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### Incorporating Rights: Child Labor in African Agriculture and the Challenge of Changing Practices in the Cocoa Industry

Erika George

*Boston University School of Law*

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INCORPORATING RIGHTS: CHILD LABOR IN AFRICAN AGRICULTURE  
AND THE CHALLENGE OF CHANGING PRACTICES IN THE COCOA  
INDUSTRY

*Erika George* \*

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I. INTRODUCTION

Millions of children around the world are working.<sup>1</sup> Many youth are

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<sup>1</sup> Gerald Abraham, *The Cry of the Children*, 41 VILL. L. REV. 1345, 1354 (1996); *Current Status + Progress: An estimated 150 million children worldwide are engaged in child labour*, UNICEF, <http://data.unicef.org/child-protection/child-labour> (last visited Aug. 8,

fortunate to enjoy age-appropriate employment and learn valuable skills through work.<sup>2</sup> Unfortunately, too many children labor under abusive conditions—some are trafficked, others are enslaved.<sup>3</sup> These unfortunate children are denied the opportunity to enjoy the fundamental human rights essential to their development and guaranteed under international law.

This essay offers an overview of the issues associated with child labor eradication, a review of the legal instruments regulating the work of children, and an assessment of recent initiatives to address the worst forms of child labor in the cocoa industry as illustrative of evolving best practices. It is argued that protecting the rights of working children will require more than changes in law. Examples of constructive changes include recent international policy developments clarifying the responsibilities of business enterprises with respect to human rights and recent initiatives in the cocoa and chocolate industry sector incorporating respect for children's human rights into business practices. These developments, in combination with fair trade certification schemes, do hold promise for creating change.

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2014).

<sup>2</sup> David M. Smolin, *Conflict and Ideology in the International Campaign Against Child Labor*, 16 HOFSTRA LAB. & EMP. L.J. 383, 396 (1999) (contesting assumptions underlying universal condemnation of child labor and the potential overbroad reach of present terminology and commenting on the worth of youth work: "All work and no play makes Jack a dull boy; All play and no work makes Jack a mere toy"); see also Christian Parenti, *Chocolate's Bittersweet Economy*, CNN Money (Feb. 15, 2008, 10:02 AM), [http://archive.fortune.com/2008/01/24/news/international/chocolate\\_bittersweet.fortune/index.htm](http://archive.fortune.com/2008/01/24/news/international/chocolate_bittersweet.fortune/index.htm) (An 11-year-old boy helps with the work of his father's cocoa farm because he needs to learn how to be a farmer).

<sup>3</sup> See, e.g., INT'L FIN. CORP., *Addressing Child Labor in the Workplace and Supply Chain*, *Good Practice Note 1* (2002), available at <http://www.ifc.org/wps/wcm/connect/0c566200488555cbb834fa6a6515bb18/ChildLabor.pdf?MOD=AJPERES&CACHEID=0c566200488555cbb834fa6a6515bb18> ("According to International Labour Organization (ILO) statistics published in May 2002, there are an estimated 352 million children aged 5-17 engaged in some form of economic activity around the world. Of these 352 million, 246 million were either (i) below their country's minimum age for employment; (ii) working in occupation that jeopardize the physical, mental or moral wellbeing of a child; or (iii) working as slaves, prostitutes or bonded laborers."); Christina Lamb, *The Child Slaves of the Ivory Coast: Bought and Sold for as Little as £40*, THE TELEGRAPH (Apr. 22, 2001), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/cotedivoire/1317006/The-child-slaves-of-the-Ivory-Coast-bought-and-sold-for-as-little-as-40.html> (reporting on UNICEF map depicting child trafficking routes in the region, "Most [children] used in slavery or bonded labour come from Mali, Benin, Burkina Faso and Togo; the main destinations are Côte d'Ivoire and Nigeria . . . as well as Ghana, which both sells and receives children"); Humphrey Hawksley, *Mali's Children in Chocolate Slavery*, BBC NEWS (Apr. 12, 2001), <http://news.bbc.co.uk/2/hi/africa/1272522.stm>.

## II. ISSUES COMPLICATING CHILD LABOR ERADICATION

The eradication of abusive child labor remains challenging due to a complex interaction of different factors that influence whether or not a child will work. There are different approaches to the child labor issue, depending on how the causes and consequences of child labor are understood. While there is a broad consensus that the worst forms of child labor must be abolished, questions concerning the role of work in the life of a child remain contested, particularly in the agricultural sector. Will working harm or help a child? Should child labor be permitted or prohibited?

### *A. The Current Debate on Definitions and Objectives*

There are distinctions to be drawn between work that is harmful and employment that helps build character and capacities.<sup>4</sup> Ideally, age-appropriate employment yields benefits both to the child and his or her family. Children may enhance their future opportunities for gainful employment by acquiring a set of skills in a trade or a profession through work experience.<sup>5</sup> A child from a poor family may elevate the economic status of his or her family by contributing to household earnings.<sup>6</sup> In other instances, early employment can burden the child and condemn his or her family to intergenerational cycles of poverty.<sup>7</sup> In many developing countries,

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<sup>4</sup> ELAINE L. CHAO, U.S. DEP'T OF LABOR, *ADVANCING THE CAMPAIGN AGAINST CHILD LABOR VOLUME II: ADDRESSING THE WORST FORMS OF CHILD LABOR*, 41 (2002); Katherine Cox, *The Inevitability of Nimble Fingers? Law, Development, and Child Labor*, 32 *VAND. J. TRANSNAT'L L.* 115, 122–24 (1999) (discussing right to work at a certain age).

<sup>5</sup> See MICHAEL BOURDILLON ET AL., *RIGHTS AND WRONGS OF CHILDREN'S WORK* 35–39 (2010) [hereinafter *RIGHTS AND WRONGS OF CHILDREN'S WORK*] (reporting on the attitudes of children towards work and finding children often value and enjoy work for social access status and future earning prospects); Parenti, *supra* note 2.

<sup>6</sup> See Cox, *supra* note 4, at 146–47; *Access the Data: Child Labour*, UNICEF, <http://data.unicef.org/child-protection/child-labour> (download “Download Data”) (last visited Sept. 18, 2014) (showing 48% of the Ghana population are considered to be poorest household wealth quintile, and in Côte d'Ivoire 37% are considered in the poorest bracket).

<sup>7</sup> See ELAINE L. CHAO, U.S. DEP'T OF LABOR, *FACES OF CHANGE: HIGHLIGHTS OF U.S. DEPARTMENT OF LABOR EFFORTS TO COMBAT INTERNATIONAL CHILD LABOR 2* (2003) (Child labor continues the cycle of poverty that afflicts developing countries because the children cannot go to school or get a good education, and without education the children will fight the same battle as their parents and developing countries will not progress.); see Cox, *supra* note 4, at 146 (noting that “child labor may perpetuate poverty... [because] it inhibits a child's ability to educate herself, traps her in unskilled and poorly paid work, or permanently impairs her health.”); *Social Indicators*, U.N. STATISTICS DIV., <http://unstats.un.org/UNSD/Demographic/products/socind/default.htm> (last visited Aug. 12, 2014) (In Côte d'Ivoire, 66.9% of the adult population fifteen years and up are engaged in economic activity, while in Ghana the rate is at 69.4%. The average education of a child in Côte d'Ivoire is six years, while in Ghana it is eleven. Finally, Côte d'Ivoire has an adult fifteen years and up literacy

economic necessity may dictate that children work.<sup>8</sup> However, when the conditions of work constitute a form of modern slavery, or when a child is trafficked into forced labor and work comes at the cost of a child's right to education, international law is violated and intervention is imperative.

