

# The regional regulation of child labour laws through harmonisation within COMESA, the EAC and SADC

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**Summary:** *Child labour results in children working under dangerous and hazardous conditions, which affects their growth and development, as well as their health and safety. It also results in the abuse (physical and mental) and violation of the rights of a child. It is important to note that not all forms of work undertaken by a child are considered child labour. The highest incidence of child labour in the world is in Africa and, therefore, this requires better regulation and monitoring. It is argued that the banning of child labour in Africa currently is not achievable given the socio-economic factors, cultural perspectives and beliefs about childhood and the role of the child. This article looks at child labour in the African context and argues for the harmonisation of child labour laws, in the Common Market for Eastern and Southern Africa, the East African Community and Southern African Development Community through regional integration. There are several benefits to the legal harmonisation of child labour laws: uniformity and certainty in the law, which facilitates better regulation; consistency in the interpretation and application of the law; and sharing of resources and capacity development, to highlight a few. The article concludes that the sub-regional integration of child labour laws through legal harmonisation currently is a viable option for these regions.*

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## 1 Introduction

Child labour is considered a disturbing and widespread problem. According to Brown, child labour is practised throughout the world, which includes First World countries, but is a common occurrence in developing countries.<sup>1</sup> It is estimated that an average of 160 million children are involved in child labour globally, of which 79 million were engaged in hazardous work.<sup>2</sup> Between 2016 and 2020 there was a global surge in the number of children involved in child labour from 151,6 to 160 million. In respect of the regional prevalence, Asia and the Pacific, and Latin America and the Caribbean showed a downward trend since 2016. However, the same cannot be said for sub-Saharan Africa, where there has been an increase since 2012. According to the International Labour Organisation (ILO) there are now more children engaged in child labour in sub-Saharan Africa than in all other regions combined.<sup>3</sup> Some of the noted reasons for the high rate of child labour in Africa include the fact that '[t]he region has the majority of fragile and conflict-affected countries; at least one quarter of all countries were fragile or in conflict in every year from 2015 to 2020'.<sup>4</sup> Africa also has an estimated 39 per cent of 'the world's refugees, asylum seekers, returnees, stateless persons and internally displaced persons, a higher share than any other region'.<sup>5</sup> These are but a few factors that have resulted in the increase of child labour in sub-Saharan Africa.

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- 1 S Brown 'Protecting the children: The need for a modern-day balancing test to regulate child labour in international business' (2010) *Journal of Transnational Law and Policy* 129 at 133. Global estimates of child labour: Results and trends, 2012-2016 International Labour Organisation (ILO), Geneva, 2017 ISBN: 978-92-2-130152-3 (print); ISBN: 978-92-2-130153-0 (web pdf) 5 13, [https://www.ilo.org/global/publications/books/WCMS\\_575499/lang--en/index.html](https://www.ilo.org/global/publications/books/WCMS_575499/lang--en/index.html) (accessed 16 September 2020).
  - 2 International Labour Organisation and United Nations Children's Fund 'Child Labour: Global estimates 2020, trends and the road forward, ILO and UNICEF' (2021). Licence: CC BY 4.0, <https://www.ilo.org/ipecc/ChildlabourstatisticsSIMPOC/lang--en/index.htm>, (accessed 10 December 2021).
  - 3 As above.
  - 4 World Bank 'Classification of fragile and conflict-affected situations' July 2020, [www.worldbank.org/en/topic/fragilityconflictviolence/brief/harmonizedlist-of-fragile-situations](http://www.worldbank.org/en/topic/fragilityconflictviolence/brief/harmonizedlist-of-fragile-situations) (accessed 10 December 2021).
  - 5 United Nations General Assembly 'Assistance to refugees, returnees and displaced persons in Africa: Report of the Secretary-General' A/75/322, United Nations, New York, 24 August 2020, <https://digitallibrary.un.org/record/3886099> (accessed 10 December 2021).

This article looks at child labour in the African context and argues for the harmonisation of child labour laws, in the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC) and the Southern African Development Community (SADC). COMESA, EAC and SADC are referred to as regional economic communities (RECs). These sub-regions were selected due to their link with the Tripartite Free Trade Area (TFTA) which binds the three sub-regions. The article starts off by conceptualising child labour. This is followed by looking at the impact of child labour on a child at an international and regional level. Lessons and challenges encountered by the Organisation for the Harmonisation of Business Law in Africa (OHADA) in implementing its business laws through legal harmonisation are analysed.<sup>6</sup> OHADA is examined to draw on the experiences to support the need for the sub-regional regulation of child labour through harmonisation.

