order to meet this principle, they should establish and enforce a minimum age (which normally depends on the national social and economic context) for employment of children for all different forms of work, according to Convention 138. Normally, the minimum age for admission to employment is never less than 15 years old and it should not be less than the minimum age to complete compulsory schooling. Developing countries may be entitled to exceptions, under specific circumstances, when their economy or educational facilities are insufficient or inadequate, children may be em-

⁶² *ibid.*

⁶³ The ILO has a follow-up procedure consisting in an annual report on the status and progress of the relevant standards (rights and principles) implementation within their borders, stating the potential impediments to ratification or areas where they need special assistance.

See <<http://www.ilo.org/declaration/thedeclaration/lang--en/index.htm>>.

⁶⁴ See ILO Global Jobs Pact and Decent Work Agenda at <http://www.ilo.org/jobspact/policy/lang--en/WCMS_DOC_GJP_ARE_STA_EN/index.htm>.

⁶⁵ Report of the Director-General (Report I (B)), The end of child labour: Within reach, 2006, at <[http://www.ilo.org/public/libdoc/ilo/P/09382/09382\(2006-95\)90.pdf](http://www.ilo.org/public/libdoc/ilo/P/09382/09382(2006-95)90.pdf)>.

⁶⁶ Children, rights, and the law, edited by Philip Alston, Stephen Parker, John Seymour.

⁶⁷ ILO Declaration on Fundamental Principles and Rights at Work (n 54).

⁶⁸ For example domestic work. See The Role of International Law in the Elimination of Child Labour, Procedural Aspects of International Law Series, (Brill Publishing, Martinus Nijhoff, 2007).

⁶⁹ Nijhoff, The Role of International Law in the Elimination of Child Labour, Procedural Aspects of International Law Series, 2007.

ployed at the age of 14. In case of 'lighter work', children may be allowed to work when they are two years younger than the general minimum age rule.

In case of 'worst forms of child labour', it is considered totally unacceptable to admit children under the age of 18, as per Convention 182. Besides, its abolition should be a matter of urgency and immediate action. 'Worst forms of child labour' normally refer to inhumane practices, as slavery, trafficking and drugs, debt bondage and other forms of forced labour, prostitution and pornography, forced military recruitment of children. The Convention 182 also covers all forms of work that may be dangerous or harmful for the health, safety and morals of children, such as working in mines and quarries, as it will be seen below in the case-study.

In addition, elimination of child labour is intimately linked with the UN Millennium Development Goals (MDGs), not only through the right to education (MDG 2), as referred above, but essentially because child labour is a fundamental prerequisite to eradicate extreme poverty and hunger (MDG 1). Admittedly, poverty has been considered one of the main reasons of child labour perpetuation. Child labour, on the other hand, is a primary cause of poverty, as it pushes children to start prematurely working, consequentially undermining children's opportunities to access primary education and the necessary skills to obtain decent work⁷⁰ and income as adults. A sad vicious circle that has unfortunately been the reality of many countries in Sub-Saharan Africa. All governments have positive obligations to realize human rights for their people and to contribute to the alleviation of poverty, which together with access to education can be crucial in the combat against child labour.⁷¹ This would also certainly help to create more jobs and better wages for adults and, therefore, alleviate poverty.

Poverty is also commonly associated with social injustice and social exclusion, a phenomenon closely related to child labour. Child labour hinders human and sustainable development. It is regrettable, however, that child labour itself is not part of the MDG framework, which would certainly impact on the reduction of the problem and on the expansion of educational opportunities to all children. Children's access to education is with no doubts one of the most effective strategies and tools to eliminate child labour and should be supplemented by a range of other measures. Namely, awareness campaigns and adequate social protection systems, among others.

3. Labour Rights as Human Rights and its Importance for Multinational Corporations

After specific considerations on child labour, an anticipation of what will be discussed in the second part of this chapter, it might be now noteworthy to highlight another important aspect within this thesis' scope: the importance of labour rights as human rights for multinational corporations (MNCs). One of the goals, when framing labour rights as human rights, it is also to target MNCs and engage into corporate campaigning and advocacy strategies, an important concern that will be more attentively addressed in chapter IV of this thesis. However, it is important, at this stage, to refer that MNCs have, lately, been more receptive and flexible to human rights discourse, namely through adoption of corporate social responsibility (CSR) measures and codes of conduct. They have extensively adhered to initiatives such as the UN Global Compact or the OECD Guidelines for Multinational Enterprises (MNEs). Increasingly, they have also become more aware of and eager to link their business with human rights and labour rights initiatives and projects, which somehow portrays them as 'human rights movements' and 'defenders', proving their willingness to associate themselves with other organisations promoters of international human rights norms.⁷² Another example of progress in this field and of states commitment to achieve positive effects on 'peoples lives', is their participation in the 'Decent Work Agenda'. This has been developed by ILO and provides support through country programmes in coordination with ILO mem-

⁷⁰ See ILO Decent Work Agenda at <<http://www.ilo.org/global/about-the-ilo/decent-work-agenda/lang-en/index.htm>>.

⁷¹ See International Programme on the Elimination of Child Labour (IPEC) at <<http://www.ilo.org/ipecc/lang-en/index.htm>>.

⁷² See United Nations Global Compact, After the Signature: A Guide to Engagement in the UN Global Compact, 18 – 20, available at: <http://www.unglobalcompact.org/docs/news_events/8.1/after_the_signature.pdf>.

ber states, to the 'labour community' in achieving the creation of more jobs, enforcement of rights at work, and implementation of social protection and social dialogue measures.⁷³

According to some labour rights movements, these new tendencies will make MNCs more responsive to eventual charges for human rights or labour rights violations.⁷⁴ Somewhat, this brings hope to the eradication of child labour. A new framing of labour/worker's rights, as human rights, has also notably influenced corporations to address worker's/labour rights abuses in their supply chains.⁷⁵

In a nutshell, MNCs seem now more committed to embrace human rights practices and apply those standards to their business activities. A concept of business that it is still quite new for Chinese corporations.⁷⁶ Although it has, thus far, worked as an effective and strategic marketing tool and a way to be recognised as a 'good corporate citizen'. There are still, however, alleged failures, or lack of awareness on these issues, as we will see when discussing the case of Chinese mining companies in Katanga, DRC.

To conclude the discussion of 'labour rights as human rights', which has given rise to many academic debates, I would like to briefly refer to some divergent views on this issue, mainly those conveyed by *Alston*⁷⁷ and *Langille*.⁷⁸ On one hand, Alston has criticised the formulation and ratification of the ILO Declaration and its exclusive concentration on core labour standards. According to him, it constraints labour rights' essence to a group of specific four core labour rights. The author argues that the main role of these core standards is to replace a broader conception of labour rights with a more narrow focus on a limited *corpus* of labour standards.⁷⁹ Alston defends that these core of rights is merely promotional and lacks a solid legal base of obligations and key-institutional responses to potential labour rights abuses.⁸⁰ Furthermore, according to him, this core of rights is exclusively focused on a set of procedural civil and political labour rights.⁸¹ Essentially, this confirms that in the Declaration there is a clear neo-liberal economic approach⁸² and an exclusion of an economic and social rights agenda⁸³ (health and safety standards). The consequences of such an approach seem unbalanced and impact, in particular, on the protection of rights at work (mostly economic and social rights) and also, in general, on the indivisibility of human rights.⁸⁴ In sum, Alston argues that all human rights are indivisible and 'fundamental' and should have, on equal terms, the same standing before the law.⁸⁵ As maintained, economic and social rights are in risk of being delegitimized. According to him, this is the pith of labour rights, since ILO has given preference to civil and political rights in its Declaration.⁸⁶

On the other hand, Langille, as well as Maupin, have responded to Alston's arguments. Langille says that the 'heart' of labour rights are those 'procedural' and 'enabling rights'⁸⁷ (those that create conditions allowing access to other worker's rights). For this author there is a distinction that should be made between those labour rights that are 'procedural in nature' and labour standards that are 'outcome-based'.⁸⁸ Langille argues that within labour law there is a combination of procedural and substantive components or pillars. Some of those components are addressed to workers and ascribe to them rights of procedural protection; secondly, the sub-

⁷³ See ILO Decent Work Agenda and country reports at <<http://www.ilo.org/global/about-the-ilo/decent-work-agenda/lang--en/index.htm>>.

⁷⁴ UN Vienna Declaration and Programme of Action (n 44) 465.

⁷⁵ *ibid.*

⁷⁶ Brautigam (n 25) 304.

⁷⁷ Alston, Core Labour Standards' and the Transformation of the International Labour Rights Regime, 2004; and Philip Alston & James Heenan, Shrinking the International Labor Code: An Unintended Consequence of the 1998 ILO Declaration on Fundamental Principles and Rights at Work?, 2004.

⁷⁸ Langille, Core Labour Rights—The True Story (Response to Alston), 2005.

⁷⁹ Alston, Core Labour Standards' and the Transformation of the International Labour Rights Regime, 2004, 458.

⁸⁰ *ibid.*

⁸¹ *ibid.*

⁸² *ibid.*

⁸³ Alston (n 72) 486–87; Alston & Heenan (n 72) 253–56.

⁸⁴ Philip Alston & James Heenan (n 72).

⁸⁵ *ibid.*

⁸⁶ *ibid.*

⁸⁷ Brian Langille, Core Labour Rights—The True Story (Response to Alston), 2005, 409, 429; Maupain, Revitalization Not Retreat: The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers' Rights, 2005, 439, 448.

⁸⁸ *ibid.*

stantive standards are addressed to employers and their obligations in providing minimum standards of health, safety or wages to their employees.

Finally, from Langille's point of view, Alston is seemingly mixing the two different concepts.⁸⁹ Despite all divergence on this matter, for Langille the ILO Declaration is coherent and should be valued as such. Particularly due to its approach to labour law and labour rights.⁹⁰ On the contrary, for Alston, who has got a more human rights oriented-approach, Langille's arguments are not convincing enough, and economic and social rights should be seen as guarantors of 'outcomes' and not facilitators of 'processes', whose conception is, according to the author, rather weak.

Sequentially, it is important to briefly stress China's view and understanding of 'labour rights as human rights', or better saying, a lack of recognition of labour rights as human rights. It is not new that in China fundamental labour rights have always been seriously violated, in breach of China's Labour Code. In fact, there is not even reference to labour rights in their human rights literature. They rather do, but distinguish both as separate categories, highlighting that labour rights are not considered under the umbrella of human rights.⁹¹ This conception is particularly relevant when considering China's relations with Africa, given the frequent cases of African workers in Chinese companies claiming tense labour relations and hostile behaviour from Chinese employers towards trade unions, violations of worker's rights, poor working conditions, low wages and unfair labour practices.⁹² Several studies⁹³ and recent news have also reported that Chinese employers often violate the core ILO Conventions and principles. Namely the Conventions 138 and 182, as it will be exemplified in the case-study in chapter III, of Chinese mining companies in DRC, and where evidence of child labour has been found.⁹⁴ Again, it will be shown China's position towards labour rights and human rights, ie, as two different and non-convergent categories of rights.

B. Child Labour

1. Child Labour: 'Everyone's Business'?

'Children are everyone's business'

UNICEF, Global Compact and Save the Children Meeting on
Children's Rights & Business Principles Initiative, 24 June 2010.

Child labour has been a widespread and stubborn phenomenon and still persistently occurring in all regions of the world, with special incidence in developing countries.⁹⁵ Among those countries, the Sub-Saharan African region stands out and registers a higher rate than any other major region in the world.⁹⁶ According to the ILO Global Report 2010, unlike the Asia Pacific or Latin America or even the Caribbean, that have been decreasing their incidence of child labour, the numbers in Sub-Saharan Africa have been rather increasing every year and one out of four children are still trapped in child labour. ILO has estimated that there are 65.1 million economically active children in Sub-Saharan Africa alone, as for 2010.⁹⁷ As seen above, child labour is intrinsically linked to the rights of the child. In that regard, The UN Convention on the Rights of the Child (CRC) refers to the right of children being protected from economic exploitation and any work that is likely to be hazardous, or to interfere with the child's education, harmful to their health, physical, mental, spiritual, moral or social development. Thus, in line with what is also prescribed by ILO Conventions 138 and 182, it is not acceptable when

⁸⁹ Philip Alston & James Heenan (n 72).

⁹⁰ *ibid.*

⁹¹ Anita Chan, *Labour Standards and Human Rights: The Case of Chinese Workers Under Market Socialism*, 1998, 886-904.

⁹² Jauch (n 20) 52.

⁹³ Anthony Yaa Baah and Herbert Jauch, *Chinese Investments in Africa: A Labour Perspective*, African Labour Research Network, 2009.

⁹⁴ Clark (n 17).

⁹⁵ International Labour Organization (1998), 'Child Labour Risks Growing in Africa', OUA and ILO Convene Tripartite Meeting, Press Release, 4 February.

⁹⁶ Bhalotra, *OECD Social Employment and Migration Working Paper N 4, Child Labour in Africa*, 2003.

⁹⁷ ILO Global Report *Accelerating Action Against Child Labour* (n 32) 43.

children work at a young age, for long hours, with little pay, in hazardous conditions or in slave-like conditions.⁹⁸

The ratification of the Convention 182 by many of the African countries emphasizes their willingness and thorough determination in gaining respect from the international community and in combating the scourge of child labour.⁹⁹ However, the Convention's enforceability is not always very linear and there is still a long way to go through from ratification to implementation within all different contexts and China is certainly an example of this challenge.

2. What is Meant to Be Child Labour?

In this section, the aim is to provide an overview of what is meant to be child labour, primarily from a legal perspective paving the way through the next chapter that will focus on the case of Chinese mining companies operating in the DRC and the use of child labour. A case-study that is representative of Chinese investments in Sub-Saharan Africa and their impact on human rights, particularly on children's rights.

To begin with, child labour is not clearly defined by international law, due to political, economic and cultural heterogeneity of the international community. These same reasons have also impeded the adoption of an effective set of measures against this threat and constituted an obstacle to a unanimous agreement on a definition in recent times.¹⁰⁰ The CRC (Article 32, paragraph 1) defines child labour as 'work performed by a child that is likely to interfere with his or her education or to be harmful to their health or physical, mental, spiritual, moral or social development'. Likewise, ILO attempted to define child labour as exploitative 'work that harms a child's well-being and hinders his or her education, development and future livelihood'¹⁰¹, meaning that it can be mentally, physically, socially or morally dangerous and harmful to children, especially when it deprives them from the right to education and obliges them to prematurely drop out school or to combine school with long and heavy work. In this sense, child labour is a form of exploitation and the denial of a child's right to education, therefore, a violation of a human right, recognised by international instruments. In extreme situations, child labour may involve children being enslaved and abruptly separated or left by their families and exposed to hazards and illnesses from a very early age.¹⁰² Thus, it is imperative that the international community and all governments adopt policies on the elimination of child labour.

Yet, despite being difficult to draw a line in some cases and consider that there are 'acceptable' forms of work that children can perform, as mentioned above, it should be bear in mind that the term child labour is different and not comparable to the term 'youth employment' or 'student work'.¹⁰³ Essentially, it depends on children's age, on the type of work, on the conditions under which it is performed and on the objectives pursued. A proper answer or definition varies according to different countries and their culture. 'Youth employment' and 'student work' are normally considered legal and somewhat positive for the personal development and maturation process of children and young people, as long as does not interfere with their schooling. Very different is child labour, which is considered a human rights violation, as it deprives children from their childhood, thereby compromising their potential and dignity, physical and mental development. Not all kind of child labour is considered bad or harmful though. Especially when it refers to light work that does not interfere with children's right to education and leisure. Child labour normally results from a wide gamut of underlying social and economic problems, including poverty, as already underlined above, as well as war, such as the case of child soldiers' recruitment in many African countries. These are indeed important factors influencing household deci-

⁹⁸ UNICEF, Implementation Handbook for the CRC, 1998.

⁹⁹ The Convention 182 was ratified by 49 African States between 1999 and 2005 and the Convention 138 on the Minimum Age obtained 46 ratifications.

¹⁰⁰ Nesi, et al, Child Labour in a Globalized World: An Analysis of ILO Action, 2008, 1-5.

¹⁰¹ ILO and International Organisation of Employers, Eliminating Child Labour: Guides for Employers, Guide One: Introduction to the Issue of Child Labour, 2007, (thereafter, ILO Guide One for Employers).

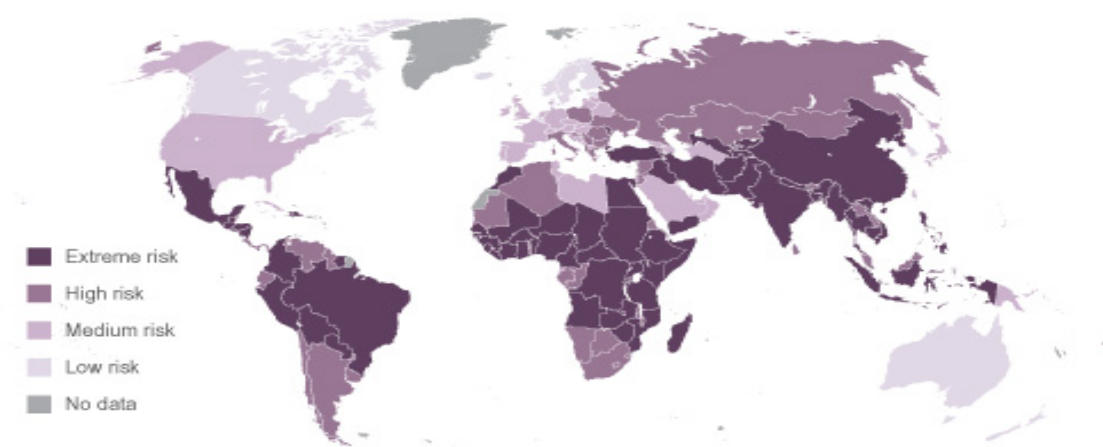
¹⁰² Eliminating the worst forms of child labour: A practical guide to ILO Convention No 182. Handbook for parliamentarians No 3, 2002.