Whether the eradication of child labor is an objective that can or should be achieved remains contested as policy makers from different sectors weigh the rewards of child labor against its risks.<sup>9</sup> Some advocate the total abolition of child labor,<sup>10</sup> while others advance the view that reasonable regulation would be both preferable and possible.<sup>11</sup> There has been an evolution in approach from an emphasis on a universal minimum age for work to the identification and elimination of harmful work.<sup>12</sup>

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rate of 56%, while Ghana has a rate of 67%).

<sup>8</sup> See Harvetta Asamoah, *International Human Rights*, 32 INT'L L. 559, 561 (1998) (addressing child labor in the context of its relationship with poverty and identifying efforts on behalf of ILO, U.S. Department of Labor and the International Conference on Child Labor from 1996 to 1997); Cox, *supra* note 4, at 129 (Child labor is "fundamental evolutionary state in the development of a country," and once a country develops enough child labor will die out of its own accord.); Parenti, *supra* note 2 (Children from neighboring farms come together to help each farmer harvest their crop in time. They don't work for pay, but just for the promise that that farmer in turn will help their family farm bring in the harvest.).

<sup>9</sup> For different detailed discussions of the causes and consequences of child labor, see generally RIGHTS AND WRONGS OF CHILDREN'S WORK, *supra* note 5; ALESSANDRO CIGNO & FURIO CAMILLO ROSATI, THE ECONOMICS OF CHILD LABOUR (2005); ANACLAUDIA G. FASSA ET AL., CHILD LABOUR: A PUBLIC HEALTH PERSPECTIVE (Anaclaudia G. Fassa et al. eds., 2010) [hereinafter A PUBLIC HEALTH PERSPECTIVE]; ANNE KIELLAND & MAURIZIA TOVO, CHILDREN AT WORK: CHILD LABOR PRACTICES IN AFRICA (2006); BURNS H. WESTON, CHILD LABOR AND HUMAN RIGHTS: MAKING CHILDREN MATTER (Burns H. Weston ed., 2005).

<sup>10</sup> See, e.g., Frederick B. Jonassen, *A Baby-Step to Global Labor Reform: Corporate Codes of Conduct and the Child*, 17 MINN. J. INT'L L. 7, 29–30 (2008) (Children have the same option/lack of options as slaves: they are told what kinds of work they are going to do and they must do it. Children are under the legal protection and control of their parents just like slaves are under the control of their owner. Getting financial gain from children is like slave labor.).

<sup>11</sup> See Cox, *supra* note 4, at 122–24, 143 (developing countries need child labor and will grow out of it in time if they are helped), 144 (quoting UNICEF, "It is true that the poorest, most disadvantage sectors of society supply the vast majority of child laborers. The conclusion often drawn from this is that child labour and poverty are inseparable and that calls for an immediate end to hazardous child labour are unrealistic."); Jonassen, *supra* note 10, at 27–29 (Complete abolition of child labor would take away parents' rights and infringe upon cultural traditions in other countries. Many other countries view their children as a resource who owe a duty to them, and expect them to work to benefit the family.); see, e.g., RIGHTS AND WRONGS OF CHILDREN'S WORK, *supra* note 5, at 203–17 (introducing a "new policy framework" for assessing child labor practices); Jennifer Bol, *Using International Law to Fight Child Labor: A Case Study of Guatemala and the Inter-American System*, 13 AM. U. INT'L L. REV. 1135, 1149 (1998).

<sup>12</sup> A PUBLIC HEALTH PERSPECTIVE, *supra* note 9, at 1 (explaining that many countries

Despite these ideological differences over working children, if the worst practices are ever to end, the global child labor eradication campaign must seek to change cultural practices, consumption patterns, and modes of production. Protecting children will require more than the existing prohibitions against the worst forms of child labor. Protection will require changes along the length of the global supply chain from the cocoa farmers to factories to consumers.

### *B. Causes and Conditions: Child Labor on West African Cocoa Farms*

The volatility of commodity markets and the vulnerability of children combine to create challenging conditions for eradicating child labor abuse in cocoa farms in West Africa.<sup>13</sup> There is evidence that increased climate variability will increase the amount of time required for farming activities.<sup>14</sup> Commodity price fluctuations create uncertainty for farmers.<sup>15</sup> Recent

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have high numbers of child headed households where responsibility for supporting younger siblings falls to older children contributing to pressures to seek employment to provide for other family members).

<sup>13</sup> BRIAN CAMPBELL & BAMA ATHREYA, *THE COCOA PROTOCOL: SUCCESS OR FAILURE?* 1, 13–6 (2008), available at <http://www.laborrights.org/sites/default/files/publications-and-resources/Cocoa%20Protocol%20Success%20or%20Failure%20June%202008.pdf>.

<sup>14</sup> Jonathan Colmer, *Climate Variability, Child Labour and Schooling: Evidence on the Intensive Extent of the Margin* 26 (Ctr. for Climate Change Econ. & Pol’y Working Paper No. 148), available at <http://www.feem.it/userfiles/attach/20139251654554NDL2013-081.pdf> (finding that climate variability is associated with an increase in child labour on the farm but also a decrease in child labour in the home).

<sup>15</sup> *Global Hunger and Food Security Initiative: Consultation Document*, U.S. DEP’T OF STATE (Sept. 28, 2009), <http://www.state.gov/documents/organization/130164.pdf> (All countries need to have food security to ensure progress. Food security is the ability to produce or purchase enough food that your family does not live in fear of hunger. In 2003, several African countries came together to create the Comprehensive African Agriculture Development Program, which began the task of addressing the challenges of creating food security throughout Africa.); see also Food & Agric. Org. of the U.N., *FAO’s Sub-Regional Emergency and Rehabilitation Office - West Africa/Sahel 2010-2013 Strategy*, at 2 (Jan. 2010), available at [http://www.fao.org/fileadmin/user\\_upload/emergencies/docs/FAO\\_REOWA\\_Strategy.pdf](http://www.fao.org/fileadmin/user_upload/emergencies/docs/FAO_REOWA_Strategy.pdf) (Four different issues have created reoccurring shocks in the West African agricultural world: (i) uneven distribution of rainfall (either it is too early or too late, too hard or not enough); (ii) consequences of global crisis (fall in demand and price of cash crops and livestock, reduced levels of remittances, erratic exchange rates); (iii) continuation of above average cereal prices as well as essential household goods; and (iv) adverse terms of trade. These issues prevent West Africa from fully regaining their feet and ability to bounce back from such a shock. The shocks come closer together, making it more difficult for agriculture to recover from them.); GÉRARD VIATTE ET AL., *RESPONDING TO THE FOOD CRISIS SYNTHESIS OF MEDIUM-TERM MEASURES PROPOSED IN INTER-AGENCY ASSESSMENTS 14* (2009), available at [http://www.fao.org/fileadmin/user\\_upload/ISFP/SR\\_Web.pdf](http://www.fao.org/fileadmin/user_upload/ISFP/SR_Web.pdf).

political crises in Côte d'Ivoire and Mali have further increased insecurity.<sup>16</sup> Low cocoa prices drive some farmers to employ children to lower labor costs.<sup>17</sup> Political instability and economic insecurity force migration flows to regions of greater relative wealth, and labor traffickers exploit children in the region made vulnerable by poverty and instability.<sup>18</sup>

Global demand for cocoa is growing,<sup>19</sup> while the supply of cocoa is at risk of reduction due to poor productivity and the aging cocoa trees.<sup>20</sup> A large portion of the world's cocoa comes from West Africa.<sup>21</sup> By some estimates, the region accounts for up to 70 percent of worldwide cocoa production.<sup>22</sup> Côte d'Ivoire and Ghana are the two largest cocoa producing