## 2 Conceptualisation of child labour

The ILO defines child labour as

children permanently leading adults' lives, working long hours for low wages under conditions damaging to their health and physical and mental development, sometimes separated from their families, frequently devoid of meaningful educational and training opportunities that could open up to them a better future.<sup>7</sup>

Child labour is regarded as work that 'children should not be doing because they are too young to work, or – if they are old enough to work – because it is dangerous or otherwise unsuitable for them'.<sup>8</sup> Child labour is used in two different ways. The first refers to a child who is below a certain age, and any work done by such child is prohibited.<sup>9</sup> The second finds child labour acceptable if it is done on family establishments as a way of economic contribution by the child.<sup>10</sup>

Children are also trapped in various forms of slavery, armed conflicts, forced labour and debt bondage as well as in commercial sexual exploitation and illicit activities, such as drug trafficking and

<sup>6</sup> A detailed analysis follows in the article below.

<sup>7</sup> <http://www.ilo.org> (accessed 16 September 2019).

<sup>8</sup> <http://www.un.org/en/globalissues/briefingpapers/childlabour/intlconvs.shtml> (accessed 21 February 2021).

<sup>9</sup> TC Nhenga-Chakarisa 'Who does the law seek to protect and from what? The application of international law on child labour in an African context' (2010) 10 *African Human Rights Law Journal* 161 at 178.

<sup>10</sup> Nhenga-Chakarisa (n 9) 179.

organised begging, as well as many other forms of labour.<sup>11</sup> These are considered the Worst Forms of Child Labour (WFCL) as it impacts the physical and mental development of a child and goes against the good morals of society.

According to Duncan and Bowman, finding a definition to child labour is a challenge because the 'usage of and the connotations attached to the term depends substantially on the socio-cultural contexts in which it is deployed'.<sup>12</sup>

Distinguishing between child labour and child work has been problematic as these terms are usually used interchangeably. The term 'work' relates to the earning of wages in the labour market. Child labour, on the other hand, occurs both in the labour market (formal sector) and outside the labour market (informal sector) which can be paid or unpaid labour. When determining whether an unpaid activity is regarded as work, the question is asked as to whether the activity contributes to production.<sup>13</sup>

Determining when work becomes child labour is a serious challenge for African societies, despite attempts by international law to devise a criterion. As pointed out by Nhenga-Chakarisa, 'the criteria used to determine child work and child labour change across time, place and culture and vary according to different conceptions of childhood'.<sup>14</sup> It is essential to draw clear definitions on child work that is acceptable and work that is considered harmful.

### 3 Impact of child labour

The impact of child labour takes several forms. Child labour results in the violation of many of the fundamental rights of a child. Children are exposed to various forms of abuse, including poor pay, hazardous working conditions, physical, mental and verbal abuse as well as poor working conditions, all detrimental to their health, growth and development.<sup>15</sup>

11 RA Mavunga 'A critical assessment of the Minimum Age Convention 138 of 1973 and the Worst Forms of Child Labour Convention 182 of 1999' (2013) 16 *Potchefstroom Electronic Review* 122.

12 B Bowman & N Duncan 'Educational aspirations, child labour imperatives and structural inequalities in the South African agricultural sector' (2008) 26 *Perspective in Education* 29 at 30.

13 K Basu 'Child labour: Cause, consequence, and cure, with remarks on international labour standards' (1999) 37 *Journal of Economic Literature* 1085.

14 Nhenga-Chakarisa (n 9) 181.

15 BM Celek 'The international response to child labour in the developing world: Why are we ineffective?' (2004) 11 *Georgetown Journal on Poverty Law and Policy*

Child labour is regarded as a global human rights issue that impacts on all members of the international community.<sup>16</sup> According to Celek, there are several consequences for children engaging in work that is hazardous or likely to cause harm. The first relates to the physical development of a child, in that children are not as strong as adults and, therefore, are susceptible to injuries.<sup>17</sup> Second, the body of a child has weaker 'anatomical, physiological and psychological systems' than adults and, therefore, they more likely to be adversely affected by chemical toxins.<sup>18</sup> Third, children are exposed to physical dangers and exploitative working conditions due to working long hours for low wages. The physical detriment caused by child labour depends on the type of employment and the conditions of the workplace.<sup>19</sup> The type of work in which children engage affects the psychological progress of a child.<sup>20</sup> Fourth, children who engage in work instead of attending school compromise their hope for a better quality of life.<sup>21</sup> Kern suggests that child labour places tremendous mental strain on the child by having to work extremely long hours under poor working conditions without being able to attend school.<sup>22</sup> This diminishes the mental development of the child and reduces the chances of improving their economic situation.<sup>23</sup> Kasper indicates that there are serious health risks associated with child labour. The type of work entails hazards that impact on the health of a child. The hazards are biological, chemical, physical, mental, injury, pesticides, poisoning and diseases.<sup>24</sup>