¹⁰³ ILO and UN Global Compact, The Labour Principles of the UN Global Compact: A Guide for Business, 2008.

sions on child labour.¹⁰⁴ The limited access to education or inadequate educational facilities is another factor to be considered. In some cases, to deny children's access to workplace may lead to more serious and precarious situations, such as the case of prostitution and begging. Thus, in order to prevent child labour it is fundamental to address its underlying root-causes. In this sense, a good advice for Chinese companies operating in Africa would certainly be to consider all range of issues (low family income or inexistent educational facilities) that are behind the problem and try to overcome such difficulties.

According to ILO, it is estimated that 218 million children, between the ages of 5 and 11 work worldwide.¹⁰⁵ However, it is extremely difficult to have a precise figure of the extent of child labour, since a large part of the problem, especially when it comes to its worst forms, is hidden, due to its illegal nature, often practiced in underground shops, brothels, remote farms, mines, etc.¹⁰⁶ In some countries, there is also a lack of reliable documentation, as birth certificates, which are easily made unviable or forged. The highest incidence of child labour occurs, however, in those rural or urban areas where authorities still have difficult access to.

Global Map of Child Labour Risk 2010



(Source: The Global Compact website. Human Rights and Business Forum)

3. International Legal Instruments on Child Labour

Human rights issues have persistently drawn the attention of civil society and international community and the expansion of the movement against child labour has gained increased support. The CRC,¹⁰⁷ adopted in 1989, was considered the most complete and comprehensive treaty on children's rights ever adopted and it was ratified by almost all countries in the world, except Somalia and the United States. The CRC has not only embodied fundamental and general provisions on children's protection related to work as such, but it tackled specific issues on exploitation of children that were built upon by the ILO for its fights against the worst forms of child labour.¹⁰⁸

The CRC defines child as any person below 18 and maintains that all children have the right to be protected from economic exploitation as per Article 32, paragraph 1, referred above. According to CRC, governments should penalise all those who violate its provisions requirements. The ILO was the first international organisation adopting binding rules on child labour.¹⁰⁹ In fact, one of the foremost reasons that justified the adoption of

¹⁰⁴ UNICEF, Implementation Handbook for the CRC (n 96).

¹⁰⁵ Report of the Director-General (Report I (B), The end of child labour (n 63). At <[http://www.ilo.org/public/libdoc/ilo/P/09382/09382\(2006-95\)90.pdf](http://www.ilo.org/public/libdoc/ilo/P/09382/09382(2006-95)90.pdf)>.

¹⁰⁶ Eliminating the worst forms of child labour: A practical guide to ILO Convention No 182 (n 100).

¹⁰⁷ See <<http://treaties.un.org/doc/Publication/UNTS/Volume%202133/v2133.pdf>>.

¹⁰⁸ Nesi (n 98) 203.

¹⁰⁹ Cullen, Procedural Aspects of International Law, Volume 28: Role of International Law in the Elimination of Child Labour, 2007.

the founding treaty was the enhancement of the conditions of working children (and women), as shown by the Preamble to the Constitution.¹¹⁰

Throughout its existence, one of the ILO main concerns has been the establishment of a minimum age for admission to employment as the cornerstone of child labour definition and regulation. Moreover, the adoption of international labour standards testifies a commitment by the international community to abolish child labour and to draw a line on the distinction between child labour and acceptable forms of work.¹¹¹ The Convention 138, 1973,¹¹² comprised the most comprehensive and authoritative international definition of minimum age for admission to employment and it constitutes a landmark that shall be applied to all economic sectors of activity and to all working children.¹¹³ The convention ascribes to ratifying States the obligation to determine a minimum age¹¹⁴ and defines a range of minimum age below which no child should be required to work. In many cases, these minimum age may vary accordingly to the level of development and type of employment and work¹¹⁵. The ILO Convention 138 was ratified by 116 countries. China was one of them and established that the minimum age to be employed is 15, making an exception of 12 or 13 years for cases of light work, when it does not interfere with children's education or does not have negative impact on health. In the case of developing countries, the stipulation of a minimum working age of 15 may be exceptionally reduced to 14.

For long time, the principal means used by ILO to combat the threat of child labour was the adoption of international labour standards. ILO's agenda on child labour reflects member States belief that childhood is an important period of physical and mental development of the life and education of any human being and it should not be devoted to work. In 1999, another milestone in the struggle against child labour was achieved through the adoption of the Worst Forms of Child Labour Convention¹¹⁶ (ILO Convention 182) and accompanying Recommendation 190.¹¹⁷ Both ILO Conventions, 138 and 182, are fundamental and seek to attain the abolition of child labour. However, the means they use to pursue this goal are substantially different.¹¹⁸ The ILO Convention 138, for instance, does not require a specific timeframe within which such measures to abolish child labour should be taken, just like Convention 182 does. As set forth in Article 1 of Convention 138, a 'national policy' should be designed in order to ensure the effective abolition of child labour, as mentioned. Differently, the Convention 182 focuses its scope on certain forms of child labour that should not be accepted, neither tolerated by any member states, irrespectively of how developed is the country and its national circumstances.¹¹⁹ As per Article 1 of the Convention 182 'each member state which ratifies this Convention shall take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency'.

Furthermore, the Convention 182 does not contain 'flexibility clauses', neither makes any distinction between developed and developing countries, unlike the Convention 138. Hence, all measures taken by the member states shall not only ensure the prohibition of child labour, but also the elimination of the worst forms of child labour. These two Conventions are a good example of a complementary nexus for the effective abolition of child labour, where immediate action and time-bound measures are extremely necessary.¹²⁰

¹¹⁰ *ibid.*

¹¹¹ Eliminating the worst forms of child labour: A practical guide to ILO Convention No 182. (n 100).

¹¹² The Convention 138 is accompanied by Recommendation 146. See: <<http://www.ilo.org/ilolex/cgi-lex/convde.pl?C138>>.

¹¹³ Eliminating the worst forms of child labour: A practical guide to ILO Convention No. 182. (n 100).

¹¹⁴ Article 1 of Convention 138.

¹¹⁵ *ibid.*

¹¹⁶ See <<http://www.ilo.org/ilolex/cgi-lex/convde.pl?C182>>.

¹¹⁷ See <<http://www.ilo.org/ilolex/cgi-lex/convde.pl?R190>>.

¹¹⁸ Nesi (n 98) 83-91.

¹¹⁹ ILO, Child Labour, Report IV (2A), ILC, 87th Session, 1999, Geneva, Office commentary, 34.

¹²⁰ *ibid.*

4. ILO Convention 182 on Worst Forms of Child Labour

The Convention 182 is significantly important in the context of this thesis, since the case-study that will be analysed below portrays a case of use of child labour by Chinese mining companies in the DRC. Therefore, further considerations will be drawn upon. The Convention 182 was ratified by 171 countries, including China and in its Article 2 'child' is defined as all persons under the age of 18 and prohibits young workers under this age to engage in the worst forms of child labour.¹²¹

The Article 3 of the Convention 182 details the type of work that children under 18 are prohibited to perform, which includes all forms of slavery or similar practices (clause a); prostitution and production of pornography (clause b); illicit activities (clause c); and hazardous work (clause d). Nevertheless, we can make a distinction here between two categories of the worst forms of child labour: first, the so called 'unconditional' worst forms of child labour as noted in clauses (a) to (c) of article 3, which are intrinsically linked with children's basic rights and obviously prohibited to all persons below the age of 18; secondly, hazardous work, which under clause (d) of article 3 is a 'conditional' worst form of child labour.¹²² Hence, hazardous work is prohibited to persons under 18 and when the nature of the work or circumstances in which it is performed are likely to endanger and harm the health, safety and morals of the children,¹²³ such as the case of working in mines and discussion to which I will return further below when analyzing the case-study in the next chapter.

Focusing on the second category of worst forms of child labour – hazardous work – it can be said that the Convention 182 and its implications, as well as a good understanding in what consists hazardous work, may serve as a basis to further elaborate and grasp the dimension of the problem and impact of Chinese investments in Africa and the use of child labour, specifically when those investments are in the mining industry.

Paragraph 3 of the Recommendation 190 states that 'hazardous work' can be all type of work performed underground or under water, at dangerous heights or in confined spaces (clause c); work with dangerous equipment, machinery and tools or which involves manual handling or transport of heavy loads (clause c); work in an unhealthy environment, for example, where children are exposed to hazardous substances and chemicals, agents, excessive temperatures or to heavy vibrations and noises (clause d);¹²⁴ and, finally, work under particularly hard conditions including long working hours, night work and working in isolation and confined to the employers' premises (clause e).

Moreover, article 4, paragraph 1, of the Convention 182 states that national laws or regulations and the competent authorities shall determine the types of work that are referred to under article 3 (d) according to the 'relevant international standards, in particular paragraphs 3 and 4 of the Worst Forms of Child Labour Recommendation 190'. Notwithstanding, in case there is no specific definition of what kind of activities may constitute hazardous work in articles 3 (d) and 4 (1), the member states should themselves determine the types of work that should be considered particularly hazardous (ie, worst forms of child labour). In this regard, they should consult concerned employers' and workers' organisations and take into account all relevant international standards (this does not imply that they have to ratify or respect such standards).

Further to this legal analysis, it is worth noting that article 5 of the Convention 182 indicates that each ratifying member state is entitled to establish appropriate mechanisms to monitor the implementation of the Convention's provisions.¹²⁵ A provision that is reinforced by paragraph 8 of the Recommendation 190. Furthermore, article 6 (1) mentions all action programmes that can be designed and implemented by each Government to abolish, as a priority, all worst forms of child labour. As per paragraph 2 of the Recommendation 190, the above mentioned programmes of action should be implemented as a matter of urgency. These programmes should be an effective mechanism through which it is possible to identify and denounce the worst forms of child

¹²¹ Eliminating the worst forms of child labour: A practical guide to ILO Convention No 182 (n 100).

¹²² ILO. A Future Without Child Labour – Global Report under the Follow-UP to the ILO Declaration on Fundamental Principles and Rights at Work, 2002, 9.

¹²³ ILO and UN Global Compact, The Labour Principles of the UN Global Compact: A Guide for Business (n 101).

¹²⁴ Save the Children Denmark, 2006, Child Labour Toolkit: responsible approaches to child labour in the Textile and Garment Industry, <<http://www.redbarnet.dk/Default.aspx?ID=8760&M=Shop&PID=19448&ProductID=767>>.

¹²⁵ *ibid.*

labour, and also a way to prevent it or even eradicate it. These programs may also be used to mobilise public opinion and concerned groups, namely children and their families. In addition, article 7 (1) refers to the sanctions that should be imposed to those who do not respect and enforce the Convention's provisions; while clause 2 stresses the importance of education in the elimination of child labour, which should be nothing but a goal for each Member State.

Finally, article 8 suggests international cooperation among all Member States. A provision that has special relevance in the context of China-Africa relations if interpreted in the sense that China should cooperate towards the social and economic development of the African continent. As per article 8, all Member States that ratify the Convention should take all 'appropriate steps to assist one another in giving effect to the provisions of the Convention through enhanced international cooperation and or assistance, including support for social and economic development, poverty eradication programmes and universal education'. In the spirit of this article can be found the idea of 'partnership' among states. However, there is no legal or binding obligation of cooperation or assistance among states arising from the Convention's ratification. The only implicit obligation is to take 'an appropriate step towards enhanced international partnerships'.

Furthermore, paragraph 11 of the Recommendation 190 further suggests how that cooperation or assistance by member states can be undertaken in order to prohibit and eliminate child labour, and paragraph 16 determines that such international cooperation should include 'mobilizing resources for national or international programmes' (clause a); 'mutual legal assistance' (clause b); 'technical assistance including the exchange of information' (clause c); and 'support for social and economic development, poverty eradication programmes and universal education' (clause d).

Just to conclude this chapter, I would just like to emphasise that the above analysed set of ILO and UN substantial normative solutions and institutional monitoring implementation and compliance mechanisms are surely a positive key-factor *per se*. Although, all Member States should give priority to the coordination and integration of their activities with the normative frameworks of the two organizations, in order to assure that all children have the best protection possible.

In the next chapter it will be analyzed a case-study where some of the issues preliminary discussed above – labour rights, human rights, (worst forms of) child labour - intersect in the context of Chinese investments in Africa.

5. Child work or child labour?

Summing up what has been discussed while making a link to the next chapter, a case-study where two different cultures intersect upon a complex reality and where economic interests may put at stake children's rights, it would be at this stage useful to shed some light on the importance of considering cultural and economic aspects that are intrinsically involved in many cases of child labour and that should not be overlooked. The national context and cultural aspects that are normally behind the main actors, the host state and the foreign investor, are of extreme relevance when dealing and addressing issues of child labour as such. Whether in the DRC or Zambia, in Angola or Zimbabwe, Chinese investors should be aware of and not ignore the local reality and its pressing human rights issues. They should engage in preventing and eliminating those same problems through, for instance, business strategies that would not allow child labour to continue hidden away from authorities; instead of colluding or neglecting and even worsening *in loco* the problems.

There is a whole cultural *rationale* behind, which should be somewhat considered. Child labour has not always been framed as a 'social evil', especially when it is done in a familiar context. In this sense, it is important to make a distinction between work or 'child work' and 'child labour', which normally is very crucial to understand the phenomenon of child labour. Along with this line of thought, 'child work' is considered either neutral or good for children, while 'child labour' is bad and pernicious.¹²⁶ The difference between both categories is

¹²⁶ Ling & Myers, What works for working children, UNICEF Italy and Radda Barnen Sweden. And Anker, Richard: 'Labour market policies, vulnerable groups and poverty', 1998, 49-88.; and William, Considering Child Labour. Changing terms, issues and actors at the international level, 1999, 13 – 26.

especially relevant in Africa, where certain forms of work orientation for children within the ambit of the family are considered an important part of the process of socialisation. Particularly, the adoption of the Convention 182, for instance, and its applications and implementation has revealed that there are two paradigms to take into consideration. The first one is related to this idea of 'child work' as an element of socialisation, implying that the different national contexts should be taken into account and the work of children presents not only an economic utility, but it is equally relevant from a social and cultural point of view.¹²⁷ Without denying the socio-cultural importance of the work of children in traditional societies, child labour also constitutes an important additional income for the family, including parents. This aspect subjects children and their growth to many dangers and deprives them from their childhood. The second paradigm builds exactly on these concerns and is focused on the protection of children. However, the fact that it is backed up by the government and by NGOs gives rise to some doubts and concerns on this paradigm, often being labelled as an element of the Western 'conspiracy' against African societies. If, on one hand, the political choices of African states are quite influenced by donor organisations, on the other hand, it is also true that, with the ratification of international standards, states commit themselves towards the international community. Thus, the application of the Convention 182 requires the adoption of national measures aimed at the elimination of the worst forms of child labour. This becomes even more mandatory considering the existence of a real economic exploitation of children forced to obtain revenues for their parents or other persons.

In addition, beyond this idea of one form of child labour being worse than another there is also a paradigm of thinking that situates child labour within the socio-cultural context of the society concerned, which tends to avoid the temptation of classifying the use of children in household chores as child labour, even when the children merely help out their parents. In this sense, a 'prioritisation approach'¹²⁸ seems quite relevant, as ILO has demonstrated, because some forms of child labour are notoriously worse than others and some are even acceptable, and some others may be an escape to a worst solution. For example if we take into account when a child has to choose between working in mines or being a child soldier.

The Convention 182 identifies hazardous work, such as the case of working in mines, demanding urgent efforts to eliminate them. In fact, the consideration of a 'prioritization approach' to child labour emerges from the ambiguity of the concept itself.¹²⁹ Child labour can be considered from a purely legalist spectrum, meaning that child labour is merely a type of work that is prohibited by national and international law, but even the legal provisions and attempted definitions are a result of social, cultural, political and economic views of each of the member states and all actors involved in the drafting and implementation process of such laws.¹³⁰

Yet, the definition of child labour, despite lacking some certainty, should be also seen as steeped within cultural questions, especially when we are before an African context, where the utilisation of children in certain activities is accepted as part and parcel of the socialisation process, which should not be the case, however, of children working in mines and quarries. The context of labour should be thus very fundamental in denoting it as child labour. In the same token, the economic and social *rationale*, as above referred, behind the activity should be seen as an important key-element.¹³¹

One of my concerns is the above assumption that in some African countries the generation of child income is necessary and justifies the disempowerment and depreciation of child labour laws. In some cases, child labour may actually be a necessity, in rural communities or agrarian societies, a question that raises some turmoil among non-western or developing countries in relation to whether or not they should adopt the same standards on child labour as western or developed countries, but there is indeed another underlying concern and dilemma emerging about this question. It is true that in some communities there is a cultural expectation that a child will work as young as 6 or 10, but should business (foreign-born business, MNCs or local subsidiaries of MNCs) really support this continuous and vicious cycle through employment of children? I would say no, especially when considering cases like the one described in the previous chapter. Culture should not be an excuse for

¹²⁷ Nesi (n 98).

¹²⁸ Cullen, *Procedural Aspects of International Law*, 2007, 5.

¹²⁹ *ibid.*

¹³⁰ *ibid.*

¹³¹ Ennew, Myers & Plateau, 2005.

economic exploitation, especially of children. Culture is a net and peculiar system of traditions and beliefs that is in constant evolving process, which means that the use of child labour should never be explained as a practice permanently rooted in traditions and cultural contexts and unable to be different and, therefore, justifiable.