<sup>16</sup> Marc-Andre Boisvert, *West Africa's Refugee and Security Crisis*, INTER PRESS SERVICE (Mar. 19, 2014), <http://www.ipsnews.net/2014/03/west-africas-refugee-security-crisis/> (Post-election violence between 2010-2011 in Côte d'Ivoire resulted in an estimated 3,000 deaths and refugee flows to Ghana, Togo and Liberia. Islamist insurgents in Mali from the Movement for Unity Jihad in West Africa have attacked aid workers and displaced an estimated 500,000 Malians within and beyond the borders of the country); see *Overview of Ghana*, WORLD FOOD PROGRAM, <http://www.wfp.org/countries/ghana/overview> (last visited Aug. 12, 2014) (The main reason for lack of food security in Ghana is poverty. Six out of ten people are poor, and a lot of work needs to be done to get more security in Ghana.); see, e.g., Parenti, *supra* note 2 (Civil war raged in the Côte d'Ivoire from 2002 to 2004. Income from the cocoa exports began to fuel the fighting; creating "blood chocolate" that provided fast cash for armed groups. Chocolate exporters and manufacturers say the war and its aftermath have hampered their efforts to eradicate child labor.); see also DAVID J. FRANCIS, THE NORWEGIAN PEACEBUILDING RES. CTR., THE REGIONAL IMPACT OF THE ARMED CONFLICT AND FRENCH INTERVENTION IN MALI 2-3 (2013), available at [http://www.peacebuilding.no/var/ezflow\\_site/storage/original/application/f18726c3338e39049bd4d554d4a22c36.pdf](http://www.peacebuilding.no/var/ezflow_site/storage/original/application/f18726c3338e39049bd4d554d4a22c36.pdf); *Overview of Cote d'Ivoire*, WORLD FOOD PROGRAM, <http://www.wfp.org/countries/cote-d-ivoire/overview> (last visited Aug. 12, 2014) (National unrest has permeated the country since the early 2000's, with intermittent outbreaks of armed conflict. The elections in 2010 were highly contested, and between 500,000 and 700,000 people were displaced in Côte d'Ivoire and the surrounding countries. Because of the unrest and the challenges associated with such an existence, the average daily wage is \$1.25 for 23% of the country, which is well below the U.N. poverty line.).

<sup>17</sup> See Cox, *supra* note 4, at 147.

<sup>18</sup> Bureau of Int'l Labor Affairs, *Cote d'Ivoire: 2012 Findings on the Worst Forms of Child Labor*, U.S. DEP'T OF LABOR, 1-2 (2012), available at <http://www.dol.gov/ilab/reports/child-labor/findings/2012TDA/cotedivoire.pdf>.

<sup>19</sup> *Securing Cocoa's Future: The Challenges*, MARS, INC., <http://www.mars.com/global/brands/cocoa-sustainability/challenges.aspx> (last visited Oct. 27, 2014) (explaining 2% annual growth means the world will require at least one million more metric tons to meet the demand by 2020).

<sup>20</sup> FAIR LABOR ASS'N, *Sustainable Management of Nestlé's Cocoa Supply Chain in the Ivory Coast - Focus on Labor Standards* 6 (2012), available at [http://www.fairlabor.org/sites/default/files/documents/reports/cocoa-report-final\\_0.pdf](http://www.fairlabor.org/sites/default/files/documents/reports/cocoa-report-final_0.pdf).

<sup>21</sup> Paulette L. Stenzel, *Mainstreaming Fair Trade and Resulting Turmoil: Where Should the Movement Go From Here?*, 37 WM. & MARY ENVTL. L. & POL'Y REV. 617, 639 (2013).

<sup>22</sup> The Hershey Co., Annual Report (Form 10-k) 5 (Feb. 18, 2011).



countries.<sup>23</sup> A significant portion of the workforce in both Côte d'Ivoire and Ghana is employed in agriculture.<sup>24</sup> To a certain extent, child labor is consistent with social expectations that children help the family and with sustaining a farming culture.<sup>25</sup>

Cocoa cultivation is often a family business. By some estimates, over 90 percent of all cocoa comes from approximately three million small family farmers who depend on cocoa cultivation as their primary source of income.<sup>26</sup> Cocoa farming is labor intensive.<sup>27</sup> The work can be hazardous.<sup>28</sup> For instance, children working in agriculture may be exposed to harmful pesticides, responsible for hauling heavy loads, or for using sharp tools such as machetes to harvest cocoa.<sup>29</sup> Of the 819,921 children identified by the U.S. Department of Labor study as working in Côte d'Ivoire's cocoa sector, 50.6 percent of them reported injuries from dangerous activities.<sup>30</sup> The U.S. Department of State has estimated that more than 100,000 children in Côte d'Ivoire are working in "the worst forms of child labor" and that up to 10,000 may be human trafficking victims or slaves.<sup>31</sup>

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<sup>23</sup> See FAIR LABOR ASS'N, *supra* note 20, at 6.

<sup>24</sup> *Id.*

<sup>25</sup> See Parenti, *supra* note 2.

<sup>26</sup> See Fairtrade Foundation Commodity Briefing: Cocoa, FAIRTRADE FOUND., [http://www.fairtrade.net/fileadmin/user\\_upload/content/2009/resources/2011\\_Fairtrade\\_and\\_cocoa\\_briefing\\_summary.pdf](http://www.fairtrade.net/fileadmin/user_upload/content/2009/resources/2011_Fairtrade_and_cocoa_briefing_summary.pdf) (last visited Sept. 18, 2014).

<sup>27</sup> FAIR LABOR ASS'N, *supra* note 20, at 47.

<sup>28</sup> See INT'L FIN. CORP., *supra* note 3, at 18 (providing detailed description of the hazards of child labor in agriculture); FAIR LABOR ASS'N, *supra* note 20, at 3, 32–33 (looking in depth at all the different potential hazards children face in the cocoa industry), 42 (hazardous tasks on cocoa farms include: carrying heavy loads, cutting trees, sale/transport/application of plant protection products, burning fields and using machetes).

<sup>29</sup> Rep. of the Indep. Expert on the Situation of Human Rights in Côte d'Ivoire, HUMAN RIGHTS COUNCIL, 19th Sess., Feb. 27–Mar. 23, 2012, 13 U.N. Doc. A/HRC/19/72 (Jan. 9, 2012) (Doudou Deine); DORTE THORSON, CHILDREN WORKING IN COMMERCIAL AGRICULTURE: EVIDENCE FROM WEST AND CENTRAL AFRICA 9 (2012), available at [http://www.unicef.org/wcaro/english/Briefing\\_paper\\_No\\_2\\_-\\_children\\_working\\_in\\_commercial\\_agriculture.pdf](http://www.unicef.org/wcaro/english/Briefing_paper_No_2_-_children_working_in_commercial_agriculture.pdf); TULANE UNIV. PAYSON CTR. FOR INT'L DEV. & TECH. TRANSFER, OVERSIGHT OF PUBLIC AND PRIVATE INITIATIVES TO ELIMINATE THE WORST FORMS OF CHILD LABOR IN THE COCOA SECTOR IN CÔTE D'IVOIRE AND GHANA 27–8 (2011), available at [http://www.childlaborcocoa.org/images/Payson\\_Reports/Tulane\\_Final\\_Report.pdf](http://www.childlaborcocoa.org/images/Payson_Reports/Tulane_Final_Report.pdf).

<sup>30</sup> Bureau of Int'l Labor Affairs, *Cote d'Ivoire*, *supra* note 18.

<sup>31</sup> See 2006 Country Reports on Human Rights Practices: Côte d'Ivoire, U.S. DEP'T OF STATE (Mar. 6, 2007), <http://www.state.gov/j/drl/rls/hrrpt/2006/78730.htm>.