One may understand though that for some families to lead their children towards work is the way they find to deal with low income and therefore overcome economic difficulties, but one can also not overlook the fact that it is very irresponsible of the governments to legitimise child labour practices and justify it as culturally acceptable and an income generator means that leave families out of poverty. Breaking this cycle of poverty will require, instead, that governments provide families with a wider range of resources to increase their income and quality of life. Child labour is certainly not an answer to combat poverty and those governments claiming otherwise are just neglecting their obligation to give families alternative means and resources, and also their obligation to protect them from human rights abuses from third parties, namely enterprises, through appropriate policies, regulations and adjudications.

A second problem is the impact of child labour on development, particularly as it distorts the whole labour process. Children work the longest hours and are the worst paid of all labourers, working at very low costs, sometimes without contracts and any form of security.¹³² Hence, children, who are considered 'cheap' and readily available, are used exploitatively in the labour arena and by this process wealth and profit are created for those employing or using them. Therefore, child labour raises concerns for a number of reasons, ranging from the conditions of children involved, and the implications of this type of labour on other issues in the economy, such as adult employment and wage levels and thus general development.

Notwithstanding, throughout this study the aim was not to provide a theoretical definition of child labour or try to explain it from a socio-cultural or political-economic perspective, but rather give essential elements to understand that the African/Congolese (that will be stressed below) socio-cultural context allied to the Chinese economic self-interests in the country (in the DRC), and in Africa in general, may cause drastic consequences and detrimental impact on children's rights. When children are employed or used as a workforce at Chinese mining companies in Africa there is an obvious economic exploitation of these children below the legally prescribed age in the labour sector and for the benefit of a significant other. Consequentially, there is a gross violation of their most basic and fundamental rights. Through child labour there are not only economic implications and benefits for those involved in the exploitation, but there is also an evident unfair competition towards all those other companies, local or international, that struggle to comply with what has been nationally and internationally legislated and regulated and, therefore, considered to be the best standards and practices. Hence, this makes one wonder if those (in this case, the Chinese) driven by their own economic self-interests are not just taking advantage of a vulnerable social reality? One more reason why the 'economic *rationale*' and 'the social context' behind the main scene cannot be forgotten. Obviously, not only in this specific case of China in the DRC, but elsewhere, where same practices and principles are equally or similarly applied.

IV. Country Case-Study

A. Chinese Mining Companies in Katanga, Democratic Republic of Congo (DRC), and the Use of Child Labour

In recent years, China's growing influence in Africa has garnered considerable attention and criticism. This involvement began in the early post-cold war period and since then China has started displaying reinvigorated interest in the African continent, particularly in those countries of the Sub-Saharan region rich in natural resources. Nevertheless, an analysis on how the Chinese investments impact in this region on child labour has not yet received enough academic consideration. Drawing on findings and reports provided by Non-Governmental Organisations (NGOs) and the World Bank,¹³³ which have recently been researching and following-up the situa-

¹³² Boyden, Jo and Bequale, Assefa, *Working Children: Current Trends and Policy Responses*, 1988.

¹³³ The analysis of the case-study presented in the current chapter is supported by extensive qualitative and quantitative data collected and gathered in several reports of local and international NGOs, particularly working on human rights and working conditions related issues of Chinese companies operating in the mining sector in

tion in the field, this chapter provides an in-depth analysis of a case-study focused on Chinese mining companies operating in South-Eastern mineral-rich Katanga province,¹³⁴ in the Democratic Republic of Congo (DRC), where clear evidence of the use of child labour has been found at the mines and quarries owned by these Chinese corporations. Further legal and empirical considerations will be drawn upon on the issue of child labour and to what extent are the rights of children ensured, protected or neglected (including the right to be free from child labour), taking into consideration of course the international standards and domestic legal framework.

1. Democratic Republic of Congo – Country Context

The Second Congo War, the largest war in modern African history and the widespread of illegal exploitation of minerals and resources, that took place between 1998 and 2003,¹³⁵ is a recent example of the corporate greed and atrocious crimes against humanity, involving a war where more than three million lives were lost.¹³⁶ During the war national and international companies have often engaged in forced and child labour practices.¹³⁷ The 'UN Panel of Experts on Illegal Exploitation of National Resources and Other Forms of Wealth of the DRC' identified over eighty companies from developed nations¹³⁸ that, motivated by the countries' mineral wealth, have exploited the Congolese natural resources during the war period.¹³⁹

The DRC has always been well known for being particularly rich in mineral resources. The main engine of the country's economy, which owns one of the world's largest deposits of copper, cobalt, tin, tantalum, gold and diamonds, whose wealth could give rise to a potential growing economic development. However, the DRC Government has been misusing its mining sector's potential unwisely and hence missing a good opportunity to bolster sustainable economic development and growth. Instead, the government has engaged in political and management corrupt practices within its state-owned mining enterprises, as well as in inadequate policies that may severely constraint the private sector investments.¹⁴⁰ Some of the state-owned enterprises (SOEs) were object of restructuration processes and the private sector was finally allowed and stimulated to start investing in the country, especially after the conflict period and Mobutu government's collapse.

In 2002, the Mining Law No 007/2002 of 11 July 2002, also called 'incentive for private capital' was enacted, amending the previous one and leading to the liberalisation of the public sector and proliferation of the private

DRC. The studies and reports are as follows: (1) *'Artisanal Mining in the Democratic Republic of Congo'* issued in June 2010 by PROMINES (a technical assistance project of the World Bank) and the NGO Pact Inc.; (2) *'Chinese Private and Public Investments in the Mining Sector in Katanga: Good Governance and Human Rights'*, issued in May 2010 by NGO 'Contre L'Impunité Pour Les Droits Humains' (ACIDH), may 2010; (3) *'Chinese Mining Operations in Katanga, Democratic Republic of the Congo'*, issued in September 2009 by the NGO 'Rights and Accountability in Development' (RAID); (4) *'Chinese companies in the extractive industries of Gabon and the Democratic Republic of Congo: perceptions of transparency'* issued in August 2009 by 'Centre for Chinese Studies'; (5) *'Strengthening the Civil Society Perspective. By China's African Impact. Emerging Powers in Africa Programme'* issued in April 2009 by 'Fahamu'; (6) *'Democratic Republic of Congo Growth with Governance in the Mining Sector'* issued in May 2008 by 'World Bank'; (7) *'2007 Annual Performance Report (October 2006 – September 2007)'* issued in November 2007 by 'The Extractive Industries Network (EIN) Democratic Republic of Congo' and submitted to USAID DRC Mission; (8) *'Digging in Corruption. Fraud, Abuse and Exploitation in Katanga's Copper and Cobalt Mines'* issued in July 2006 by 'Global Witness'.

¹³⁴ Chinese investments in the DRC have mostly been concentrated in the South-Eastern mineral-rich Katanga province and in its 'copper capital', Lubumbashi.

¹³⁵ Vuyelwa Kuuya, Final Report of the Panel of Experts on the Illegal Exploitation of national resources and Other Forms of Wealth of the Democratic Republic of Congo, UN Doc S/2002/1146 (2002), at <<http://www.natural-resources.org/minerals/law/dcs/pdf/N0262179.pdg>>.

¹³⁶ Weissbroadt, Business and Human Rights, 2005, 57-59.

¹³⁷ Letnar Černič, Jernej, Corporate responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational Enterprises (December 17, 2008). Hanse Law Review (HanseLR), Vol 3, No 1, September 2008. Available at SSRN: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1317263> last accessed 1 March 2013. See also All Party Parliamentary Group on the Great Lakes region, The OECD Guidelines for MNEs and the DRC, 2005.

¹³⁸ There were identified thirty developed nations of North America, Western Europe, and Asia that are members of the OECD.

¹³⁹ Černič (n 135).

¹⁴⁰ World Bank, 'Democratic Republic of Congo: Growth with Governance In the Mining Sector,' Report No: 43402-ZR, May 2008.

mining companies in the country.¹⁴¹ The new mining law consisted of an important step forward for the mining sector, one of the most competitive and complex in the world of its kind. A measure that has aimed to increase the mining production and economic growth, as well as to create more jobs and ensure sustainable development for the whole country.¹⁴² The deficiencies of the sector, undermined by a despotic government and lack of proper institutional structures and dysfunctional administration, have remained. Thus, they have also constituted a threat to larger revenues, mainly for the Congolese population¹⁴³. The global financial crisis that unfolded in 2008 put at stake many national and international investments in the DRC¹⁴⁴, namely Chinese companies who had to start facing the threat of western competition. Although, they have astutely overcome such difficulties. Further considerations on this matter will be drawn upon in the next section.

2. The Mining Sector in Katanga and the Chinese Connection

There has always been bilateral cooperation between China and the DRC, especially from 1960 to 1972. The ties have, however, been strengthened after the launching of the new China-Africa partnership summit that took place in Beijing in 2000.¹⁴⁵ As preliminarily mentioned, China's skyrocketing economic and industrial growth demanded increasingly more raw materials. Contrarily, the DRC, despite having a potentially wealthy mining sector, still lacked basic infrastructure, which was hampering the country's development. In this context, China's approach seemed seemingly beneficial and, in April 2008, Sino-Congolese relations and ties started to emerge more decisively with the signing of a number of cooperation agreements¹⁴⁶ between the DRC government and Chinese SOEs. The beginning of what seemed to be a genuine 'minerals-for-infrastructure barter deal' and a 'win-win' partnership between both countries.¹⁴⁷ Through these agreements, Chinese companies' investments¹⁴⁸, allured by Congo's abundant natural resources supplies¹⁴⁹, would help the DRC to convert its rich mineral resources into economic capital and in exchange, China would feed its fast-growing economy.

In the above-mentioned agreements, it was set that the Chinese SOE would equip the DRC with infrastructure,¹⁵⁰ in exchange for access to its mineral deposits, on a basis of transparency, respect for the 2002 Mine Law and Labour Law and respect for their legal and contractual obligations, which unfortunately was not very often the case.¹⁵¹

China started actively investing in the country with infrastructure construction, telecommunications, development assistance, building up schools and hospitals,¹⁵² and particularly in the mining sector, building mineral units, whose supply was dependent on the craft mining of minerals and known for employing a large number of children, who work under hazardous and precarious conditions.¹⁵³ In this context, Chinese companies (state and non-state owned) started to be also accused of violating labour standards in the mining industry, namely of practices of illegal use of child labour, sub-standard health and safety conditions in Katanga.¹⁵⁴ In consequence,

¹⁴¹ ACIDH (2010), 11.

¹⁴² Kuuya (n 133) 11.

¹⁴³ Supra, footnote 130, 6.

¹⁴⁴ Jansson, et al, Chinese Companies in the Extractive Industries of Gabon & the DRC: Perceptions of Transparency, 2009, 36-38.

¹⁴⁵ *ibid* 7.

¹⁴⁶ China and the DRC signed in 2008 an agreement to swap 10 million tonnes of copper or for US\$9 Billion worth of mines and construction of civic infrastructure. Asia Times, *China has a Congo copper headache*, by Peter Lee 11 March 2010.

See <http://www.atimes.com/atimes/China_Business/LC11Cb02.html>.

¹⁴⁷ Asia Times, *China has a Congo copper headache*, by Peter Lee 11 March 2010.

¹⁴⁸ There is no exact information available on the value of these investments, however according to all studies analysed suggest that Chinese investors have roughly invested around US\$1.5 million in their processing plants.

¹⁴⁹ The Economist. Wednesday 15 June 2011.

¹⁵⁰ China Railway Group Limited and Sinohydro Corporation were two of the companies signing the so called 'contract of the century' with the DRC Government and injected in the country a major funding of \$9 billion. Emerging Powers in Africa Programme Report 2009.

¹⁵¹ *ibid*.

¹⁵² These activities fall under the umbrella of the Forum on China–Africa Cooperation (FOCAC). See <<http://www.focac.org/eng/>>.

¹⁵³ ACIDH (2010), 16.

¹⁵⁴ Alden, *China's Role in Mineral Commodities in Africa: Options for Development*, 2008, 6.

over 600 Chinese nationals involved in mining were expelled by the government accused of violating basic labour principles, but evidence suggests that such practices have still been taking place in the sector until recent days.¹⁵⁵ Another characteristic of Chinese investments in the country that should be pointed out, and that has been quite debated and criticised, is the fact that companies frequently import their labourers/workers from China, rendering the measurement of the problem even trickier - even if the workers are adults. Chinese managers and supervisors are hired for higher-paid positions, while African workers are normally given basic tasks with very low pay.¹⁵⁶ The problem indeed lies primarily in the fact that Chinese employers seem to disregard whether or not these workers are adults or vulnerable children working in hazardous conditions and, in breach of national and international legislation. The consequences and impact on the community, and on children in particular, seems thus to be negatively high.

Soon, it became obvious that Chinese investments in the mining sector in Katanga were part of a strategic, pragmatic and extremely conditional policy to obtain the necessary natural resources to keep path with its increasingly growing resources demand and rapidly economic booming over the last decade, regardless the human rights situation, social commitments and national and international laws, which explains companies engagement in illicit practices of hiring child labourers. It is also noteworthy that Chinese investments have been indirectly linked with the involvement of child soldiers in the South-East part of the DRC. Some of the UN Panel reports pointed out that Congolese minerals and respective revenues were frequently used to buy weapons and fuel conflicts and also finance local militias' illicit activities.¹⁵⁷ An issue intimately linked with the use of child soldiers in the country, another form of worst child labour, as many of these armed groups used to frequently hire children, who were forced to work as combatants, labourers and even sex slaves.¹⁵⁸

3. Mining industry: a source of human rights abuses?

The mining sector has always been a large source of human rights violations, namely challenging economic, social and cultural rights of the local communities. From 2006 to 2010, local and international NGOs, including local and international news agencies, have been repeatedly denouncing and reporting numerous legal and human rights abuses of Chinese mining operations in Katanga. They have suggested that processing plants and mining entities run by Chinese economic actors, among others, have not yet stopped such tendency, but given rise to serious concerns. As reported, they are commonly known for employing or using children's workforce¹⁵⁹ as young as 10 years old and make them work in hazardous and heavy labour conditions, such as in the mines of Katanga, where these children are exposed to radioactive minerals and to all kind of related assaults and dangers.¹⁶⁰ These Chinese companies operating in the mines of Katanga have also been accused of regularly failing to uphold the Congolese Labour Law and engage in corrupt practices.¹⁶¹ In self-defence, they claim that for them it is not always easy to do business in the DRC, due to the engrained practices of corruption they frequently encounter at all different levels. As stated in some reports, some Chinese employers and workers maintain that they would rather prefer to have better and closer relations with Congolese people and be more compliant with authorities' rules and regulations, but the language barrier it is a difficult obstacle to overcome.¹⁶² We should not generalise however, as some Chinese companies have shown certain degree of awareness in relation to the local laws and best practices¹⁶³.

¹⁵⁵ *ibid* 6. See also RAID and ACIDH reports.

¹⁵⁶ Jauch (n 20) 48-55.

¹⁵⁷ *ibid*.

¹⁵⁸ US Department of State, 'Country Reports – 2006: DRC', Section 5. See also Human Rights Watch, Democratic Republic of Congo: Briefing to the 60th Session of the UN Commission on Human Rights.

¹⁵⁹ Garrett, DRC: Guns, sweat and tears in North Kivu's tin ore mines, 2008 and Clark et al, 2008, (n 154); Malemba N'Sakila, The Chinese Presence in Lubumbashi, DRC, 2008, 7-10.

¹⁶⁰ PROMINES Study and Pact, Inc, 2010, 7.

¹⁶¹ *ibid*.

¹⁶² *Ibid* 72.

¹⁶³ See study by Centre for Chinese Studies for the Extractive Industries Transparency Initiative (EITI) and Revenue Watch Institute (RWI). 'Chinese Companies in the Extractive Industries of Gabon & the DRC: Perceptions of Transparency', 2009.

The recent developments garnered considerable concerns, especially for those who claim that, in contrast with western companies pressured to give evidence of social responsibility, the Chinese companies regularly turn a blind eye into national and international laws and human rights standards. This thesis' scope is, in this sense, to examine whether or not this non-compliant behaviour also happens in relation to child labour laws and provisions. Thus far, from what has already been demonstrated above, Chinese companies seem direct or indirectly linked with the issue of child labour. A sentiment that has started being fuelled when 'China Lets Child Workers Die Digging in Congo Mines for Copper'¹⁶⁴ (Bloomberg, July 2008) in 2008 made the headlines the news causing heightened concerns locally and internationally about the impact and responsibility of Chinese public and private companies in the mining sector. Especially, the impact of these investments on child labour in mines and quarries. This reported case of child workers in the mines of the DRC also serves as a basis for our country case-study object of analysis, which illustrates quite well the type and scale of the Chinese presence in the continent, while questioning to what extent do these investments contribute to the social and economic development of the local community and respect for human rights, eg, children's rights. In this regard, it will be analysed below which national and international human rights norms and standards have been adopted by the Congolese government and respected by Chinese companies. Moreover, whether or not there is a role for corporate social responsibility will be further analysed in the next chapter.

The above-mentioned news-article notes that there are private Chinese smelters in Katanga buying copper ore from Congolese middlemen who collect it from children who afterwards dig in extremely unsafe conditions¹⁶⁵.