### III. INSTRUMENTS REGULATING THE WORK OF CHILDREN AND PROTECTING CHILDREN'S RIGHTS

International institutions have established minimum standards with regard to children and work. The global legal standards listed below set forth who is a child and what is harmful labor. International standards set agriculture apart as special. Because it is not uncommon for children to help their families to farm, an exception is made for agriculture to respect the special circumstances created by family farming. Accordingly, international standards governing the minimum age for employment draw distinctions between children working in the production of food for consumption on a family farm and children hired for commercial purposes.

#### A. *International Legal Instruments*

##### 1. Who is a Child?

The 1990 Convention on the Rights of the Child (the "CRC") provides that any person below the age of 18 years is a child for the purpose of the rights it guarantees.<sup>32</sup> The 1973 ILO Convention 138 sets the universal minimum age for employment at age 15 in most instances, allowing a departure downward to age 14 in developing countries.<sup>33</sup> The 1999 ILO Convention 182 provides that anyone under the age of 18 is a child for the purpose of the immediate elimination of the worst forms of child labor.<sup>34</sup> The 1999 African Charter on the Rights and Welfare of the Child recognizes that the "child occupies a unique and privileged position in the African society," and "due to the needs of his physical and mental development requires particular care with regard to health, physical, mental, moral and social development."<sup>35</sup>

Despite existing legal definitions, conceptions of childhood and maturity can vary by context and have changed over time. Some historians have argued that childhood was not always considered a special social status warranting special protections and became a social construct only after economic conditions allowed families to increase emotional investment in

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<sup>32</sup> U.N. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1448 (entered into force Sept. 2, 1990); see Bol, *supra* note 11, at 1140.

<sup>33</sup> ILO Minimum Age Convention, 1973 (No. 138), June 26, 1973, 1015 U.N.T.S. 297 [hereinafter ILO Convention No. 138] (entered into force June 19, 1976).

<sup>34</sup> ILO Worst Forms of Child Labour Convention, 1999 (No. 182), June 17, 1999, 2133 U.N.T.S. 161 [hereinafter ILO Convention No. 182] (entered into force on Nov. 19, 2000).

<sup>35</sup> African Charter on the Rights and Welfare of the Child pmbl., 1990 OAU Doc. CAB/LEG/24.9/49 (1990) (entered into force Nov. 29, 1999).

children.<sup>36</sup> These historians document that the concept of a childhood in Western societies emerged in tandem with the growth of an economic middle class, the extension of universal education, and the reduction of child and infant mortality.<sup>37</sup> As societies moved from agrarian to industrialized economies, societal expectations shifted away from viewing children as economic contributors to the family unit and towards a vision of children as people to be protected and educated.<sup>38</sup>

The concept of childhood is malleable in that it has been given different meanings in different times and places. In non-Western societies, socioeconomic factors may similarly inform ideas about the status of children. Different life expectancies in different areas of the world can contribute to the earlier onset of adulthood. For these reasons, there can be disparities between what international human rights law recognizes as the appropriate age for assuming adult responsibilities and what is treated as childhood due to socioeconomic conditions and cultural expectations in particular country contexts.

## 2. What is Harmful?

The CRC calls upon participating States to recognize the right of the child to be “protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral or social development.”<sup>39</sup> The CRC does not preclude all work.<sup>40</sup> It does require State parties to: 1) provide for a minimum age of employment; 2) regulate hours and conditions of work for children; and 3) punish violations.<sup>41</sup>

The 1998 International Finance Corporation Policy Statement of Forced Labor and Harmful Child Labor is similar in substance to the CRC. It provides that harmful child labor consists of “the employment of children that is economically exploitative, or is likely to be hazardous to or interfere with the child’s education or to be harmful to the child’s health or physical, mental, spiritual, moral or social development.”<sup>42</sup>

The ILO Convention 182 calls for the immediate elimination of the worst forms of child labor and defines a child as anyone under 18. The worst

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<sup>36</sup> See Loretta E. Bass, *The Sociology of Children and Youth, in 21ST CENTURY SOCIOLOGY: A REFERENCE HANDBOOK VOLUME 2*, 140-141 (2007).

<sup>37</sup> See *id.*

<sup>38</sup> *Id.*

<sup>39</sup> U.N. Convention on the Rights of the Child, *supra* note 32, art. 32.

<sup>40</sup> See Cox, *supra* note 4, at 126.

<sup>41</sup> INT’L FIN. CORP., *supra* note 3, at 3.

<sup>42</sup> *Id.* at 2.

forms include:

- 1) All forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labor, including forced recruitment of children for use in armed conflict;
- 2) The use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;
- 3) The use, procuring or offering of a child for illicit activities in particular for the production and trafficking of drugs as defined in relevant international treaties; and
- 4) Work, which, by its nature or the circumstances in which it is carried out, is likely to harm the health safety or morals of children.<sup>43</sup>

Particularly relevant to the types of tasks often associated with cocoa cultivation in West Africa, ILO Recommendation 190 further clarifies that children should not do work “with dangerous machinery, equipment and tools, or which involves the manual handling or transport of heavy loads.”<sup>44</sup> Recommendation 190 also provides that children should be protected from “work under particularly difficult conditions such as long hours or overnight or confined to premises of the employer.”<sup>45</sup> Children on cocoa farms work with machetes, haul heavy loads, are frequently confined to farms, and are violently abused for attempts to escape.<sup>46</sup>

There is an exception to the ILO Convention 138 universal minimum age for employment. It recognizes family-based child labor on farms as a special circumstance as follows:

The provisions shall be applicable as a minimum to the following: mining and quarrying, manufacturing; construction; electricity, gas and water; sanitary services; transport storage and communication; and plantations and other agricultural undertakings mainly producing for commercial purposes, *but excluding family and small-scale holdings producing for local consumption and not regularly employing hired workers.*<sup>47</sup>

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<sup>43</sup> ILO Convention No. 182, *supra* note 34.

<sup>44</sup> ILO Worst Forms of Child Labour Recommendation, 1999 (No. 190) art. 3(c), June 17, 1999.

<sup>45</sup> *Id.* at art. 3(e).

<sup>46</sup> Kemi Mustapha, *Taste of Child Labor Not So Sweet: A Critique of Regulatory Approaches to Combating Child Labor Abuses by the U.S. Chocolate Industry*, 87 WASH. U. L. REV. 1163, 1165 (2010).

<sup>47</sup> ILO Convention No. 138, *supra* note 33 (emphasis added); *see also* INT’L FIN. CORP., *supra* note 3, at 10.

Small farmers are a significant source for cocoa presenting a challenge for securing supply chains from all child labor.<sup>48</sup>

### *B. Protocols and Promises*

Reports of abuses occurring on West Africa cocoa plantations captured the attention of members of Congress and prompted action. An initial proposal by Representative Eliot Engel (D-NY) to develop a “slave free” labeling requirement for cocoa products was abandoned in favor of a voluntary accord after the cocoa industry agreed to adopt certain portions of the proposed bill as standard industry protocol.<sup>49</sup>

The resulting 2001 Harkin-Engel Protocol (the “Protocol”) was non-binding, but contained time-bound phases for eradicating the worst forms of child labor and forced labor from all cocoa farms worldwide. The Protocol set out an action plan and steps for eliminating the worst forms of child labor. The steps included: (1) A Public Statement of Need and Plan of Action; (2) A Multi-Sectorial Advisory Group; (3) A Joint Statement on Child Labor Witnessed with ILO; (4) A Memorandum of Cooperation binding major stakeholders to exchange information exchange and cooperate to enforce internationally agreed standards to eliminate the worst forms of child labor; (5) A Joint Foundation to oversee and sustain efforts to eliminate child labor with multi-sector governance; and (6) Creation of Credible Standards of Public Certification of Cocoa free of the worst forms of child labor.<sup>50</sup>

The International Cocoa Initiative (the “ICI”), a product of the Protocol, has been operating since 2002 to “oversee and sustain efforts to eliminate the worst forms of child labor and forced labor in the growing and processing of cocoa beans and their derivative products.”<sup>51</sup> While some progress has been made, for many the Protocol has fallen short of its

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<sup>48</sup> See JAN CAPPELLE, OXFAM-WERELDWINKELS, TOWARDS A SUSTAINABLE COCOA CHAIN: POWER AND POSSIBILITIES WITHIN THE COCOA AND CHOCOLATE SECTOR 17–18 (2009), available at [http://www.oxfam.org/sites/www.oxfam.org/files/file\\_attachments/towards-a-sustainable-cocoa-chain-0901\\_3.pdf](http://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/towards-a-sustainable-cocoa-chain-0901_3.pdf).