'Adon Kalenga, a 13 years old orphan, homeless and barefoot, is one of the children working for a Congolese middlemen, Nsumba, who pays child labourers like Adon a flat rate of \$3 a day to fill sacks with ore and wash them in the closest stream and sells afterwards the ore to Private Chinese companies.'¹⁶⁶

Solving complex problems like this one will implicitly imply solving other dilemmas even more complicated than the simple enforcement of national labour laws. As aforementioned, one of the most obstinate critiques to Chinese companies in Africa is related to their exploitative labour practices.¹⁶⁷ In some cases, Chinese are not aware of local labour laws and regulations and tend to apply in Africa the same low and detrimental standards they commonly tend to put in place in China. Child labour is still a widespread, systematic and increasingly serious problem across China.¹⁶⁸ Chinese companies are not the only ones though infringing labour laws in Africa. China is significantly a large and increasing growing presence in the continent, thus it should play a key-role model in promoting human rights and encourage better labour practices and economic and social standards. Besides, China has signed the ILO Conventions 138 and 182 and, therefore, all Chinese companies, whether operating in China or elsewhere, are bound to respect the international provisions.

Unfortunately, Adon, the barefoot and homeless child, is not an isolated case and many other children have been used as labour force in mines and quarries explored by Chinese in the DRC, according to the reports of ACIDH and RAID. Hence, a legal comparative analysis of several international standards, to which both countries are subject to, as well as Congolese and some Chinese laws, regulations and policies aiming at guiding Chinese companies' engagement and action in DRC, will be thereafter analysed. This legal analysis will attempt to grasp the degree of compliance of Chinese companies operating in Katanga with international standards and local norms and it also intends to identify some 'good practices' on child labour issues, ie, whether or not children's rights have been ensured.

¹⁶⁴ Simon Clark et al, 'China Lets Child Workers Die Digging in Congo Mines for Copper', Bloomberg. 23 July 2008.

¹⁶⁵ Ibid 155.

¹⁶⁶ 'China Lets Child Workers Die Digging in Congo Mines for Copper', Bloomberg, 2008.

¹⁶⁷ Brautigam (n 25) 299 – 301.

¹⁶⁸ Ibid.

4. Legal Framework

a. International Standards

The Chinese and the Congolese governments have both ratified important international human rights standards, namely the ICESCR and the CRC. All the provisions of both international instruments should be fully respected and fulfilled by Chinese and all companies conducting their business in the DRC. Both governments ratified several ILO key-standards, such as the Convention 100 on Equal remuneration; Convention 111 on Discrimination (Employment and Occupation); Convention 138 on Minimum Age and Convention; Convention 182 on Worst form of Child Labour and supplementary provisions of Recommendation 190.¹⁶⁹

As internationally enshrined in the Conventions 138 and 182,¹⁷⁰ which were analysed in the previous chapter, children should not work before age of fifteen and before finishing school. Regarding hazardous tasks, the minimum age should be between 16 and 18. Regarding that 'all children under 18 must be protected from the worst forms of child labour'.¹⁷¹ All ratifying member states are legally bound by the Conventions they ratify, once they are officially in force. As per article 2 (1) of the Convention 138, each member state, at its own discretion, may specify the minimum age for admission to employment or work within its own territory.

The participation of children in mining and quarries has drawn the attention and concerns of ILO over the past years.¹⁷² ILO made clear that such practices, due to the serious hazards they imply for health, safety and children's future, are not in compliance with the Convention 182¹⁷³ and should be regarded as a matter of urgency. Under this Convention, worst forms of child labour include all kind of labour that 'jeopardizes children's health, safety and morals'. According to the International Programme on Elimination of Child Labour (IPEC)¹⁷⁴ it is estimated that there are one million children working in small-scale mining and quarries all over the world.¹⁷⁵ The conditions where these children work are often pernicious and unimaginable, endangering severely their lives. It is extremely difficult to know the exact number of children working in the mines in Katanga, especially in Chinese companies, given the hidden or illegal nature of the activity, but it is believed that the number is quite significant.¹⁷⁶

There are other important international standards that Chinese mining companies must respect. One of them would be the 'Principles of Extractive Industries Transparency Initiative (EITI)',¹⁷⁷ of non-binding and voluntary nature. This would somewhat highlight the important role of the government and private companies in promoting and integrating transparency in their own business activities. In fact, in 2005, the DRC adhered to this initiative, but the Congolese government and the Chinese companies have not yet shown willingness in integrating coherent transparency patterns and accountability criteria of private and state actors in their mining operations.¹⁷⁸ Furthermore, some Chinese companies have been sceptical about the implementation of these guiding principles under the low governmental standards in the mining sector, some others are unaware of them, or are simply not interested in integrating corporate social responsibility (CSR) measures into their business activities.¹⁷⁹ An important factor to take into consideration is also whether these are small, medium or large companies. Normally, medium and large companies are more likely to be receptive to CSR issues, because they are more aware of its consequences for their business in long-term; contrarily to small companies

¹⁶⁹ Report I (B) (n 63).

¹⁷⁰ See list of ratifications of Convention 182:

<<http://webfusion.ilo.org/public/db/standards/normes/appl/applbyConv.cfm?hdroff=1&conv=C182&Lang=EN>>.

¹⁷¹ Convention 182.

¹⁷² Mining and Quarrying. Background Document. World Day. Against Child Labour. International Programme on the Elimination of Child Labour (IPEC), 2005.

¹⁷³ See ILO Facts on Child Labour, 2005.

¹⁷⁴ See <<http://www.ilo.org/ipec/lang--en/index.htm>>.

¹⁷⁵ *ibid.* See <http://www.ilo.org/wow/Articles/lang--en/WCMS_081364/index.htm>.

¹⁷⁶ RAID (2009), 5.

¹⁷⁷ Extractive Industries Transparency Initiative (EITI) is a 'coalition of governments, companies, civil society, investors and international organisations' and sets global standards for transparency in the mining sector. See <<http://eiti.org/>>.

¹⁷⁸ ACIDH (2010).

¹⁷⁹ Černić (n 135). See also <<http://www.africafiles.org/printableversion.asp?id=22345>>.

which are often more interested in short-term profit.¹⁸⁰ Regardless of the company size, it is also crucial the level of education and awareness of the company's leader for CSR and transparency commitments.¹⁸¹

An important measure for Chinese companies to make their business more socially responsible could also be through the adoption the norms and standards of the UN on the responsibilities of transnational corporations and related business enterprises¹⁸² with regard to human rights. These norms are a comprehensive framework of international legal principles applicable to business regarding human rights and international labour law.¹⁸³ According to section A, paragraph 1 on the general obligations 'states have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including ensuring that transnational corporations and other business enterprises respect human rights. [...] including the rights and interests of vulnerable groups', and pursuant to section D (Rights of workers), paragraph 6, 'Transnational corporations and other business enterprises shall respect the rights of children to be protected from economic exploitation as forbidden by the relevant international instruments and national legislation as well as international human rights and humanitarian law'. These norms do not constitute a formal treaty under international law and, therefore, are not legally binding. More UN initiatives and norms will be analysed in the Chapter V with regard to CSR.

Finally, the DRC has ratified the African Charter on Human and People's Rights,¹⁸⁴ which was adopted in 1981 and as per article 18, paragraph 3, states must ensure children's protection in accordance with international declarations and conventions. The DRC has also ratified the African Charter on the Rights and Welfare of Children,¹⁸⁵ whose article 15 on child labour maintains that every child shall be protected from all sort of economic exploitation and hazardous work that might affect physical, mental, spiritual, moral, or social development', in line to what has been prescribed by the ILO Conventions 138 and 182. However, there is no monitoring in place to ensure states' compliance.¹⁸⁶

b. National Legal Framework

An analysis of the Congolese legal system reveals the existence of norms and institutions belonging both to the sphere of the state and to a customary system, which due to difficulties of the state and people's behaviour, tend to become an unfulfilled legal order. Each national legal source entails a different concept of child labour. Despite the existence of a set of laws and regulations, the incidence of child labour is still high. The DRC is reported as having about 39.8 percent of children working¹⁸⁷, in all different sectors, between the ages of 5 to 14, as for 2005¹⁸⁸. Children are normally used as forced labourers in mines.¹⁸⁹ Mines are in reality where more children are found working, comprising an average of one third of the workforce.

In addition, it has been reported that in 2009 the ILO called the DRC government, trade unions and employers to discuss the issue of child labour in the mines of Katanga and designed adequate policies and programmes to withdraw these children from the mines.¹⁹⁰ However, all the efforts were frustrated when companies, in this case foreign companies or specifically Chinese companies, where exploitation of child labour was found, com-

¹⁸⁰ *ibid.*

¹⁸¹ *ibid.*

¹⁸² See Resolution 2003/16, and UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003).

¹⁸³ Weissbrodt and Muria: Current Developments: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, 2003, 901.

¹⁸⁴ African Charter on Human and People's Rights. OAU Doc CAB/LEG/67/3 rev 5, 21 I.L.M. 58 (1982).

¹⁸⁵ African Charter on the Rights and Welfare of the Child. OAU Doc CAB/LEG/24.9/49 (1990).

¹⁸⁶ *ibid.*

¹⁸⁷ UCW analysis of ILO SIMPOC, UNICEF MICS, and World Bank surveys, Child Economic Activity and School Attendance Rates, 2005.

¹⁸⁸ There are no recent or exact data and statistics on child labour in the DRC. UNICEF report 'The State of the World's Children' reveals that 29 percent of boys and 34 per cent of girls aged between 5 and 14 perform child labour. In 2000, the ILO estimated that nearly 2 million children aged between 10 and 14 were economically active in the DRC, with an almost equal number of girls and boys.

¹⁸⁹ US Department of State, 'Country Reports – 2006'. See also Watchlist on Children and Armed Conflict, Struggling to Survive: Children in Armed Conflict in the Democratic Republic of the Congo, 2006, 6; Global witness, Digging in Corruption, Washington DC, July 2006, 10 and 32; Human Rights watch, DR Congo: Army Abducts Civilians for Forced Labour, 2006.

¹⁹⁰ See Global March against Child Labour at <<http://www.globalmarch.org/news/291110.php>>.

promised and put at stake all government' attempts to abolish the scourge of child labour. Thus, it is extremely important that all companies operating in the country ensure that their activities support and respect human rights standards, especially in the most volatile areas.

As stated in the introduction of the Congolese Labour Code,¹⁹¹ the new labour legislation was inspired by ILO's Conventions and Recommendations.¹⁹² Many of the Congolese Labour provisions on child labour explicitly reflect the willingness of the DRC Government to commit to the Convention 182, ratified in 2001. One could even say that the adoption of the Convention 182 has highlighted Congolese authorities' determination to ensure a more effective protection of children by combating the phenomenon of child labour, specifically its worst forms. Nevertheless, the political determination collides here once again with an inflexible social and economic situation. This aspect emerges clearly in the process of the national implementation of policies against child labour.

According to the article 6 of the Labour Code, the minimum age set for admission to employment and apprenticeship is 16 years old. However the same article (clause a) opens an exception to those of age of 15, exempting them from this rule in case they are explicitly authorised from an 'Inspector of Work' and from their parents or guardians. Children under the age of 16 should also not work more than four hours a day¹⁹³ and in any circumstance a child can be employed under the age of 15 (article 133, Labour Code). However, there appears to be a loophole in the law, as article 133 only sets a limit age for those children employed by companies, whereas in many cases these children working in artisanal mines are not directly employed by companies (as they never signed a contract), but rather work independently. Working in mines is considered anyway as a hazardous work and according to the Congolese labour law the minimum age for this type of work should be 18.¹⁹⁴ In practice, despite the law prohibition, many children perform hazardous work in the DRC, namely in mines, where the age limit is very regularly disregarded. Even when the trading companies do not employ directly children, they buy products which have been mined or worked on by children. The Congolese government has compiled a list of what it considered to be 'hazardous work' for children that dates back to Order 2224 of 1953, but the current law does not include any provision for the informal sector. Normally, the so called 'light work' is authorised to persons between the age of 14 and 16, eg, work in farms, in the informal business or domestic service, where in fact the majority of children work in the DRC.¹⁹⁵ Despite the Convention 182 calls for member states periodic reviews and revisions of their lists, the DRC government has not done so since 1953.¹⁹⁶ According to the 'International Trade Union Confederation (ITUC) Report' for the WTO on the 'Internationally Recognised Core Labour Standards in the DRC',¹⁹⁷ there is a problem of funding and human resources to control or prosecute those who offend the law and use child labour as well as efficient inspections to workplaces.

Particularly focusing on Chinese companies' activities in the DRC, they are indeed commonly known for not complying with domestic laws, specifically with the Congolese Mining¹⁹⁸ and Labour Code,¹⁹⁹ as well as with the Congolese Constitution, and also for severally disregarding important principles, rules and local practices. Chinese companies, as all other foreign mining companies operating in the DRC, have the legal obligation to comply with all laws and regulations regarding children's rights and protections, as per article 1 of the Congolese Labour Code²⁰⁰ stating that all companies, with no exception for Chinese companies and any other, willing to operate in the DRC 'must obey all local laws, regulations and policies'. The Chinese Ministry of Commerce has

¹⁹¹ Congo Code du travail Loi n°45-75 du 15 mars 1975.

¹⁹² Loi No 015/2002 du 16 Octobre 2002 portant Code du Travail, Exposé des Motifs.

¹⁹³ US Department of State 'Country Reports – 2006: DRC', section 6 d.

¹⁹⁴ Article 41 of DRC Constitution defines child as any person below the age of eighteen and the final part of the same article refers to all forms of exploitation of minors and that it should be punished by law. Along with this constitutional provision, article 18 of the Labour Code sets out that eighteen is also the minimum age to be admitted to apprenticeship.

¹⁹⁵ International Confederation of Free Trade Unions, report for the WTO General Council Review.

¹⁹⁶ ILO Committee of Experts, Individual Direct Requests C182: Congo (2009).

¹⁹⁷ The International Trade Union Confederation (ITUC) Report for the WTO on the 'Internationally Recognised Core Labour Standards in the DRC, Report for the WTO General Council Review of the Trade Policies of the DRC, 2010.

¹⁹⁸ Law No 007/2002 of 11 July 2002. DRC Mining Code.

¹⁹⁹ Law No 015/2002 of 16 October 2002, Congolese Labour Code or in French Code du Travail.

²⁰⁰ Congolese Labour Code or in French Code du Travail.

recognized this provision and reiterated that Chinese companies in the DRC 'would always take into consideration all local labour laws and social responsibilities'²⁰¹.

The DRC is known for its bad-governance records and problems with administration of justice and for a certain 'culture of impunity', which certainly aggravates potential human rights abuses and spurs the disrespect of the rule of law. Corruption has been a serious and imminent problem in the country and of difficult control. Very often, mining companies in the DRC do not comply with international and/or local regulations with regard to health, safety and labour standards and do not have a CSR agenda.²⁰² On the other hand, the government inspectors do not have adequate training and are easily corrupted.²⁰³ Overall, there is a problem of ineffectiveness of the public institutions, responsible for regulating and supervising the mining sector, as pointed out by the World Bank.²⁰⁴ Without an appropriate supervision and monitoring system, it is difficult to control the spread of child labour in mines. In this regard, Congolese governmental institutions need to be restructured, strengthened and subject to more adequate measures of accountability²⁰⁵ in order to ensure children's rights and prevent their violation from external non-state actors.

Eager to increase sustainable FDI and more investors in the mining sector, the Congolese edited a simplified guide in English²⁰⁶ to bring more awareness about local laws and practices among the business community and future investors. From my point of view, this kind of measures and initiatives, if properly used, could effectively help potential investors to be more informed and act accordingly to their obligations and duties towards human rights and labour rights. It could promote practices of CSR in the business sector and, therefore, avoid potential violations of laws. This lack of essential information, especially on labour law and human rights should be overcome to avoid more situations where legislation relating to labour rights, human rights and mining regulations are unknown and persistently breached by operators.

Just to conclude the Congolese legal analysis, it should be highlighted that another example of the DRC's commitment to children's protection is the adoption in 2009 of a special 'national code on the rights of children'. A law (Law No 09/001 of 10 January 2009 on Child Protection),²⁰⁷ that has been based on what was already established in the national Labour Code, in terms of minimum age for employment (article 50), prohibition of the worst forms of child labour (article 53), economic exploitation and violence (article 58), defining economic exploitation as any abuse of children's right that may hamper their right to education.

Thereby, The DRC seems to have taken important efforts to guarantee children's protection. However, their obligation to protect is still quite far from being completely reached and effective. Children's rights are not yet properly protected, despite of an almost complete normative framework. Such obligation should rest, however, with the host country, the DRC in this case, but if the government fails thereof or does not comply with the existing laws, the Chinese companies should not be exempt from respecting national and international standards and from their social corporate responsibility towards the local community.

In all reports analysed,²⁰⁸ it was emphasised that Chinese companies' often breach with the article 133 of the Congolese Labour Code on 'the prohibition of employing children bellow the age of fifteen' or eighteen in case of hazardous work, which somehow proves the theory that children's rights have, in fact, not been properly assured and respected. Thus, Chinese companies disrespect the local law, but the DRC government does not seemingly also have strong and effective methods of enforcing and monitoring such laws and protect children's rights. Ie, the government seems to have the necessary legal means and framework to accomplish such protection (for example, the Labour Code in force seems to be able to provide enough protection to children, where it is considered that work in mines and quarries is illegal and beyond children's capacity and abilities), but lacks stronger enforceability, leaving a 'window' opened to further violations. Again, this case-study is exemplificative of how Chinese economic power can go beyond the host state laws and practices and take some advantage of

²⁰¹ Jauch (n 155).

²⁰² See n 131.

²⁰³ RAID (2009), 5-6.

²⁰⁴ See n 131.

²⁰⁵ *ibid.*

²⁰⁶ Ministry of Mining, 'Guide of Mining Investors', DRC, 2003.

²⁰⁷ Loi no 09/001 du 10 janvier 2009 portant protection de l'enfant.