<sup>49</sup> See CAMPBELL & ATHREYA, *supra* note 13, at 1-2 (providing a history and critique of the protocol).

<sup>50</sup> CHOCOLATE MFR. ASS’N, PROTOCOL FOR THE GROWING AND PROCESSING OF COCOA BEANS AND THEIR DERIVATIVE PRODUCT IN A MANNER THAT COMPLIES WITH ILO CONVENTION 182 CONCERNING THE PROHIBITION AND IMMEDIATE ACTION FOR THE ELIMINATION OF THE WORST FORMS OF CHILD LABOR 2-3 (2001), available at [http://mvopplatform.nl/publications-en/Publication\\_2380](http://mvopplatform.nl/publications-en/Publication_2380).

<sup>51</sup> INT’L COCOA INITIATIVE, ANNUAL REPORT 7 (2011); see also *Charter of the International Cocoa Initiative*, INT’L COCOA INITIATIVE (Dec. 19, 2012), <http://www.cocoainitiative.org/en/documents-manager/english/27-ici-charter/file> (last modified Mar. 8, 2013).

promise.<sup>52</sup> The Protocol has failed to live up to the expectations of some labor rights activists who maintain that years after the initial accord, a consumer still cannot know whether or not the chocolate they purchase was procured from a plantation engaging in the worst forms of child labor.<sup>53</sup> The failure of the original effort to yield more immediate changes to protect children from abuse has led to a renewed commitment on the part of Protocol participants. As a result, the 2010 Framework of Action to Support Implementation of the Harkin-Engel Protocol has set 2020 as a new target, and aims to reduce the worst forms of child labor in the cocoa sector as defined by ILO Convention 182 by 70 percent.<sup>54</sup>

#### IV. INCORPORATING RIGHTS: INITIATIVES TO ADDRESS CHILD LABOR AND IMPACT ASSESSMENTS

Expectations on industry to eradicate child labor continue to escalate. There is a growing taste for transparency on the part of the public. It would be unfair to say the Protocol has achieved nothing. While the pace of progress has been slow, there has been movement in the right direction. Since 2001, additional legislative and policy initiatives have emerged in other contexts encouraging the business community to incorporate human rights considerations. Further, efforts to hold the business community accountable for abuses continue.

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<sup>52</sup> Jessica Dacy, *NGO Slam Industry Inaction Over Child Labour*, SWISSINFO, (Sept. 20, 2011, 9:40 PM), [http://www.swissinfo.ch/eng/business/NGOs\\_slam\\_industry\\_over\\_child\\_labour\\_.html?view=print&cid=31181328](http://www.swissinfo.ch/eng/business/NGOs_slam_industry_over_child_labour_.html?view=print&cid=31181328) (stating that the international coalition of NGOs, 10-Campaign, feel that the result promised by the Protocol have not come to fruition, demand that the Protocol become binding law and not voluntary, and also want more funding from the major chocolate companies to go toward combating child labor in Ghana and Côte d'Ivoire); see CAMPBELL & ATHREYA, *supra* note 13, at 2 ("None of the activities undertaken under the auspices of the 'protocol' have attempted to monitor or improve labor conditions within the cocoa supply of any chocolate company."); Susan Ariel Aaronson, *Globalization and Child Labor: The Cause Can Also be a Cure*, YALE GLOBAL ONLINE (Mar. 13, 2007), <http://yaleglobal.yale.edu/content/globalization-and-child-labor-cause-can-also-be-cure> ("The International Labor Rights Fund filed suit against Nestle, ADM and Cargill . . . NGO's such as global Exchange want governments to adopt a social label and ban imports of cacao that can't be shown to be fairly traded.")

<sup>53</sup> Amanda Gregory, *Chocolate and Child Slavery: Say No to Human Trafficking this Holiday Season*, HUFFINGTON POST (Oct. 31, 2013, 4:00 PM), [http://www.huffingtonpost.com/amanda-gregory/chocolate-and-child-slave\\_b\\_4181089.html](http://www.huffingtonpost.com/amanda-gregory/chocolate-and-child-slave_b_4181089.html); see CAMPBELL & ATHREYA, *supra* note 49 (accompanying text).

<sup>54</sup> Press Release, Office of Senator Tom Harkin, Sen. Harkin, Rep. Engel and DOL Secretary Solis Take Next Step in the Fight to End the Worst Forms of Child Labor in the West African Cocoa Sector (Sept. 13, 2010), *available at* <https://www.harkin.senate.gov/press/release.cfm?i=327641>; Brett Dodge, *Monitoring Child Labor in Cocoa in Ghana*, Ergon Associates (Mar. 25, 2013), [http://www.ergononline.net/?p=636&option=com\\_wordpress&Itemid=161](http://www.ergononline.net/?p=636&option=com_wordpress&Itemid=161).

### A. *Pillars and Principles: The Responsibility to Respect*

In 2011, the U.N. Human Rights Council unanimously endorsed a Framework and Set of Guiding Principles on Business and Human Rights (the “Framework”).<sup>55</sup> The Framework rests on three pillars: (1) the responsibility of governments to protect human rights; (2) the responsibility of business enterprises to respect human rights; and (3) access to remedy for victims of violations.<sup>56</sup> Creation of a credible form of certification is consistent with the pillar on corporate responsibility to respect rights. To properly put the principles into practice, a business must be in a position to know and show their human rights impacts.

The responsibility to respect human rights on the part of business requires, among other things, a policy commitment and a due diligence process to identify adverse impacts of human rights. Some industry leaders have undertaken initiatives to address child labor operating from a human rights framework assuming responsibility to respect rights. Others have emphasized identifying risks and increasing efficiency with less explicit reference to human rights instruments.

### B. *Industry Initiatives: Collaboration for Change*

Campaigners have sought commitments from industry to increase transparency, to purchase cocoa certified as free of abuse, and to fund anti-poverty projects.<sup>57</sup> Companies are purchasing more certified cocoa and are

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<sup>55</sup> *UN Human Rights Council Endorses Principles to Ensure Businesses Respect Human Rights*, UN NEWS CTR. (June 16, 2011), <http://www.un.org/apps/news/story.asp?NewsID=38742#U-nVilbpzwl>.

<sup>56</sup> U.N. Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the “Protect, Respect, and Remedy” Framework*, U.N. Doc. HR/PUB/11/04 (2011) [hereinafter U.N. Guiding Principles] (emphasis added). For a U.N. policy complementing the U.N. Guiding Principles that is specifically geared to children’s issues, see also, *Children’s Rights and Business Principles*, UNICEF, available at <http://www.unicef.org/csr/12.htm> (last visited Dec. 5, 2014) (UNICEF Principles released on Mar. 12, 2012 at a global event in London).

<sup>57</sup> See, e.g., Will Martindale, *Mars and Nestlé Urged to be More Transparent about Supply Chains*, THE GUARDIAN (Sept. 20, 2013), <http://www.theguardian.com/sustainable-business/investors-mars-nestle-transparency-supply-chain>; *Ferrero’s Commitment – Traffik Free By 2020*, STOP THE TRAFFIK (April 17, 2012), <http://stophetraffik.wordpress.com/2012/04/17/ferreros-commitment-traffik-free-by-2020/> (NGO Stop the Traffik specifically said they will watch Ferrero’s progress in insuring their promise to produce 100% of their chocolate free from child labor by 2020); *What is Fair Trade? Impact Education*, FAIR TRADE USA, <http://fairtradeusa.org/what-is-fair-trade/impact/education> (last visited Mar. 23, 2014); JUSTICE & INT’L MISSION OF THE UNITING CHURCH IN AUSTRALIA & SOCIAL JUSTICE BD. OF THE UNITING CHURCH IN WESTERN AUSTRALIA, *CHOCOLATE COMPANY COMMITMENTS TO ENDING ABUSES IN COCOA PRODUCTION IN WEST AFRICA* (Sept. 2012), available at <http://www.laborrights.org/sites/default/files/publications-and-resources/Chocolate%20>

investing more in the region for development.<sup>58</sup> Certification schemes and fair trade labels could potentially contribute to the elimination of child labor.<sup>59</sup>

### 1. Nestlé and Human Rights Impact Assessments

In 2013, Nestlé published *Talking the Human Rights Walk: Nestlé's Experience Assessing Human Rights Impacts in its Business Activities*.<sup>60</sup> The report details the company's partnership with the Danish Institute for Human Rights to "map the gaps" in its supply chain.<sup>61</sup> The company has devised a Human Rights Due Diligence Program that consists of, among other things, training, "assessment of human rights impacts in high risk operations," and monitoring and reporting performance.<sup>62</sup> The Human Rights Impact Assessments evaluate different "functional areas" including, among other things, community impacts as well as the procurement and the sourcing of raw materials.<sup>63</sup> Nestlé intends to act upon The Human Rights Impact Assessments, and to foster transparency by communicating the actions taken to the public.<sup>64</sup>

Human Rights Impact Assessments are distinct from audits. Unlike audits conducted to conform practices to company policies and national laws, assessments are conducted to uncover practices that are inconsistent with international human rights standards.<sup>65</sup> Audits seek compliance from facilities; assessments seek continuous improvement at both the corporate

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Company%20Commitments.pdf (showing that Hershey donates 2 million dollars in funding annually for anti-poverty projects, while Nestle donates \$11.3 million annually and Kraft/Cadbury donate \$7.2 million annually).

<sup>58</sup> Ron Todt, *Hershey's to Use Certified Cocoa Only by 2020*, HUFFINGTON POST (Oct. 3, 2012, 7:13 PM), [http://www.huffingtonpost.com/2012/10/04/hersheys-certified-cocoa-2020\\_n\\_1938741.html](http://www.huffingtonpost.com/2012/10/04/hersheys-certified-cocoa-2020_n_1938741.html); *Cocoa*, STARBUCKS, <http://www.starbucks.com/responsibility/sourcing/cocoa> (last visited Mar. 23, 2014); *Securing Cocoa's Future: Certification*, MARS, INC., <http://www.mars.com/global/brands/cocoa-sustainability/cocoa-sustainability-approach/certification.aspx> (last visited Mar. 23, 2014).

<sup>59</sup> Shima Baradaran & Stephanie Barclay, *Fair Trade and Child Labor*, 43 COLUM. HUM. RTS. L. REV. 1 (2011) (arguing for the use of fair trade labels as an alternative method of eliminating child labor to prosecuting single offenses and using cocoa industry in Côte d'Ivoire as one example of extreme forms of child labor).

<sup>60</sup> *Talking the Human Rights Walk: Nestlé's Experience Assessing Human Rights Impacts in its Business Activities*, NESTLE CORP (2013), [http://www.nestle.com/asset-library/documents/library/documents/corporate\\_social\\_responsibility/nestle-hria-white-paper.pdf](http://www.nestle.com/asset-library/documents/library/documents/corporate_social_responsibility/nestle-hria-white-paper.pdf).

<sup>61</sup> *Id.* at 7.

<sup>62</sup> *Id.* at 11.

<sup>63</sup> *Id.* at 21.

<sup>64</sup> *See id.* at 14.

<sup>65</sup> *Id.*



and country operations levels.<sup>66</sup> External third parties conduct audits but assessments are internal and conducted in cooperation with NGO partners and corporate headquarters.<sup>67</sup> Unlike an audit, the assessment process includes external stakeholder engagement with civil society organizations, academia, trade unions, government and UN agencies, as well as business associations.<sup>68</sup> The company recently cooperated with a Fair Labor Association investigation to assess the human rights impact in Côte d'Ivoire as part of a due diligence effort to put U.N. Guiding Principles into practice.<sup>69</sup> The U.N. Guiding Principles contain provisions on conducting human rights due diligence and assessing the impact of business practices with respect to recognized human rights that business enterprises should implement to meet their obligations consistent with standards set forth in the U.N. Framework.<sup>70</sup>

## 2. Mars and Child Labor Monitoring Systems and the Mutuality Principle

Mars, a privately held, leading global chocolate manufacturer with global brands worth billions, including M&M's, Snickers, Dove, Milky Way and Twix, was the first in the industry to pledge to certify 100 percent of its cocoa as sustainably produced by 2020.<sup>71</sup> Working in partnership with certification organizations, such as Fairtrade, Rainforest Alliance and UTZ, the company promotes training and organizing for farmers aimed to increase productivity sustainably.<sup>72</sup> These leading product certifiers do incorporate basic labor standards into their respective indicators that are intended to be consistent with ILO Conventions 182 on the Worst Forms of Child Labor, 138 on Minimum Age, and 29 on Forced Labor.<sup>73</sup>

In order to meet the ambitious 100 percent target, Mars has recognized, as evidenced by its recent activities in West Africa, that it must participate in

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> FAIR LABOR ASS'N, *supra* note 20, at 8-9; *see also* E-mail from Yann Wyss, Human Rights Specialist, Nestlé S.A., to Erika R. George, Professor of Law, University of Utah S.J. Quinney College of Law (Nov. 14, 2014) (on file with author).

<sup>70</sup> *See* U.N. Guiding Principles, *supra* note 56, at 16-18.

<sup>71</sup> *Securing Cocoa's Future: Certification*, *supra* note 58.

<sup>72</sup> *Id.*

<sup>73</sup> TULANE UNIV. PAYSON CTR. FOR INT'L DEV. & TECH. TRANSFER, FOURTH ANNUAL REPORT: OVERSIGHT OF PUBLIC AND PRIVATE INITIATIVES TO ELIMINATE THE WORST FORMS OF CHILD LABOR IN THE COCOA SECTOR IN CÔTE D'IVOIRE AND GHANA 62-68 (Sept. 30, 2010), *available at* [http://fairtrade.net/fileadmin/user\\_upload/content/2009/resources/2010-09-30\\_tulane-fourthann-cocoa-rprt.pdf](http://fairtrade.net/fileadmin/user_upload/content/2009/resources/2010-09-30_tulane-fourthann-cocoa-rprt.pdf) (detailing operational standards and criteria used by Utz, Rainforest Alliance and Fairtrade Labeling Organizations International (FLO)).

changing regional conditions to ensure a reliable supply of cocoa worthy of certification. The strategy Mars has put forward is consistent with “The Five Principles” at the foundation of its business: 1) quality; 2) responsibility; 3) mutuality; 4) efficiency; and 5) freedom. The belief underlying the mutuality principle is explained as an enduring shared benefit.<sup>74</sup> Therefore, the standard against which business relationships are to be measured is the extent to which a mutual benefit is generated. Coupled with the company’s stated commitment to efficiency, this orientation best explains the approach to promoting change in Côte d’Ivoire’s cocoa sector.