²⁰⁸ Ling & Myers (n 124).

its weaknesses in favour of its own interests. A case, certainly, not exclusive of DRC, but probably representative of what happens in other African countries, where Chinese companies have been actively investing and behaving through similar patterns. Due to the complexity of this problem, it is important to understand to what extent these corporations can be held responsible for their negative actions and impact on the local community, particularly on children. A problematic that I will maintain and address in the next chapter of this thesis.

c. Chinese Labour Laws

Chinese national laws, like any other countries' legislation, cannot be applied beyond Chinese territory borders, ie, in any other country elsewhere. Therefore, Chinese laws cannot be applied in the DRC. They should, however, serve as an example or a platform for Chinese companies' performance and behaviour when operating overseas. Based on their own national laws, they should know and be aware of certain basic principles within labour relations and that companies cannot disregard. Child labour should consist in one of them.

Notwithstanding, whether internally or internationally, China's government has not been a role model in terms of human rights records, namely on labour and child rights. The incidence of child labour is still quite high,²⁰⁹ but one cannot deny that some efforts and progress have gradually been underway. China wants to be seen as a responsible power and seeks to improve its stance and acceptance internationally. For that reason it has tried to adopt international norms and standards, as exemplified by the ratification of relevant international documents and treaties with regard to children's rights protection. Another example is the inclusion in its national legislation of a wide range of children's rights provisions. In theory, it represents a good step forward, but in practice the enforcement of those laws and treaties it is still very disputable and far from ideal. Laws are made by people and for people and reflect a certain culture and way of thinking. Bearing this in mind, I will just briefly point out few labour law/and child labour-related examples.

Chinese Constitution contains provisions on children's State protection and prohibition of maltreatment,²¹⁰ and defines 'children' as all persons under the age of eighteen.²¹¹ Amid all laws and regulations on child rights protection, the most significant one is the Chinese Law on Protection of Minors (passed in 1991 and revised in 2006)²¹².

In 2008, the new labour legislation²¹³ was adopted and reinforced the Chinese workers' rights (labour contract law, employment promotion law, and labour dispute mediation and arbitration law). These new legal efforts are indicative of China authorities' attempt to change its approach towards labour-related issues. Yet, this should be taken as an 'example-to-follow' by Chinese companies operating in the DRC or in any other country.

5. Chinese Companies and the issue of Child Labour in the mines and quarries in Katanga

Despite prohibitions by the Congolese law and Convention 182, ratified by China in 1999 and by the DRC in 2001²¹⁴, there are a large number of children under the age of eighteen working in the artisanal sector in DRC, especially in Katanga. It is estimated that there are roughly one million artisanal miners and 20,000 of them are children²¹⁵, and 40% of them under the age of 15, as of 2010²¹⁶. According to the ILO, child labour in mining and quarrying is considered a type of worst form of child labour, due to the extent and severity of hazards and risks of death, injury and disease these children are exposed to. On account of this, there should be no

²⁰⁹ Ibid 13.

²¹⁰ Xian Fa, Constitution of the PRC, art 49 (1982).

²¹¹ The Minors Protection Law, art 2.

²¹² The PRC Law on the Protection of Minors, 2007, Gazette of the Standing Committee of the National People's Congress.

²¹³ See <<http://www.ilo.org/dyn/natlex/docs/WEBTEXT/37357/64926/E94CHN01.htm#Chap7>>.

²¹⁴ Eliminating the worst forms of child labour: A practical guide to ILO Convention No 182 (n 100).

²¹⁵ RAID interview with Group One, a Brussels-based NGO working in Katanga on a project funded by the Belgian Ministry of Foreign Affairs and UNICEF on the protection of children working in artisanal mining. RAID Report, 18.

²¹⁶ ACIDH (2010), 18.

excuse, including poverty, to have children working in this sector.²¹⁷ In light with what has already been argued above, private actors should engage in the prevention and elimination of such practices and be held responsible.

The numbers are quite significant and show that awareness campaigns deployed for this purpose have not yet persuaded the government to adopt measures to ban children's access to mines and craft quarries. Or the adopted measures by the government have thus far not produced the expected results. Hence, it is important to find the causes of this scourge and promote all stakeholders' commitment (the community in general, private communities, local authorities and local organisations). At this right moment, thousands of children are still being exploited in hideous and hazardous conditions and forced to survive in mines and craft quarries, not only in Katanga, but in many other regions. It is of all state and non-state actors' responsibility to help these children.

The problem tends to be more complex than it seems. In some cases, children working in mines are not formally employed, but working independently, as aforementioned, or as a family member, which means they have never signed a legal contract. However, the companies' responsibility and liability should not be dismissed due to the nature of the work these children are obliged to perform. In any case, child labour in mining and quarries is a 'heavy burden' and one of the 'worst forms of child labour' as it implies a huge extent and severe hazards and risks of death, injury and diseases.²¹⁸ It is crucial that the government legislates and reinforces their existing laws on mining and quarrying activities and makes them more enforceable and restrictive.

As argued above, children have the same human rights as adults, but in virtue of their age, vulnerability in early process of acquiring knowledge and experience, they have special rights and protection, including protection against economic exploitation and work that jeopardises their health, safety and morals and hinders their development and access to education. Child labour is a complex issue and for that reason Chinese companies need to address it sensitively and should never take any action that may force working children to perform even more exploitative work. Activities like mining put at stake children's lives and are likely to damage their normal and sustainable development, depriving them from their childhood, dignity and from a proper education. Without completing a primary education, it is likely they will remain illiterate and without the needed skills to get a job and contribute themselves for the economic development of their own country in the future. The goal of all companies, whether Chinese or not, should be the abolition of child labour within their sphere of influence and not its enablement. A goal that reflects the spirit of the principle 5 of the UN Global Compact, as it will be referred in the next chapter. Child labour may also have repercussions for the company's reputation and brand image and severely affect the profits.

In the particular case of Katanga, children are required to do the same work as adults. They spend long hours working in washing and sifting ore in water, crushing ore and carrying heavy bags and even extracting minerals and, due to their small size, some employers make them dig, as supposedly it is easier for them to go through the narrow holes, while inhaling dust and noxious, and often in contact with harmful and radioactive minerals, endangering their safety and health.

In Chinese companies, children are also commonly assigned picking up and sorting minerals that have been dug by others from the deposits; transport materials and carry very heavy bags on their heads, shoulders and backs; processing of minerals including crushing rocks, sieving crushed powder, washing minerals, and amalgamating gold using mercury; trading minerals; transporting goods and trading them in the mines.²¹⁹ Finally, there are also cases where children are forced to prostitution, 12 years old girls have been identified working as prostitutes.²²⁰ Some children only work during holidays break, but there are numerous cases of school dropout, as families cannot afford the school fees. There is also a high rate of death among the young workers in mines, the majority of them between 15 and 20 years old and cases of illness, such as eye irritation and cancer.²²¹

A study sponsored by the US Agency for International Development (USAID) and further developed by its consult PACT and four other international mining companies involved in cases of illegal artisanal miners, con-

²¹⁷ ILO Report on the World Day Against Child Labour 2005.

²¹⁸ *ibid* 1.

²¹⁹ PROMINES (2010), 7.

²²⁰ PROMINES (2010), 89.

²²¹ Global Witness (2007), 32.

cluded that despite firmly prohibited by the Congolese Law and international standards (ratified by the DRC and China) there are a large number of children and youth under the age of 18 years working in Chinese companies exploring the artisanal mining sector in DRC. This proves negligence of children's rights in the region by the action of Chinese mining companies. All studies and NGOs reports²²² were unanimous that there are up to 40% of child miners working in Kolwezi²²³ mines (acknowledging that in some cases they could be even younger, as it is very hard to precisely tell the exact age of teenagers between 16-19 years of age). It is estimated that there are around 4000 children, 35% girls and 65% boys, and some as young as five years old. 68% of them study full-time and only before or after school or during weekends or holidays dig at the quarries. There are 40% of children's fathers working in Kolwezi and 20% of them work in mines. Additionally, 10% have their mothers are also employed at the mines.²²⁴

It is estimated that 40% of children are separated from their families and 72% work free-lance and only 20% have a middleman as their manager²²⁵. The numbers are significant, especially for a type of work that implies such serious damages and causes such devastating impact on children's education, health, welfare, and future opportunities. A premature exclusion from school may indeed restrain their opportunities and choices in the future. Besides, working in mines is a hard and hazardous burden even for an adult. Its impact on a child growing body and bones, plus their exposure to minerals, dust, chemicals and radioactivity could have irremediable negative consequences. On the top of that, many mining areas in the region are linked to inappropriate lifestyle where children are exposed to alcohol, drugs and promiscuity, as referred, including sexually-transmitted diseases, since a very young age. Children are easy targets of aggression and violence (6% of child miners have claimed to be injured in accidents and 4% victims of violence),²²⁶ while involved in these artisanal mining communities, especially because of certain patterns of responsibility, which in many of them are very low. As a consequence, many cases of drugs and alcohol addiction and even dilution of cohesive family values and other important factors have been reported²²⁷. There are even more extreme cases where children at the age of three have been raped by artisanal miners, some of them justify their acts by saying that they were under 'fetish' or witchcraft influence, others say that is the way to protect children or curing them from HIV/AIDS.²²⁸

The reasons behind the use of children in mines may vary considerably. The most common is poverty (and parental socio-economic-status). Children are normally brought in a very early age by the parents that work in mines and quickly get familiar and used to that environment and quickly start working themselves along with the parents. In some cases, almost without even 'noticing' it or thinking that they are fated to do so and that it is the natural course of events. In some other cases, it is the economic necessity that leads them towards the work in mines, either for personal survival when they have no family, either pressured to help with their families' income (35% of their earnings is normally given to the family) and with the school fees (normally 25% of the earned money goes to school expenses, in 85% of the cases)²²⁹. There are other cases where children are forced to work to pay parents debts or when the mine area is under military control.²³⁰ There is a percentage of 43% of children pressured by friends to work in the mines after school or during weekends, because there are no other alternatives, such as sports or after-school activities.²³¹

Regardless any reason, children should not be encouraged to work and should be helped, through other meanings, to live a healthy and normal childhood. When states do not take their responsibilities, all the different private actors, companies included, should be the ones preventing and combating such reality, instead taking advantage of it. It is estimated that at least 93% of children agree that they would rather not be doing

²²² Ling & Myers (n 124).

²²³ Kolwezi is a city in Katanga Province.

²²⁴ PROMINES (2010), 92.

²²⁵ RAID (2009), 18.

²²⁶ RAID (2009), 18-19.

²²⁷ *ibid.*

²²⁸ *ibid.*

²²⁹ RAID, 18-19 and PROMINES 98-101.

²³⁰ PROMINES 98-101.

²³¹ *ibid.* 92.

this job and endanger their lives, if there was something else they could do.²³² Within all these cases there is a sociological dimension and relevant economic factors reinforcing this problem that should also be considered. A minority of 7% of children asserted that without their help, their families would not be able to be fed and even survive. It has been estimated that 30% of these children are allegedly sent to work by their parents and 60% of them approve and support work at the mines²³³.

It is difficult to believe that parents would deliberately send their children into tunnels and make them load heavy bags, if there were other options. Although, it is true that most parents consider that there are no other options and likelihood of survival in alternative to the mining sector and they are just helping their children by let them learn something and acquire skills that might be useful for their future. Some other parents may even consider that all these activities related to mining, such as transport or mineral washing, are perfectly acceptable and do not imply risks to their fragile condition. It is noteworthy to point out that some of cultural aspects are also implicitly involved in these cases. For some families, girls are supposed to start working from an early age in minerals' related activities.²³⁴ When children are not directly used in Chinese processing plants, they are indirectly involved into the ore processing. Some of them are 10 years old or younger. The problem is aggravated when these companies do not formally hire them, instead pay them to load bags, and in the end of the day all of them buy minerals from children.²³⁵ Some of these Chinese companies argue that they are helping these children and their families' to survive and make a living.²³⁶ However, it should not be forgotten that all children have the right to be protected from all kind of economic exploitation, as stated in article 32 of the CRC, which was signed and ratified by both China and DRC Governments. Contrary to what is argued by Chinese companies, they are not helping these children harsh childhoods when encourage them to work, but they are clearly promoting and taking advantage of the use of child labour for their own business and highly benefiting from such unfortunate reality. Some NGOs (through the efforts of 'Groupe One')²³⁷ have undertaken interesting projects in these mining sites, in order to get children back to school. They have provided them with school equipment and supporting their families through training programs to improve their skills and enable them to work and earn money by themselves, thus breaking the presumably doomed vicious cycle of poverty.²³⁸ In the light of UNICEF's experience, to simply pay school fees is, generally, not enough to keep children in school and away from hazardous works. It is necessary to promote a wider spectrum of social protection, namely emotional and financial support to their families.²³⁹ In this sense, Chinese Government should make its SOEs aware of the pressing problems and serious human rights issues that local communities face in all these cities where they operate their business. These companies should be encouraged to take adequate solutions and contribute meaningfully to combat child labour, not only in the artisanal mining sector in Katanga, but elsewhere, where such practices have been taking place. They should provide, for example, day-care facilities where parents can leave their children or even schools when they are inexistent. There is an ingrained problem in these communities of lack of incentives, as schools do not exist or are too far from these remote areas. Some NGOs²⁴⁰ have been actively engaged in trying to solve this problem, but if there is no willingness from governments and from companies, all the efforts and projects end up frustrated and fruitless.

Finally, from the foregoing, one could say that one of the main key-factors behind child labour in Katanga is the precarious economic situation of families and the indifference of other state and non-state actors. The challenge is, however, to understand who is benefiting from child labour in mines and quarries in Katanga, and

²³² Extractive Industries Network Report (2007), 38.

²³³ *ibid* 38.

²³⁴ PROMINES, 93.

²³⁵ ACIDH, 19-20.

²³⁶ Unreported World, 'China's Africa Takeover', Quicksilver production for Channel 4; Broadcast, May 2007.

²³⁷ Groupe One is a UNICEF-supported Belgian non-governmental organization.

²³⁸ To alleviate poverty may require educating families on benefits from letting their children go to school and give them the opportunity to learn new skills (reading and writing) and acquire new capacities, which could be more beneficial for families in long term.

²³⁹ Shantha Bloemen, 'Pounding rocks and crushing potential: Child Labour in DR Congo', 12 June 2009 at <http://www.unicef.org/infobycountry/drcongo_49979.html>.

²⁴⁰ For instance, the program of Groupe One, supported by UNICEF and the Belgian Government, aims at preventing child labor in mines in Katanga, by developing sustainable alternative sources of livelihood for children or sending them to school.

elsewhere these problems are also still a reality. If we attempt to sketch an operational chain of the selling craft-exploited ore, it is actually possible to grasp the current and indirect beneficiaries of child labour in mines and quarries. First, at the national level, this chain of sales comprises two specific steps: at the first stage, we have the traditional child-miners selling off ore to traders (Congoese buyers); secondly, at the next stage, the merchants sell the commodity to the trading industrial companies. Thus, the result of the equation seems to quite show that at the top of this chain we have the multinational factory corporations, all highly benefiting from increased revenues.

From this step-by-step operation, it can be concluded that children are, in fact, trapped within the process and all benefits end up in the trading companies 'hands'. In this specific case, Chinese mining companies are the ones befitting from the whole process and operational chain and, therefore, they should be responsible as the craft-exploited ore is the source of supply for operational smelters scattered in the province. This is proved by the existence of multiple outlets selling minerals in many Chinese cities. Multiple counters for Chinese minerals have been found in many mining cities and towns of Katanga province.²⁴¹ In addition, it is also not very likely that these companies were not aware of the (direct or indirect) use of child labour in mines, as the presence of children in mines is extremely visible, as the NGOs' reports affirm.²⁴²

Nevertheless, even knowing about all these cases of exploitation of children, companies deliberately engage in business purchasing minerals from craftsmen, without carrying if there are children behind the process and without even considering the adoption of certain measures to prevent this problem and abolish child labour. The problem could be prevented if companies would have monitoring, audit and certification systems with their supply chains and if they would make them sign contracts attesting non-exploitation of children. Herein lies one of the key-questions about the dual responsibility (active and passive) Chinese companies must have towards the elimination of child labour. On one hand, Chinese companies have active responsibility for operating in the DRC. Despite the efforts internally undertaken by the DRC government, or internationally by the international community in banning the worst forms of child labour in the mines of Katanga, these Chinese companies continue to exploit children (whether direct or indirectly). Chinese companies in Kolwezi, for instance, continue to buy ore disregard the age and quality of the seller. Others even encourage these children to work and perform many hazardous activities by giving them access to their facilities.²⁴³ On the other hand, Chinese companies hold a passive responsibility when buying these minerals, as they are thereby promoting child labour in mines and, at the same time, nullifying and undermining all NGOs and international community efforts on the abolition of child labour in mines. This way, they simply do nothing to stop it, neither engage in child labour-abolishing programmes and projects²⁴⁴.

6. Chinese companies and perspectives of responsible business

In conclusion of this chapter and as an anticipation of the next one where CSR will be further discussed, I would like to preliminary acknowledge that the present case-study does not seek to embarrass Chinese companies or tarnish their image in the world economy and in the African countries. In particular, it is not this thesis' aim to make a negative comparison between Chinese and other foreign investors and somewhat insinuate they have better and more responsible conducts. The aim is simply to provide an example of corporate misconduct that has been undermining children's rights and protection and showcase actual situations that be more attentively considered and regulated by both Chinese and host country governments.

From what has been analysed above, it is clear that there is a huge need of promoting CSR standards and practices among Chinese companies operating in Africa. However, the problem of the use of child labour and a weak CSR agenda on the issue is not exclusively confined to Chinese companies and similar situations, as suggested by some of the reports. There are probably similar cases of Congoese or other foreigner companies and, therefore, they should not be exempt of blame. However, a comparative analysis and further considerations

²⁴¹ ACIDH (2010), 21.

²⁴² Global Witness, 32.

²⁴³ *ibid.*

²⁴⁴ ACIDH (2010), 21.

with other countries' companies would go beyond this thesis scope and it is deemed preferable to focus on Chinese companies, as they are largely the majority in the mining sector in Katanga. The exact number of companies ran by Chinese is not known, but it is believed that nowadays out of 75 mining operating units in Katanga, 60 are owned by Chinese²⁴⁵ and over 90 percent of the minerals are exported to China.²⁴⁶

As mentioned in the first chapter, the Chinese government set out 'China's Africa Policy' grounded on the 'Five Principles of Peaceful Co-existence'²⁴⁷ aiming to foster the rise of China-Africa relations. However, such goals, namely 'mutual benefit and common growth', aim sustainable development and harmonious relations between peoples, which indeed will only be achieved if business relations of Chinese companies in Africa are also improved and if they behave according to local and international laws and standards. Insofar, the lack of CSR among Chinese companies was due to a weak degree of cooperation between China and the DRC at the national level.²⁴⁸ Chinese companies in Katanga are often not aware of CSR measures, probably because CSR standards are also often misunderstood in China.²⁴⁹ Most of the times, the so called 'win-win strategy' established between China and the host state is expressed in terms of business productivity and philanthropic support to local communities services. For many Chinese companies CSR is seen as a contribution to economic prosperity and creation of employment opportunities, combined with compliance with national legal frameworks and philanthropic investments and donations to local schools and hospitals.²⁵⁰

An important distinction between Chinese and Western conception of CSR has been based on the fact that Chinese focus more their business practices on the strengthening of local legal, judicial and political institutions, namely in countries with weak institutional structures, such as the case of the DRC, rather than trying to focus on the real needs of the local population. This different conception is likely to derive from a different historical past and approach between Chinese and Western governments. China usually follows a non-interference policy in keeping business away from host states' internal affairs. For that reason issues like corruption, transparency, human rights and especially child labour issues as part of CSR agenda are rarely discussed among the business operators.²⁵¹

In the particular case of the DRC, the domestic and international standards and Mining Code are the sources of CSR for mining companies operating in the country. At the domestic level, article 69, paragraph g, of the Mining Code establishes the responsibility of the companies/applicants willing to exploit and operate in the mining sector in the DRC, through the requirement of a 'plan as to how the project will contribute to the development of the surrounding communities' attached to their application. The required plan allows the government in particular, and the community in general, to assess the contribution of the mining projects within the sustainable development of the community, where the respective operations are located. These plans may be significant as they set all specifications of companies with regard to their contribution to combat poverty, create more jobs and construct basic social infrastructure, such as schools, hospitals, potable water and electricity facilities, among other important contributions. Important tools that can be used to also eradicate child labour in the mines. In this sense, the responsibility and social obligations of mining companies are exactly the capacity and concern they should have in getting involved and contribute themselves to the community development and its social needs.

Despite the existence of this plan and regulatory framework, it has not been enforced by mining companies, especially Chinese, who deliberately ignore and subvert such provisions, disregarding whatsoever impact their activities have on the community.²⁵² In most of the cases, studies of social impact, as required by the mining law, are not made public and so inexistent²⁵³. According to all the NGOs interviews and reports, there is enough

²⁴⁵ *ibid* 36.

²⁴⁶ Bloomberg Markets, September 2008.

²⁴⁷ See n 13.

²⁴⁸ RAID (2009), 5.

²⁴⁹ OECD, 'OECD Investment Policy Review of China: China CSR Survey 2006', 2008.

²⁵⁰ Responsible Business in Africa: Chinese Business Leaders' Perspectives on Performance and Enhancement Opportunities, Harvard University working paper No 54, 2009, 46.

²⁵¹ *Ibid* 47.

²⁵² RAID (2009), ii-iii.

²⁵³ ACIDH (2009) and Emerging Powers in Africa Programme (2008).

evidence to conclude that the local communities frown upon the presence of Chinese companies in the region and their indifference vis-à-vis their social responsibilities and obligations, and unanimously consider that they have a social negative impact on the community.²⁵⁴

However, it is believed that the Chinese government is in process of preparing a set of national guidelines for responsible business conduct abroad,²⁵⁵ an initiative that could be extremely more valuable if they were in line with the OECD Guidelines for Multinational Enterprises, for instance. Through them, the Chinese government should be able to persuade Chinese companies, not only large multinationals, but also smaller private companies operating in Africa, to include higher standards of CSR in their business strategies, especially in relation to labour and social rights, children's rights/and non-use of child labour, as well as economic and cultural rights of local communities. The Chinese government should not leave behind the issue of child labour and should consider to undertake meaningful measures to eradicate child labour in the mining sector of Katanga, namely with the collaboration of UNICEF.

V. Corporate Social Responsibility Approach – Ways Forward for Chinese Companies in Africa

'Business has an enormous potential to impact children's rights.'

George Kell, Executive Director of the UN Global Compact

A. Preliminary Considerations

Business has always had serious impact on human rights and, very often, more adverse than beneficial. With the globalisation and the rapidly process of proliferation of multinational corporations (MNCs) around the World, the situation became even more exacerbated, whereby international leaders and human rights defenders started the quest for an accurate paradigm within which business would not only prevent and avoid all adverse impact and malign effects on human rights, but it would promote them.

Taking the previous case-study as the steppingstone to further developments on the issue of business and human rights, exemplificative of the need of having a CSR agenda within Chinese companies business strategies and more approachable and effective business and human rights discourse, the present chapter aims at giving the necessary insights and basis to understand CSR. It intends to explain why Chinese companies operating in Africa should see CSR as a possible solution to the problems they have been facing in relation to human rights. New models are needed to shape Sino-African economic engagement, so that it is genuinely supportive of African development. Hence, it is of great importance to identify preventive ways to avoid corporate human rights abuses. In this regard, my main argument will be that business and human rights discourse must take into account child labour related issues, since many corporate human rights violations relate to labour relations, as we had opportunity to analyse throughout this thesis.

²⁵⁴ See interviews to locals working in Chinese companies in Luisha and Likasi, DRC: ACIDH Report 23-24.

²⁵⁵ RAID (2009), 5.

B. Business and Human Rights Discourse - General Overview

Can CSR be an effective solution to abolish child labour, in the context of Chinese investments in Africa? It seems to be a rhetoric question, but it has actually been the concern of many NGOs and civil society over the past few years, essentially when news and publications started criticizing Chinese companies' labour practices in Africa. In many African countries, as the above-analysed case-study of Chinese mining companies in the DRC exemplifies, several companies explored by Chinese investors maintain child labour in their main work facilities and supply chains. Among other problems, unfair wages, poor labour conditions and gender discrimination are other related issues that go beyond the scope of this thesis and for that reason they will not be stressed. The focal point of this thesis is, however, the use of child labour by Chinese companies in Africa. An issue that will now be discussed from a business and human rights spectrum, ie, through an emerging CSR approach to eliminate child labour and, consequentially, potential social protection programmes and corporate strategies and initiatives.

When addressing child labour, CSR seems to be a socially sensitive approach, but it can only be seen as 'socially responsible' when a social assessment²⁵⁶ can conclude that there is a positive social impact over a negative one on working children, their families and local community in general.²⁵⁷ By and large, the concept of CSR is not new and has recently been 'gaining momentum'.²⁵⁸ The debate on this issue has evolved around the activities of multinational corporations (MNEs) and large private companies, which may have the key-power to influence not only at the international level, but particularly the local communities where they operate.²⁵⁹ Their activities have a direct impact on society and the capacity to either damage it, or generate social benefits,²⁶⁰ as we had opportunity to see in the case-study above. Corporations have economic power that enables them to influence social policies and regulations that may impact the lives of individuals.²⁶¹ In that regard, CSR should be the path to be followed by Chinese companies. They have the power to choose whether or not hire children, for example, and infringe local and international legislation, while reversing or contributing for a worse local human rights situation. It has been perceived that there are still deficient national and international laws and regulations, as seen above too in the case of the DRC, especially with regard to corporate accountability and on those corporations conducting in or coming from a different jurisdiction outside their home state.²⁶² The problem of corporations 'power' may be more problematic when they operate in developing countries under deficient economic, social and political circumstances, as many in Su-Saharan Africa. The mining industry and extractive sector, for example, as referred above in the case-study, has dominated and reported abuses, namely of labour rights and child labour.²⁶³ Corporations driven by economic interests and natural resources quest, such as the case of many Chinese companies presence in Sub-Saharan Africa countries, are often accused of taking advantage of the vulnerable situation of these countries and for that reason they should be held accountable. All the efforts towards that aim should come not only from companies, but also from states, international institutions and stakeholders affected by those activities, in order to create structural processes, guarantee legal and social responsible behaviour and activities by corporations.²⁶⁴ In general, the seemingly poor results of CSR, in many of the cases referred above, are due to the fact that CSR is essentially an aspiration term for 'best practices', or morally acceptable behaviour and conducts and not a set of enforceable regulations or policy per se that exists in substance with legally binding effects over such corporations.²⁶⁵ They are thus free to determine

²⁵⁶ 'Social interventions are normally interwoven, theoretically and in practice, with evaluation, monitoring or audit assessments of the actual socioeconomic impacts on certain developing countries groups'. See Bahar Ali Kazmi and Magnus Macfarlane, *Elimination of child labour: Business and local communities*, in Rory Sullivan, ed, chapter 14, 181–196.

²⁵⁷ *ibid* 181-196.

²⁵⁸ Kercher, *Corporate Social Responsibility – Impact of globalisation and international business*, 2006, 1-12.

²⁵⁹ *ibid*.

²⁶⁰ Charlotte Villiers, *Corporate Law, Corporate Power and Corporate Social Responsibility*, in *Perspectives on Corporate Social Responsibility*, 2008, chap 5, 85- 108.

²⁶¹ *ibid*.

²⁶² Kercher (n 255).

²⁶³ United Nations, E/CN.4/2006/97, 2006, paras 25 and 26.

²⁶⁴ Villiers (n 257) 85.

²⁶⁵ Kercher (n 255) 86.

their own CSR agenda and policies in line with their business goals.²⁶⁶ In some cases, they can even be monitored by NGOs, who do not necessarily have a legal or political expertise and by consumers and civil society who are not always aware as well of corporate behaviour to keep it adequately under control.²⁶⁷

In this sense, some of the most pressing issues, such as child labour, namely in Sub-Saharan Africa, could be alleviated by corporate activity. In fact, Chinese corporations when operating their business in the continent could assume a role and inspirational model towards local and other foreigner corporations and shape the continent's social conditions and human rights situation, working towards a positive impact, namely on child labour. At least they could try to prevent or reduce it as far as possible through their corporate activities. Companies, namely Chinese companies in Africa, wield economic and political power and capacity to strengthen or suppress local economy and social living conditions and may have a fundamental role in cases of child labour, because it is up to them to hire or not children. In the context of the child labour issue, the official acceptance of the CRC and the ILO Conventions 138 and 182 provide a global framework of societal values with which CSR activities should be aligned.²⁶⁸ CSR activities should be designed to respond to the specific interests and needs of those within the society and who are affected by business actions.²⁶⁹

The UN High Commissioner on Human Rights on the responsibilities of transnational corporations and related business enterprises with regard to human rights reported that there are over 200 initiatives and standards regarding CSR, including international instruments, nationally based standards, certification schemes, voluntary initiatives, mainstream indices and tools, meetings, among others.²⁷⁰ Some of them will be mentioned infra. This is a sort of 'a la carte', where a company can pick and choose which social contract it will respect and put in practice.²⁷¹

In fact, many companies have been subscribing to voluntary initiatives, namely codes of conduct, directives, policies, third-party and self reporting initiatives by individual companies, groups of companies, intergovernmental organisations or civil society groups, which are adopted by corporations on a voluntary basis.²⁷² Despite all these initiatives and positive indicators, the achievements have not been enough and a lot still needs to be done in the field of CSR, particularly when speaking of Chinese companies activities in Africa. In contrast with many other foreign companies, for China the concept of CSR is still quite new and for Chinese companies operating overseas it is still a matter of building schools and hospitals and traditional philanthropy.²⁷³ A vision that seems to be based on China's current discourse on human rights, mainly focused on communitarian and social solidarity and obligations towards others.²⁷⁴ Yet, there is still a prominent gap in the definition of human rights in China²⁷⁵ or human rights norms are still interpreted as 'western' imposing standards and as a conjure of state's sovereignty as its own defence. This makes one wonder about what should be the remedy when Chinese activities, in certain African countries, do not only clash with the advancement of universal (the so called 'western') norms of human rights, but also undermine social and economic structures and paradigms, such as labour rights and child labour.²⁷⁶ Certainly, CSR would not totally hill the problem, but could somehow help to solve it. This is a reason why their policies on CSR still need to evolve and mature. However, China as always tried to be seen as a 'good world citizen' and tried to seek other countries support.

Thus, CSR could also be used by them as a campaigning tool to improve its image and reputation, and a positive demonstration of a genuine CSR policy. Thus far, we can deduce that despite being a valuable tool, CSR is not always the remedy for all problems, as it suffers of many weaknesses itself. One of them is certainly its definition that still seems to be quite problematic, especially in the globalisation context, whose definition is also debatable. Without a proper definition, companies may arbitrarily claim their own social responsible re-

²⁶⁶ *ibid.*

²⁶⁷ *ibid.*

²⁶⁸ Sullivan, *Business and Human Rights*, 2003, 181-196.

²⁶⁹ *ibid.*

²⁷⁰ UN, 2005: 4-5.

²⁷¹ Hohnen, 2005, at <<http://ead.uniethos.or.br>>.

²⁷² Villiers (n 257) 89.

²⁷³ Brautigam (n 25) 304

²⁷⁴ Ian Taylor, *Sino-African relations and the problem of human rights*, 2007, 65.

²⁷⁵ Brautigam (n 25) 304.

²⁷⁶ Ian Taylor(n 274) 85.

sponses. Another issue is also related to the voluntary approach of CSR, which gives companies power to set their own CSR agenda. This is normally implemented not out of altruism, but as a response to consumers and community's pressures.²⁷⁷ Thirdly, companies do not have enough external inspections to ensure they behave in a socially responsible manner.²⁷⁸ As seen above in the DRC case, these inspections are easily corrupted. Further bellow, only the first CSR weakness (CSR definition) will be further developed.

1. CSR Definition(s)

Despite its imminent importance there is still no single or universally definition of CSR. CSR is a dynamic concept still evolving,²⁷⁹ which shows somehow its limitations and opportunities for better progress.²⁸⁰ As Hohnen (2005) would say CSR 'can and does mean different things to different people'.²⁸¹ For the European Parliament, who recognises the Commission's definition, 'CSR is the voluntary integration of environmental and social considerations into business operations, over and above legal requirements and contractual obligations'.²⁸² Other terms to refer to CSR are normally 'corporate sustainability', 'corporate social investment', 'triple bottom line'²⁸³, 'socially responsible investment and corporate governance'.

Finally, according to the World Business Council on Sustainable Development²⁸⁴ (WBCSD), CSR is 'the commitment of business to contribute to sustainable economic development, working with employees, their families, the local community and society at large to improve their quality of life. While for the 'Business for Social Responsibility (BSR)',²⁸⁵ 'there is no single definition of CSR' and 'it generally refers to business decision-making linked to ethical values, compliance with legal instruments and respect for people, communities [...]'. Even though, CSR means 'operating a business in a manner that meets or exceeds the ethical, legal, commercial and public expectations that society has of business'. In a nutshell, CSR requires companies to develop their activities according to legal requirements and in a manner that respects social and economic interests of all, so it can ensure sustainable economic progress.

As the labour dimension is of crucial relevance within this thesis scope, it finally matters to mention ILO's views on CSR. For ILO, CSR is a way through which enterprises assess their activities' impact on the community and assert their principles and values in their internal methods and processes and in the interaction with other actors.²⁸⁶ CSR is of voluntary character and an 'enterprise-driven' initiative in relation to activities that normally go beyond compliance with the law. As per ILO, the voluntary nature of CSR means that enterprises are free to adopt (or not) social responsible conducts that go beyond their legal obligations. CSR should also be part of its integral and systematic management and not merely occasional. For ILO, CSR is also linked with sustainable development, as above mentioned and should not be used as a substitute of the government's role and duties or even as a way of collective bargaining and industrial relations,²⁸⁷ an important point in face of china's activities in other countries, showing that in the absence or poor CSR programmes by Chinese companies in the country, the government should always enforce its laws and standards and make others, especially non-state actors, respect them.

In relation to what has been said in the third chapter, when discussing labour rights as human rights, CSR is of extreme importance for ILO as well, due to its core labour standards and social dialogue that are the CSR

²⁷⁷ Haufler, 2001, ch 5.

²⁷⁸ Villiers (n 257) 91.

²⁷⁹ Kercher (n 255).

²⁸⁰ Villiers (n 257) 91.

²⁸¹ Hohnen Sustainability Strategies, 2005.

²⁸² European Parliament, 2007, para 4.

²⁸³ The phrase of 'triple bottom lines' was coined by John Elkington in his 1998 book *Cannibals with Forks: the Triple Bottom Line of 21st Century Business*.

²⁸⁴ See <<http://www.wbcds.org/templates/TemplateWBCSD5/layout.asp?MenuID=1>>.

²⁸⁵ See <<http://www.bsr.org/>>.

²⁸⁶ In Focus Initiative on Corporate Social Responsibility (CSR), Governing Body, 295th Session, March 2006.