Mars’ sustainability strategy places emphasis on the mutual risks associated with declining cocoa yields and increasing global demands. Indeed, for Mars the future of the entire industry sector depends on a “holistic program from farm to factory.”<sup>75</sup> Mars plans to build a public/private network that prioritizes the needs of farmers to promote systemic change across a fragmented set of suppliers.<sup>76</sup> According to Mars, farms that are more productive will work to the mutual benefit of farmers and the buyers by allowing farmers to earn more and by creating a stable source of supply for the marketplace.<sup>77</sup>

While the cocoa sustainability strategy Mars has advanced centers on increasing yields to promote mutual benefit and reduce poverty, the company recognized that greater productivity is not the sole solution. Strengthening communities to reduce child labor is also part of the strategy articulated in terms of mutuality in the Mars approach:

When an industry suffers, so too do the communities that depend on it. Without huge increases in productivity and income, cocoa farming communities will continue to suffer from poverty and a lack of access to basic social services. Whole families currently survive by working in the fields together, including children. The industry’s complex and fragmented structure makes it difficult to reach everyone, but only by making cocoa a viable source of income for those who depend on it can we work to ensure that when children do contribute to the farm, they do so in a safe way that’s balanced with an education.<sup>78</sup>

Mars, along with other industry leaders, has partnered with the ILO to

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<sup>74</sup> *The Five Principles*, Mars, Inc. (2011), <http://www.mars.com/global/about-mars/the-five-principles-of-mars.aspx>

<sup>75</sup> *Securing Cocoa’s Future: The Challenges*, *supra* note 19.

<sup>76</sup> *Securing Cocoa’s Future: Our Approach*, Mars, Inc. (2014), <http://www.mars.com/global/brands/cocoa-sustainability/approach.aspx>.

<sup>77</sup> *See Mars and Cocoa Sustainability*, Mars, Inc. <http://www.mars.com/global/brands/cocoa-sustainability/mars-and-cocoa-sustainability.aspx>

<sup>78</sup> *Id.*

launch a system to monitor child labor in communities in Côte d'Ivoire.<sup>79</sup> The Chocolate and Cocoa Industry Public-Private Partnership (the "Partnership") contributes to the implementation of the 2010 Framework of Action to Support Implementation of the Harkin-Engel Protocol.<sup>80</sup> The Partnership will help Mars to promote a holistic approach to addressing child labor in cocoa cultivation that links increasing farmer productivity with reducing the vulnerability of children. Increasing farmer income could decrease the pressure to employ children as cheaper labor. While cheaper and more obedient, children are less efficient. Eradication through greater efficiency is at the core of the Mars approach.

### 3. Multi-Stakeholder Initiatives and Supply Chain Certification Strategies

Certification and labeling systems have proliferated across a range of products to respond to the challenges of governing complex transnational supply chains.<sup>81</sup> There is a growing movement to establish a market demand for products produced sustainably, and there are more certified products available for consumers than ever before. Highly publicized instances of supply chains replete with human rights violations, or with links to the depletion of natural resources have elevated consumer concerns over the conditions under which the products they choose to purchase are produced. Corporations increasingly confront the challenge of protecting the value of brand reputation and ensuring a sustainable source of materials necessary to the production process. Certification strategies are being promoted as a partial solution to these challenges and concerns. However, more must be learned about the performance and potential of the growing number of voluntary sustainability and certification standards being adopted to address stakeholder concerns about how products are produced.

Certification strategies emerged when stakeholders came together to respond to governance failures to advance a "shift in the forum of action and the strategic approach" when confronted with stalemates over efforts to regulate and address global social, economic and environmental

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<sup>79</sup> *Securing Cocoa's Future: The Challenges*, *supra* note 19.

<sup>80</sup> *A Partnership to Combat Child Labour in the Chocolate and Cocoa Industry*, INT'L LABOUR ORG. (Mar. 21, 2014), [http://www.ilo.org/wcmsp5/groups/public/---dgreports/---exrel/documents/publication/wcms\\_239414.pdf](http://www.ilo.org/wcmsp5/groups/public/---dgreports/---exrel/documents/publication/wcms_239414.pdf) (listing that partner companies include ADM, Barry Callebaut, Cargill, Ferrero, The Hershey Company, Kraft Foods, Mars, and Nestle, and that the ILO's International Programme on the Elimination of Child Labour (IPEC) provides partner companies with technical assistance on eliminating child labor).

<sup>81</sup> See generally David Vogel, *Private Global Business Regulation*, 11 ANN. REV. POL. SCI. 261, 262 (2008) (reviewing scholarly literature noting expansion of voluntary codes and corporate social responsibility initiatives).

challenges.<sup>82</sup> Where binding international or national laws to protect rights or prevent harms were non-existent or inadequate, efforts to advance change through setting and certifying standards emerged as an alternative form of governance. Early certification systems established in the 1990s, such as Rainforest Alliance, the Forest Stewardship Council (FSC), and the Marine Stewardship Council (MSC), focused on environmental issues.<sup>83</sup> Today, a variety of voluntary standards exists. The cocoa industry intends its certifications to promote changes in production in accord with a set of standards against which farms can be measured. Third party verification that the cocoa purchased is produced in a manner consistent with the standards is central to the strategy.

Efforts to evaluate the efficacy of voluntary standards and certification strategies relative to their intended outcomes or stated aims are increasing. A 2012 review of the available literature conducted by the State-of-Knowledge Assessment of Standards and Certification, a multi-stakeholder collaborative, found that while there was strong evidence to judge whether or not a given certification system achieved specific aims in the short term, there was less evidence to support whether or not lasting changes could be attributed to certification.<sup>84</sup> Moreover, while there is a wealth of research on environmental certification systems, there are fewer studies on the social impacts of certification. Although claims that certification strategies are operating to empower communities and protect human rights, evidence to support such claims was found to be limited. In some instances, results were mixed with some certification schemes serving to reinforce existing patterns of exclusion; yet in other instances, the schemes enhanced inclusion and equality between men and women.<sup>85</sup>

While more must be learned about the long-term potential of promoting change through certifications, what is certain is that a growing segment of civil society organizations are committed to engaging consumers and investors to create pressure for certification. Multi-stakeholder initiatives, such as the ICI, have the potential to create space for collaboration across a range of constituencies. At minimum, the growing movement to develop standards and demand certification could serve to alter expectations about responsible business practices. More responsible business practices that are mindful of the conditions under which the commodities procured for

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<sup>82</sup> STEERING COMMITTEE OF THE STATE-OF-KNOWLEDGE ASSESSMENT OF STANDARDS AND CERTIFICATION, RESOLVE, INC., TOWARD SUSTAINABILITY: THE ROLES AND LIMITATIONS OF CERTIFICATION 2 (June 2012), <http://www.resolve.org/site-assessment/files/2012/06/Report-Only.pdf>.

<sup>83</sup> *Id.* at 4.

<sup>84</sup> *See id.* at 6.

<sup>85</sup> *See id.* at 8.

manufacture are produced ultimately stand to benefit children at risk.