²⁸⁷ ILO helpdesk factsheet, 2011.

main key-aspects, and indeed the core business of ILO. Many of the existing CSR initiatives, namely codes of conduct, concern to international labour standards' principles that have been developed by ILO.²⁸⁸

When ILO Conventions are ratified by member states they become binding on governments, requiring them to adopt national legislation to implement them. Nonetheless, despite non-binding on enterprises, the principles of such ILO Conventions can be used as guidelines for enterprises conduct, which in light with the case-study shows that once the DRC and China have ratified Conventions 138 and 182 they should make sure their provisions are fully respected and fulfilled.

The ILO also promotes certain degree of dialogue between governments, workers' and employers' organizations and provides important assistance and tools for them to grasp and implement the labour dimension of CSR.²⁸⁹ Finally, ILO has two important tools on CSR. The ILO Declaration on Fundamental Principles at Work, as mentioned earlier in chapter III, which lists the requirements that governments need to fulfil to implement ILO's core labour standards. A second tool is the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (the MNE Declaration), which will be mentioned below, and that provides guidelines on business behaviour and conduct for governments, ILO constituents and enterprises. This declaration is equally applied to MNEs and national enterprises as it reflects 'good practices' for all.²⁹⁰

2. Globalization and CSR challenges

In the context of globalization era, particularly of China's growing range of activities and investments in Sub-Saharan Africa, CSR appears to be of urgent need and relevant importance. Globalisation²⁹¹ is often accused of impoverishing a large sector of the international community and for destructing the human environment.²⁹² When considering the rise of Chinese investments in Africa it should not be forgotten that these companies operate, directly or through subsidiaries or in alliance with other entities, in more than one different jurisdiction and the most pressing issues regarding CSR occur in poor countries with weak and corrupt governmental structures.²⁹³ Weak regulations and laws on international investments can definitively distort local development, fuel conflicts and foster human rights violations and undermine problems such as child labour. As exemplified by the case of the DRC, a country strongly dependent on natural resources and foreign donors, MNEs can impel the country's economy, but also the capacity to abuse such power, especially when the host country is unable or unwilling to hold them accountable for their inadequate conduct. More efficient national and international regulations on MNEs and cross-border CSR accountability seem to be urgently necessary. The political and economic structures, especially of developing countries, should be strengthened and reinforced in order to regulate more effectively the private sector.

In fact, international law remedies for MNEs have always been considered weak, especially when the national laws of host states are not able to hold MNEs accountable when they have an inadequate conduct within a different jurisdiction.²⁹⁴ An issue that may be even more complicated when the national law of the host state, where the irresponsible business conduct is performed, it is not only inadequate, but also when the judicial system or government itself is not willing to act against the offending corporation, due to the great dependency on MNEs economic power. The Chinese case exemplifies quite well this, because many times both countries (China and the host country) rather prefer a mutual non-interference in each other's internal affairs. Therefore, there is no way to hold these MNEs accountable for their inadequate conduct. Such lack of accountability has given rise to some criticism against MNEs operating outside their home state jurisdiction.²⁹⁵

²⁸⁸ ILO helpdesk factsheet, 2011.

²⁸⁹ *ibid.*

²⁹⁰ *ibid.*

²⁹¹ Globalisation is often described as a 'slippery concept which means different things to different people in different contexts'. Dine, 2005, 5. See also *Multinational Corporations and the Ethics of Global Responsibility: Problems and Possibilities*. Mahmood Monshpouri, Claude E Welch, Evan T Kennedy.

²⁹² Herrman, 2004: 209-10.

²⁹³ David Mephram, 'Beyond Corporate Responsibility – Rethinking the International Business Agenda' at <<http://www.policy-network.net/php/article.php?sid=4&aid=282>>.

²⁹⁴ Kercher (n 255).

²⁹⁵ *ibid.*

In this context of economic globalisation, ILO soon started realising that international labour standards were being overtaken by competing products in the international development and policy markets. The business community started to feel pressured to embody CSR and other responses to fill the gap that could not be directly filled by international law.²⁹⁶ CSR was understood as a necessary phenomenon to fill in gaps in national capacity to protect workers, particularly when MNEs' investments extended to countries lacking capacity to adopt or enforce national labour law.²⁹⁷ A concern that became even higher with the rise of Chinese investments in Africa due to their reputation of supporting a string of despots and disregard for human rights principles.

Moreover, as a response to all the problems raised by the impact of business activities on human rights over the past years, there has been an exponential increase of bilateral and multilateral agreements, treaties and initiatives adopted by states and international organizations that go beyond national boundaries.²⁹⁸ These treaties mirror home countries governments' willingness to protect the investment of companies operating overseas and also host countries' willingness to allure FDI.²⁹⁹ However, the critics say that these initiatives have got a mere marginal impact on the MNEs and host countries decision-making and most of the efforts to regulate CSR have come from public international institutions and NGOs.³⁰⁰ Moreover, in line with the spread of human rights abuses attributed to corporations, the adoption of codes of conduct³⁰¹ with regard to CSR has also been gaining momentum internationally.³⁰² Whether under the shape of declarations, guidelines, compacts or principles, they outline norms for acceptable corporate conduct. These codes of conduct, despite not being legally binding, as mentioned, may be seen as a kind of diplomacy or persuasive gesture by NGOs towards governments, which may turn out in their inclusion into national legislation or accepted as universal standards.³⁰³

As a revision of the latest code of conduct situation,³⁰⁴ I will just briefly mention three³⁰⁵ that are already in operation and stress the issue of child labour: the 1976 Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises (the Guidelines),³⁰⁶ the ILO's 1977 Tripartite Declaration on Principles Concerning Multinational Enterprises and Social Policy³⁰⁷ (MNEs Declaration) both of them revised in 2000, and the UN's Global Compact (the Compact) of 1999.³⁰⁸ Initiatives that Chinese government and corporations should consider adopting, as along with growing economic and political influence comes greater responsibility.

The Guidelines³⁰⁹ were first adopted in 1976 and are the longest standing comprehensive instrument promoting high corporate standards.³¹⁰ The UN Secretary General's Special Representative on Business and Human Rights, John Ruggie, has recently said that OECD Guidelines are 'the most widely applicable set of government-endorsed standards related to corporate responsibility and human rights'.³¹¹ The Guidelines are a non-binding

²⁹⁶ *ibid* 66.

²⁹⁷ *ibid*.

²⁹⁸ Villiers (n 257) 100.

²⁹⁹ Kercher (n 255).

³⁰⁰ *ibid*.

³⁰¹ It is important to make a distinction between corporate codes of conduct that are individual company policy statements defining the company's ethical standards, and codes of conduct for multinationals that are created externally and not by the company and to some extent are imposed on multinationals. They are mostly agreements between companies and entities that create the codes. ILO, Bureau for Workers' Activities.

³⁰² Monshpouri, Welch, Kennedy, *Multinational Corporations and the Ethics of Global Responsibility: Problems and Possibilities*, 2003.

³⁰³ Kercher (n 255).

³⁰⁴ Villiers (n 257).

³⁰⁵ No mention will be purposely made to the 'protect, respect and remedy' framework (also known as 'the UN framework' or 'John Ruggie Principles'), which was adopted through Resolution 8/7 on 18 June 2008, for lack of enough room to develop this topic.

³⁰⁶ OECD Guidelines for Multinational Enterprises, at <<http://www.oecd.org/dataoecd/56/36/1922428.pdf>>.

³⁰⁷ Available at <http://www.ilo.org/wcmsp5/groups/public/@ed_emp/@emp_ent/documents/publication/wcms_101234.pdf>.

³⁰⁸ Available at <<http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html>>.

³⁰⁹ See International Law/Internationales Recht. Corporate Responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational enterprises *Jernej Letnar Černič. 2008 Vol 4 No 1.*

³¹⁰ Kercher (n 255).

³¹¹ OECD, A publication of the Investment Division, 2008.

initiative³¹² containing voluntary principles and standards addressed to entities of multinationals which operate in OECD member countries and domestic enterprises of OECD countries³¹³ in areas such as human rights, among others. The Guidelines set standards to be respected by MNEs and to make them contribute positively for economic social progress whether operating at home or abroad.³¹⁴ According to the Commentaries, 'The Guidelines are not a substitute for nor should they be considered override local law and regulation. They represent supplementary principles and standards of behaviour of a non-legal character, particularly concerning to international operations of these enterprises'.³¹⁵ The guidelines are voluntary for companies; however the adhering governments should commit themselves formally and promote their fulfilment among MNEs. The guidelines set up instruments addressing governments' responsibility and promotion of transparent policy frameworks for international investment.³¹⁶ This commitment is normally made through the National Contact Point (NCP), a government officer responsible for the promotion of the Guidelines at the national level and a guarantee that they are well known by national and international investors.³¹⁷ The NCP has been criticised as weak and not very efficient mechanism and, therefore, jointly with the Guidelines it should be reinforced.³¹⁸

Despite not being a member yet, China sees the Guidelines as a relevant benchmark. A responsible business behaviour by Chinese enterprises, when operating in China or Africa,³¹⁹ may contribute to the improvement of labour conditions and for social responsible practices and even create a higher level for investment. As mentioned in the previous chapter, it is already understood that the Chinese government is preparing a set of national guidelines based on the OECD provisions, which would be helpful in the combat against child labour. In fact, in Chapter V of the Guidelines on Employment and Industrial Relations, in its paragraph c) it is referred that 'Enterprises should, within the framework of applicable law, regulations and prevailing labour relations and employment practices and applicable international labour standards: [...] Contribute to the effective abolition of child labour, and take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency.'³²⁰ This paragraph echoes one of the four core principles and rights at work of the ILO's 1998 Declaration and recommends MNEs to contribute to the effective abolition of child labour in the same sense of ILO 1998 Declaration and ILO Convention 182. MNEs can play a fundamental and positive role in addressing the root-causes of poverty in general and of child labour in particular, two inter-related problems. They can do so through better labour management practices and higher quality, eg, well paid jobs (for adults) and contribution to economic growth. MNEs should be encouraged to reinforce this important role in contributing to the quest of a solution for child labour, namely by enhancing the standards of education of children living in the host countries where they operate.³²¹

According to ILO Tripartite Declaration (Declaration), MNEs should contribute positively to economic and social progress through the enforcement of national laws and international standards and respect their voluntary commitments.³²² MNEs should perform their business accordingly with the social goals of the host states,³²³

³¹² Clapham - Human rights obligations of non-state actors, chapter 6, 201-213

³¹³ Codes of conduct for multinationals. ILO Bureau for worker's activities.

³¹⁴ Clapham (n 309) 204.

³¹⁵ OECD, 2001, 12.

³¹⁶ OECD Guidelines for Multinational Enterprises

<<http://www.answers.com/topic/oecd-guidelines-formultinational-enterprises>> at 25 June 2006.

³¹⁷ Clapham (n 309) 208- 209.

³¹⁸ Kercher (n 255).

³¹⁹ In response to the UN Security Council's call for responsible investment in fragile African countries, the OECD adopted in 2006 OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones. This instrument is based on the guidelines and provides a multilaterally-endorsed comprehensive guidance for companies operating in countries where governments are unable or unwilling to assume their responsibilities. Work is underway with the OECD Development Assistance Committee and the UN to help companies to make the best use of this tool in situations where there is a high risk of corruption, labour and other human rights abuses. See OECD – 2008. A publication of the Investment Division – Secretariat of the OECD Investment Committee.

³²⁰ See OECD Guidelines for Multinational Enterprises – Recommendations for Responsible Business Conduct in a Global Context, 25 May 2011, 33.

³²¹ OECD Guidelines for Multinational Enterprises, 2011, 33.

³²² ILO 2001: Tripartite declaration of principles concerning multinational enterprises and social policy, Third Edition.

regarding labour rights and human rights. Governments should implement all necessary measures to face the impact of MNEs on employment, namely in those countries where Chinese companies have opted to bring their own workers, rather than hiring local workers. Another important measure stated in the Declaration is the improvement of working conditions (health and safety), wages and benefits by MNEs in developing countries, in order to fulfil basic local needs within the framework of governmental policies, important measure that may help combating child labour, a ILO core labour standard. Finally, all principles expressed in the Declaration are voluntary and addressed to governments, employers' and workers' organisations whether in home or host states.³²⁴ Despite this voluntary approach, it does not mean that the Declaration detracts the value of its normative parts that refer to binding obligations.³²⁵ Companies are bound to respect and fulfil legal obligations and their inclusion is declaratory.³²⁶

This 'voluntary approach' in fact covers the different meanings of 'will' and 'good will'. Contrary to the WTO's approach where all the obligations are covered by the 'single undertaking' *ipso jure* binding on all its members, the 'good will' dimension of ILO standards means that they are drawn on the voluntary acceptance of standards (international labour conventions), which are treaties that create obligations when ratified by member states and require their incorporation into national legislation.³²⁷ This reflects the 'general rule' of international law still based on the consent of states. Another important dimension is the efficacy and to what extent ILO has the capacity to ensure that the voluntary acceptance will be effective in each reality of its member-states. The challenge does not seem to be that difficult as all members are supposed to have 'the will' to implement the standards.³²⁸ Although, there are cases like the one analysed in chapter IV showing that it is not necessarily so easy, and that the issue represents indeed a very significant test of efficacy, especially when there are State and non-state actors, national and non-national all playing and with self-interests in the same field. A challenge that could be better understood when referring to the *preambular* paragraph of ILO Constitution which comments that 'failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries.' Thus, members have to pay the price of social progress in an open and globalised economy, which means that they are also dependent on the 'good will' of the others. An interdependence, or negative solidarity, that should also be applied to the necessary 'good will' to ratify ILO Conventions.³²⁹ The revision to this Declaration in 2000 brought important improvements for human rights protection, namely for child labour eradication.³³⁰ In the section on the conditions of work and life, a new paragraph was inserted: 'multinational enterprises, as well as national enterprises, should respect the minimum age for admission to employment or work in order to secure the effective abolition of child labour'.³³¹ Therefore, governments are asked to ratify the Convention 138 and 182.

Thirdly, the UN Global Compact (thereafter, the Compact), in its own words 'is not a code of conduct, but it highlights the global citizenship qualities of corporations and opens up opportunities for focused, mediated, directed and constructive dialogue'.³³² The Compact is an UN voluntary initiative introduced in 1999, based on 10 core principles in the area of human rights, labour standards, environment and anti-corruption.³³³ The Compact is an initiative that aims at encouraging businesses worldwide and adoption of sustainable and socially

³²³ Caux Round Table, International Labour Organisation, at <<http://www.cauxroundtable.org/ILOTripartiteDeclarationofPrinciplesconcerningMultinationalEnterprisesandSocialPolicy.html>>.

³²⁴ Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, at <<http://www.ilo.org/public/english/standards/norm/sources/mne.htm>>.

³²⁵ See Addendum I and Addendum II. See also O'Leary (1997: 260-261) for references to the possibility that the provisions of the Declaration may become customary international law.

³²⁶ I Brownlie, Legal Effects of Code of Conduct for MNEs: Commentary, 1980, 39-43.

³²⁷ Maupain, Is the ILO Effective in upholding worker's rights? Reflections on the Myanmar experience, in Labour Rights as Human Rights, 85.

³²⁸ *ibid* 85.

³²⁹ *ibid*.

³³⁰ ILO, Governing Body, Report of Sub-Committee on MNEs, GB.279/12, 2000.

³³¹ MNE-Declaration, para 36.

³³² See <<http://www.un.org>>.

³³³ Clapham (n 309) 218-219.

responsible policies and report on their implementation.³³⁴ The ten principles of the Global Compact have been universally and consensually accepted in many countries' jurisdictions and they derive from The Universal Declaration on Human Rights (UDHR), The ILO Declaration on Fundamental Principles and Rights at Work, The Rio Declaration on Environment and Development; and The UN Convention against Corruption.³³⁵ Another aim of the Compact is to 'catalyse actions in support of broader UN goals, such as the Millennium Development Goals (MDGs)'.³³⁶

The Compact, as soft law initiative of an international organisation, lacks a strong enforcement mechanism. Likewise, it also does not impose any conditions or criteria of membership to be met by participant companies before adhering to its principles and it also does not have a system to deal with complaints against companies.³³⁷ A weakness that is also shared with the OECD Guidelines. The Compact is, however, considered world's largest CSR initiative and has already gathered over 3000 participants and stakeholders.³³⁸ China has introduced the Global Compact in December 2001 and there are already 230 business participants, as for 2011.³³⁹ For the purpose of this thesis, it is important to refer to Global Compact Principle 5 regarding the 'effective abolition of child labour'. A relevant principle that should be taken into account by corporations, namely Chinese corporations operating in Africa and interestingly is the only principle in the Compact that makes explicit reference to ILO standards, ie, to child labour conventions. In fact, a part from the Compact, only few codes of conduct adopted by corporations make reference to core labour standards.³⁴⁰ The implementation of this principle would certainly imply a direct and valuable contribution to development and a way to uphold the effective abolition of child labour by companies, as they have the economic power to help children to access basic education.

After an overview of some of the voluntary codes of conduct that corporations can adopt, there are few aspects that should be summed-up. The mentioned instruments are non-binding, general and determinedly soft standards and promotional means of enforcement. Their value certainly lies in incremental measures that should be taken towards more hard law forms. Soft law may actually be seen as an opportunity to compromise and encourage corporations' participation, who otherwise would be rather worried about liability risks of legally binding rules. Soft law also has the advantage of giving a quicker and more flexible response to contemporary challenges and enables non-state actors to engage into international law in areas where they are not allowed to in traditional international law making processes.³⁴¹ As mentioned above, most of the times, the initiatives and codes of conduct lack enforcement mechanisms and sanctions. Their non-binding essence, however, does not make them mere '*aspirational* measures'.³⁴² They are appeals to corporations to behave responsibly, but without repercussions or liability in case they do not respect them. Therefore, and in line with our context of China in Africa, one may wonder if it is adequate to impose on companies' responsibility standards when they operate their business in states that allow for example child labour. Ought or not the host state bear or share responsibility?

The traditional understanding of international law has been the one that companies do not have international legal personality and, therefore, they cannot be hold accountable through international law. On the other hand, some international law norms, namely human rights norms, can only be ensured by states, guaranteeing a very limited role for corporations. The discussion on this approach has opened numerous challenges and has been undermined by new national and international precedents.³⁴³ The important here is to refer that corporations, particularly Chinese corporations when operating in African countries, should have obligations within their

³³⁴ See Lisa Whitehouse, *Corporate Social Responsibility, Corporate Citizenship and the Global Compact. A New Approach to Regulating Corporate Social Power?* University of Hull, UK 2003.

³³⁵ Kercher (n 255).

³³⁶ <<http://www.unglobalcompact.org/AboutTheGC/index.html>>.

³³⁷ Villiers (n 257).

³³⁸ The UN Secretary General Remarks at the launch of the Principles for Responsible Investment, New York Stock Exchange, 2006, at <<http://www.un.org/apps/sg/sgstats.asp?nid=2006>>.

³³⁹ See China's participation in UN Global Compact:

<http://www.unglobalcompact.org/NetworksAroundTheWorld/local_network_sheet/CN.html>.

³⁴⁰ P Alston, *Core Labour Standards' and the Transformation of the International Labour Rights Regime*, 2004, 507-508.

³⁴¹ Villiers (n 257) 101.

³⁴² Piccioto, 2003, 135.

³⁴³ Mepham (n 290).

business activities with regard to promote and protect human rights, namely child labour. As we have seen above throughout the case-study analysis, there is a danger compromising the human rights situation of the host state, especially when there are no strong political and legal structures by the governments and adequate regulatory systems by the MNEs. Chinese companies are unlikely to consider the economic and social development of the host country and rather operate in pursuit of profit maximisation. They can easily 'exploit the softness of the sustainable development concept and effectively work against sustainable development in practice'.³⁴⁴ Thus, corporations, as powerful organisations, and states as entities with capability and influence to alter structural conditions and enable corporations to act as they do, should take measures and act collectively in a responsible manner to protect social welfare and promote human rights. That is the only way to make China-Africa partnership a virtuous one.

3. 'CSR with Chinese Characteristics'

To conclude this chapter, and in light with the above said, I would like to refer to CSR approach of Chinese companies in Africa in general, which has extensively become an important issue when discussing today's international development. CSR in China, normally starts as a governmental response to irresponsible companies' behaviour within the national market.³⁴⁵ In the wake of seemingly scandals of Chinese mining companies exploiting child labour in DRC, civil society, NGOs and governments urged the business community to take stronger legal and moral responsibilities. Chinese companies are still at an early stage of learning and understanding CSR practices³⁴⁶ and a lot still needs to be done in this field. Companies have been developing 'CSR with Chinese characteristics', mostly based on contribution to local economic development, respect and compliance with national laws (a fundamental factor for the elimination of child labour) and philanthropic approach through the construction of schools, hospitals and other infrastructures. With regard to child labour, the compliance with the law is sometimes not enough, especially when the national laws are set lower than international standards. Companies should then apply higher standards and due diligence practices. A good example is again the DRC, where a good set of laws on children's protection was enacted, but violations still occur quite frequently. Higher standards could be achieved through impact assessment and social audits to find out the nature and root-causes of child labour.

At the national level, in January 2008 it was issued in China a set of Guidelines for Central State-Owned Enterprises (SOEs) regarding Implementation of Corporate Social Responsibility, whose clause 4, paragraph 19 states that 'SOEs are encouraged to exchange concepts and experience in fulfilling CSR with other enterprises at home and abroad [...]'.³⁴⁷ These guidelines on a voluntary basis and, therefore, with no binding effects require SOEs to set all necessary mechanisms to fulfil CSR and to make business more 'human-oriented, closer to scientific development, more responsible to stakeholders and environment in order to achieve harmony between enterprises' growth, society and environment'.³⁴⁸ According to these guidelines SOEs should 'comply with regulations and laws, public ethnics and commercial conventions, and trade rules'.³⁴⁹ Besides governmental regulations like the one supra-motined, Chinese companies have also been pressured by investors and local communities to incorporate in their business CSR strategies.

In 2010, 471 Chinese companies in Africa have publicly published CSR reports, which shows a quite successful achievement and willingness in strengthening CSR and a very proactive attitude, especially of those operating abroad, in complying with national and international standards.³⁵⁰ The challenges faced by Chinese companies are numerous. Chinese companies, whether operating in China or in Africa, do not give the neces-

³⁴⁴ Herrman (n 289) 212.

³⁴⁵ Cheng & Liang, Social responsibility of Chinese investment in Africa: What does it mean for EU-China Cooperation on development policy towards Africa?, 2011.

³⁴⁶ Harvard University working paper No. 54 (n 247), 56.

³⁴⁷ Guidelines to the State-owned Enterprises Directly under the Central Government on Fulfilling Corporate Social Responsibilities adopted by the State-owned Assets Supervision and Administration Commission of the State Council (SASAC) of PRC. Available at: <<http://www.sasac.gov.cn/n2963340/n2964712/4891623.html>>.

³⁴⁸ Cheng & Liang (n 342).

³⁴⁹ Clause 3, paragraph 8, Guidelines to the State-owned Enterprises.

³⁵⁰ Cheng & Liang (n 342).

sary strategic importance to CSR, which results in a lack of awareness and capacity to include CSR into corporate management.³⁵¹ Very often the CSR department of Chinese companies is marginalised, rather than being considered as a crucial part of corporate strategic business management. There is still a wrong conception of CSR as a form of public relations, by many business operators, a quite challenging issue especially for emerging private companies.³⁵² Another important aspect is the fact that despite of a good knowledge and strategic CSR planning, some Chinese companies still lack a good evaluation system that ensures the fulfilment of long term internal and social responsibility and positive external impact. Companies are still very much oriented for profit and 'short-term financial performances' in detriment of social impact and human rights consequences.³⁵³ Another factor may be related to Chinese culture itself. The culture of Chinese business has always been characterized by a 'low-key attitude' and non-engagement with stakeholders groups and NGOs.³⁵⁴ According to Chinese culture 'actions speak louder than words' which may also be used as an excuse for Chinese companies to keep themselves away from local community, NGOs and media. A corporate attitude that should be improved by Chinese investors in Africa, especially in terms of developing better partnership with local community and stakeholders and to understand their pressing needs. Thus, Chinese companies should develop a strategic CSR approach that allows the so promised 'win-win' outcomes.

As exemplified by the analysed case-study, Chinese companies invest in countries where social regulations and laws are rather weak and loose with high incidence of child labour exploitation, which may be unfairly profitable for some in short-term, but surely increase potential business risks in long term. Therefore, it is fundamental these Chinese companies in Africa cooperate with other leading companies in the region or same sector where they operate and establish adequate standards to help local economic development. Especially for those who have not well understood all these challenges, there are still two important priorities to be taken into consideration by Chinese enterprises: first, they should prioritise sustainable management of national resources, by adding value to local economy, a relevant measure in the case of Chinese mining companies in the DRC; secondly, they should employ local labourers and create more job opportunities. Thus far Chinese companies tend to use a significant number of Chinese workers or give African workers only basic tasks at very low pay, while importing Chinese managers and supervisors for higher-paid positions.³⁵⁵

VI. Conclusion

In this thesis I have attempted to grasp the nature and implications of China-Africa relations, questioning whether Chinese investments in Sub-Saharan Africa have an impact on children, eg, on child labour related issues, and whether there is room for CSR within the Sino-African economic partnership. In the first chapter, it was provided a contextualizing background of China-Africa engagement and shifting policy, characterized by an increased economic partnership and China's first steps of integration into the international economic arena. A partnership that has been grounded on a 'mutual-beneficial' and 'win-win cooperation' rhetoric, and on the principles of 'non-interference', 'sovereignty' and 'free-of-conditions' policy to local African governments. On one hand, African countries gain infrastructure, natural resources development and shelter protection against international scrutiny; on the other hand, they see local market, labour relations and problems like child labour endangered with the Chinese presence.³⁵⁶

Since one of the main aims of this thesis was to approach the Sino-African engagement from a labour perspective, in chapter III, it was discussed, through a more generalist approach, the issue of core labour standards and human rights to clearly understand to what extent there is a convergence of labour rights as human rights and how both can be articulated and differentiated. A somewhat theoretical debate, but quite helpful in explaining the importance of a focus on labour standards, when discussing Sino-African relations, and particu-

³⁵¹ *ibid.*

³⁵² *ibid.*

³⁵³ *ibid.*

³⁵⁴ Harvard University working paper No 54 (n 247) 49.

³⁵⁵ Jauch (n 20) 49-55.

³⁵⁶ In some cases, certain African countries, such as the case of Sudan, for example, see perpetuated wars when Chinese engage in weapons negotiations.

larly on child labour. A challenge that seems to depend on the context and on the role that labour rights are perceived to have when addressing current problems, namely child labour, within the global order.

Further in the same chapter it was highlighted the issue of child labour *per se* and ILO's involvement in its eradication. A problem that despite being deeply rooted in the history of humanity has recently become a matter of public debate due the emergence of Chinese investments in Africa and critics towards their labour relations in the region. It was provided an overview of ILO's main instruments on children's protection, the Conventions 138 and 182, and concluded that the implementation of international core labour rights has been for long time the principal means used by ILO to combat child labour. This reflects ILO's member states conviction that childhood is a period of life, which should not be devoted to work, but to physical and intellectual development. The vicious cycle between child labour and poverty it is also another challenge to be overcome, as poverty is considered to be one of the main reasons of child labour perpetuation. Child labour, on the other hand, is also a primary cause of poverty.

In chapter IV, several studies and research on Chinese investments in the mining sector and the use of child labour in Katanga, the DRC, led to the conclusion that Chinese mining companies in the region have been using child labour in clear breach of local and international norms and standards. Chinese companies driven by economic interests and desire of 'natural resources' security are today's largest stakeholders in mining investments in the country and have achieved striking revenues. As pointed out, China has its own interests in the DRC, especially in minerals, but also the Government of the DRC is very much willing to have its partnership reinforced and benefits highly from that through infrastructure development. Both countries seem to share the same principles and vision on economic interests. They are both not concerned in getting involved in sensitive issues, such as child labour, but in consolidating an almost symbiotic economic partnership. From the case-study analysis, it can be concluded that one of the main key-factors behind the incidence of child labour in the region is the precarious economic situation of parents, poverty, as well as the indifference of other actors, such as the Congolese government, who have the necessary legal means to protect and ensure children's rights, but fails in their enforceability by letting Chinese companies to exploit children in the region. In this regard, children's rights are certainly not protected but endangered. Therefore, they lack opportunities to access other basic human rights they are entitled to, such as the right to education.

To some extent, Chinese companies have been laying on a 'deficient' governance and politics and benefiting from that, consequentially aggravating immanent human rights problems, in the case of the DRC, the child labour situation. Moreover, China should not be the only one to be blamed. Congolese government should also be responsible for establishing solid structures, based on coherent principles and norms on children's protection and should not allow external interference inconsistent with such values. The way it has been done, Chinese presence and the profit-driven companies in the DRC seem to be an unfortunate step-backwards and they have a negative impact on child labour. As referred, the aim of this case-study in particular, and of this thesis in general, is not to tarnish China's reputation in Africa and in the international sphere. Nor compare them to other foreign investors in the region, and portray Chinese companies as greater human rights violators. Essentially, it aims to bring more awareness on the child labour issue and need of incorporating a CSR agenda into these companies' business activities.

Another conclusion, in line with the analysed above in chapter V, is that CSR of Chinese businesses in Africa is undoubtedly a phenomenon worth of research and a coin with two intriguing sides: on one hand it represents an opportunity, and on the other hand a challenge to African development. Lessons can be drawn to reflect on the effectiveness of both China's and Western's development agenda and policies during the last decade. Chinese companies have faced great challenges in filling the gap between their lack of knowledge of CSR and mechanisms to implement it, allied to their inexperience in actively engage with local communities and international standards and practices.

Corporations in general, not only Chinese, frequently infringe human rights which in recent years have caused an upsurge of concern over human rights and MNEs.³⁵⁷ In this regard CSR definition and its contribu-

³⁵⁷ Muchilinski, Human Rights and Multinationals – Is There a Problem?, 2001.

tions to more positive effects on society have been analysed and companies, particularly Chinese, have recently been urged and encouraged to adopt CSR measures and standards within their business strategies. They should, at least, base their business on established standards of corporate governance used by other multinational corporations, namely European, such as OECD Guidelines or the UN's Global Compact.³⁵⁸

In this context, a pertinent question arises: will codes of conduct offer a role for them to play in promoting human rights and especially in preventing the exploitation of child labour? As seen throughout this thesis, Chinese MNEs are 'profit-maximising' and 'profit-seeking' oriented and their understanding of CSR is still at an early stage and still very much about philanthropic social investments. That may enhance their reputation in the local community and rather benefit their workers.³⁵⁹ A certain disinterest in the socio-cultural welfare or human rights of the people living in the host state is not, however, exclusive of Chinese MNEs, but a characteristic of all MNEs in general.³⁶⁰

However, to be a 'good corporate citizenship' is not only about building schools or hospitals, but foremost involves fulfilling certain corporate obligations by providing fair revenues to the host government, for instance. Moreover, more than urging these companies to self-regulate and enforce codes of conduct voluntarily, which are still important, but not enough, it is important that governments and international organisations control potential cases of economic children's exploitation by regulating companies through both national and international legislation. As referred by Medea Benjamim,³⁶¹ 'it is important to talk more about international codes rather than codes that each company designs' according to their own interests. 'Most of the codes are based on internationally recognised rights, on the ILO's own standards [...]' and is not part of 'the companies own agenda'.³⁶² Initiatives like the Global Compact are a good hope and a step towards curtailing human rights abuses by MNEs. They are voluntary recommendations and not mandatory sets of resolutions, with no legal obligations, but only moral, and therefore they cannot hold corporations accountable through penalties or sanctions when they violate their principles or standards. Similarly can be said about the OECD Guidelines on MNEs and ILO Declaration, they both share a view of what is believe to be a 'good corporate behaviour', but at the national level, they cannot replace legally binding regulations. They are all 'legally non-binding'³⁶³ and they are minimum standards that should be used as guidelines for corporate behaviour.

Finally, the fact that a company adopts a code of conduct with provisions on children's rights does not guarantee that this corporation behaviour will be accordingly to those rights or to the provisions on the matter. Codes have to be effectively implemented and properly monitored and audit to address the issue of child labour. Certification should also be another measure used by companies. However, an inherent problem is exactly this absence of mechanisms to implement external monitoring and audit processes.³⁶⁴ A problem that should be overcome and African governments should undertake efforts to improving their revenue, particularly in the case of countries like the DRC with a wealthy mineral commodities sector, through monitoring and auditing financial accounts of Chinese and other foreign multinationals operating in their countries and, therefore, improve transparency.³⁶⁵

In general, all MNEs, when operating in another country, especially under a vulnerable human rights and governance situation as the case of many Sub-Saharan African countries, have little interest in the welfare and human rights of the people living in the host state. A problem that is reinforced through the fact that they also have no legal obligations towards the host governments where they operate. Even if their action and policies affect negatively the local population. Primary responsibility for human rights protection against MNEs falls upon

³⁵⁸ Alden (n 152) 7.

³⁵⁹ Carnegie Council on Ethics and International Affairs, Human Rights Dialogue 2 (2000).

³⁶⁰ Monshpouri (n 299) 966-989.

³⁶¹ Executive director of Global Exchange, an American NGO aiming to promote human rights and social, economic, and environmental justice across the world, at <<http://www.globalexchange.org/getInvolved/speakers/12.html>>.

³⁶² *ibid.*

³⁶³ Pieter Sanders, The Implementation of International Codes of Conduct For Multinational Enterprises.

³⁶⁴ UNDP, Human Development Report 2000, at 80 (2000).

³⁶⁵ Alden (n 152) 7.

host states, inside the territory where potential violations occur³⁶⁶ and, therefore, only states can be held accountable. Under the absence of international regulations, MNEs are free to design their own rules even if atrocious towards human rights.³⁶⁷ A solution for this problem could eventually be the implementation of a universal human rights treaty that holds MNEs directly responsible for human rights violations. This would help not only the human rights situation, but also the problem of unfair competition in the business community.³⁶⁸

In the light of the above, the concept of CSR is indeed under constant evolution, which means that corporate policies and practices and corporate responsibilities and obligations are evolving. MNEs have an intrinsic responsibility to look after their workers and community as a whole. Therefore, they should not encourage problems such as child labour. Children are inherently entitled to the same human rights as adults and, therefore, such condition cannot be neglect by these Chinese corporations.

Chinese corporations have been reaping enormous benefits and this power should be used to improve the local human rights situation of African countries, as their actions can help to strengthen, modify or undermine national and international rules of behaviour and of society. They should make use of this ambivalent role and act as an example of business free of child labour. If they benefit so much from the African resources, then it is fair they accept all responsibilities that come along with such economic gains. They should also foster other ways to work cooperatively with the African governments and all community in general, as only this way a 'win-win' scenario and mutually virtuous partnership can be built upon and problems as child labour eradicated. Overall, I am positive that the Chinese business approach to human rights will surely evolve and there will certainly be room for CSR within business priorities in Africa, namely in the field of child labour.

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³⁶⁶ Weshka, *Human Rights and Multinational Enterprises: How can Multinational Enterprises be Held Responsible for Human Rights Violations Committed Abroad?*, 2006, 659.

³⁶⁷ *ibid* 214.

³⁶⁸ *ibid* 659.

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