*C. Non-Industry Enforcement Efforts: Courts of Law and Public Opinion*

Although alternative means of regulating corporate conduct through certification are on the rise, activists have not abandoned law as an avenue to remedy the labor rights violations in commodity supply chains. At the time of this writing, at least one lawsuit was pending in U.S. federal courts against corporations alleged to be complicit in forced child labor.<sup>86</sup> In January 2014, the Ninth Circuit revived a class action suit filed against the Nestlé, Archer Daniels Midland and Cargill corporations.<sup>87</sup> Investors are suing Hershey's in Delaware Chancery Court to inspect business records to determine whether there were potential breaches of fiduciary duties by the company's board of directors relating to the use of unlawful child labor on cocoa farms in West Africa.<sup>88</sup>

Some activists remain skeptical and continue to call for mandatory reporting.<sup>89</sup> As profits are increasingly interrelated with risks to reputation, investors are asking about the human rights impacts of the companies in their portfolios.<sup>90</sup> Activist investors are asking businesses to do more to address human rights risks in their supply chains.<sup>91</sup> The Interfaith Center on

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<sup>86</sup> See, e.g., *Doe I v. Nestle USA, Inc.*, 738 F.3d 1048 (9th Cir. 2013) (filing of a class action suit by claimants former child slaves trafficked from Mali to Cote d'Ivoire against corporate defendants alleging the corporations aided and abetted forced labor on cocoa plantations).

<sup>87</sup> *Id.*

<sup>88</sup> *La. Mun. Police Emp. Ret. Sys. v. Hershey Co.*, No. 7996, 2013 WL 1776668 (Del. Ch. Apr. 16, 2013) (rejecting Hershey's claim that it is a fishing expedition and, the court granted the Louisiana Municipal Police Employees' Retirement System access to Hershey's files).

<sup>89</sup> STOP THE TRAFFIK, WE DEMAND TRAFFIK-FREE CHOCOLATE: CHOOSE CERTIFIED CHOCOLATE AND CAMPAIGN FOR CHANGE (2014); Oliver Nieburg, *EU Resolution on Cocoa Child Labour Has 'No Bite', Says Labour Group*, CONFECTIONERYNEWS.COM (Mar. 22, 2012), <http://www.confectionerynews.com/Commodities/EU-resolution-on-cocoa-child-labour-has-no-bite-says-Labour-group> (calling for the full implementation of the Harkin-Protocol in Europe by the International Labor Rights Forum).

<sup>90</sup> See, e.g., Jeff Feeley, *Hershey Investors Suing Over Child Labor Can Pursue Files*, BLOOMBERG (Mar. 19, 2014), <http://www.bloomberg.com/news/print/2014-03-18/hershey-judge-says-shareholders-can-seek-child-labor-files-1.html>; Kent Greenfield, *'Blood Chocolate,' Corporate Law and the ACS*, AMERICAN CONSTITUTION SOCIETY (Mar. 24, 2014), <http://www.acslaw.org/acsblog/blood-chocolate-corporate-law-and-the-acs>; *Addressing Child Labor In Nestlé's Cocoa Supply Chain in Cote D'Ivoire*, FAIR LABOUR ASS'N (Nov. 26, 2012), [http://www.fairlabor.org/sites/default/files/documents/reports/nestle\\_cocoa\\_consultation.pdf](http://www.fairlabor.org/sites/default/files/documents/reports/nestle_cocoa_consultation.pdf).

<sup>91</sup> See, e.g., Cox, *supra* note 4 (discussing public outcry against Nike and Reebok's use of child labor forced the companies to take steps to combat child labor problems in their operations and how the Universal federation of Travel Agents' Association, the World

Corporate Responsibility recently published “Investing the Rights Way.”<sup>92</sup> In addition, reporting requirements on conflict minerals contained in the Dodd-Frank Financial Reform Act signal an expanding understanding of matters that are “material” to investors, as well as the increasing influence of human rights violations as risks to a company’s bottom line.<sup>93</sup>

Oxfam now issues a “Behind the Brands” scorecard for investors to measure material rights risks.<sup>94</sup> The Oxfam campaign also seeks to empower consumers to “make choices in line with their values” by offering information about brands.<sup>95</sup> The Oxfam scorecard examines the agricultural sourcing policy commitments of the world’s largest food and beverage companies. Nestlé and Mars are included among the brands Oxfam assesses.<sup>96</sup>

Retailers are also exerting influence to press for change. For instance, shortly after Whole Foods refused to sell Scharffen Berger chocolate, a Hershey’s brand, allegedly due to Hershey’s perceived failure to end the use of child labor, Hershey’s joined Mars in announcing that it too will use only Fair Trade certified cocoa by 2020.<sup>97</sup>

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Tourism Organization, and the International Federation of Football Association have also taken steps to address child labor due to public pressure); Press Release, The Hershey Co., Hershey Expands Responsible Cocoa Community Programs in West Africa (Jan. 30, 2012), available at <http://www.thehersheycompany.com/newsroom/news-release.aspx?id=1653877> (releasing a statement that Hershey is starting new programs designed to help farmers in West Africa and to become certified by the Rainforest Alliance); Martindale, *supra* note 54 (finding that investors used their financial clout to get large corporations to be more clear about where their supplies are coming from and to be more conscious about the social risks and implications); Katy McLaughlin, *Is Your Grocery List Politically Correct?*, WALL ST. J. (Feb. 17, 2004, 5:34 AM), [http://online.wsj.com/article\\_print/0,,SB107698348237931093,00.html](http://online.wsj.com/article_print/0,,SB107698348237931093,00.html) (describing the different certification methods to ensure sustainable products in all agriculture).

<sup>92</sup> Margaret Wachenfeld, *Investing the Rights Way: A Guide for Investors on Business and Human Rights*, THE INTERFAITH CTR. ON CORPORATE RESPONSIBILITY (Dec. 13, 2012), <http://www.iccr.org/sites/default/files/Investing-the-Rights-Way.pdf>.

<sup>93</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §1502, 124 Stat. 1376, 2213 (2010).

<sup>94</sup> See Oxfam, *About*, BEHIND THE BRANDS, <http://www.behindthebrands.org/en/about> (last visited Dec. 8, 2014).

<sup>95</sup> See *id.*

<sup>96</sup> See *id.*

<sup>97</sup> See Paulette L. Stenzel, *Mainstreaming Fair Trade and Resulting Turmoil: Where Should the Movement Go From Here?*, 37 WM. & MARY ENVTL. L. & POL’Y REV. 617 (2013) (citing Leon Kaye, *Scharffen Berger Booted out of Whole Foods Over Child Labor Concerns*, TRIPLE PUNDIT (Oct. 5, 2012), available at <http://www.triplepundit.com/2012/10/scharffen-berger-whole-foods-child-labor/> and Oliver Nieburg, *Hershey Outlines Details of Cocoa Child Labor Pledge*, CONFECTIONERYNEWS.COM (Oct. 5, 2012), available at <http://www.confectionerynews.com/Commodities/Hershey-outlines-details-of-cocoa-child-labor-pledge>).

## V. CONCLUSION

There will certainly be those who say it is impossible to eradicate child labor in agriculture. However, it is possible to improve the conditions under which children and all workers labor through greater commitment and collaboration. To that end, policy developments that promote change in global agricultural supply chains should be participatory, rather than punitive, and could provide for education in combination with income-earning opportunities. Better practices for eradicating child labor are emerging from industry leaders who, in cooperation with labor and human rights experts, are experimenting with different types of interventions. Changes have been slow, but significant. Greater willingness on the part of industry to exercise leadership, assume responsibility for working conditions within global supply chains, and use leverage and influence to improve conditions is truly significant in the absence of binding law. Still, challenges remain, particularly with respect to monitoring violations, measuring progress, and speeding up the pace of change. The law alone is insufficient to overcome these challenges. Thus, given the complexity of child labor in the agricultural sector, enforcement must be approached as an ecosystem as the normative environment continues to evolve in response to multiple drivers.