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90; VN Muzvidziwa 'Child labour or child work? Whither policy' (2006) 22 *Research Review NS* 26.

16 J Kasper & DL Parker 'Child labour international encyclopaedia of public health' (2008) 481; CM Kern 'Child labour: The international law and corporate impact' (2000) 27 *Syracuse Journal of International Law and Commerce* 180.

17 Kasper & Parker (n 16) 481; Kern (n 16) 189.

18 Kasper & Parker (n 16) 481; Kern (n 16) 180.

19 As above.

20 As above.

21 Celek (n 15) 95.

22 Kern (n 16) 177; H Choma, R Peter & S Pumzile 'The impact of child labour in agricultural sectors in Limpopo Province (South Africa)' (2019) 9 *Journal of Politics, Economics and Society* 64.

23 Kern (n 16) 181.

24 Choma, Peter & Pumzile (n 22) 64; Kasper & Parker (n 16) 483.

## 4 Role of the International Labour Organisation in relation to child labour

The ILO was founded together with the League of Nations in 1919 by the Versailles Peace Treaty.<sup>25</sup> Since its inception, the ILO has adopted 189 Conventions and recommendations.<sup>26</sup>

The Minimum Age Convention and Minimum Age Recommendation<sup>146</sup> of 1973 are generally read together and are considered to be the most relevant instruments regulating the minimum age for employment of children. The purpose of the Minimum Age Convention is for member states to 'pursue a national law which is designed to abolish child labour and to progressively raise the minimum age of employment or work which is consistent with the physical and mental development of young persons'.<sup>27</sup> This Convention deals primarily with age in respect of employment as well as the carrying out of light work and hazardous work. The Convention was not ratified by many member states, especially by states where child labour was widespread. Developing countries used explosive population growth, endemic poverty and lack of infrastructure<sup>28</sup> as reasons for not ratifying the Convention. These countries found that the Convention failed to 'identify immediate priorities and a methodology for achieving the goal of child labour abolition'.<sup>29</sup>

During the 1990s the ILO shifted its attention towards the elimination of the Worst Forms of Child Labour (WFCL) as children were exposed to several abuses and violation of their rights. The WFCL Convention was adopted in 1999 to supplement the Minimum Age Convention.<sup>30</sup> This Convention lists certain types of

25 J Langan 'Did your jeans enslave children? Child labour in international trade' (2002) 2 *Asper Review of International Business and Trade Law* 159; L Swepton 'Adoption of standards by the International Labour Organisation: Lessons and limitations', International Council on Human Rights Policy & international Commission of Jurists Workshop, Geneva, 13-14 February 2005 1; A Trebilcock & G Raimondi 'The ILO's legal activities towards the eradication of child labour: An overview' in G Nesi, L Nogler & M Pertile (eds) *A legal analysis of ILO action* (2008) 18.

26 According to Swepton, '[c]onventions are drafted as treaties, and may be ratified, creating binding obligations. Recommendations are what the name suggests, and are drafted as guidance. They may be adopted independently of each other, but often are adopted together, in which case the Recommendation supplements the Convention and adds additional provisions to help understand or add to the ideas in the Conventions'; Swepton (n 25) 6.

27 Art 1 Minimum Age Convention.

28 A Kornikova 'International Child Labour Regulation 101: What corporations need to know about treaties pertaining to working youth' (2008) 34 *Brooklyn Journal of International Law* 209.

29 As above.

30 Preamble to the WFCL Convention.

child labour as WFCL and requires member states to take immediate action to eliminate these. It recognises the importance of free basic education, the need to prevent children from engaging in WFCL, and to provide such children with adequate rehabilitation and social integration.<sup>31</sup> The WFCL Convention sets out the action that must be taken by member states to achieve its objectives. It focuses on various criminal activities related to child labour, such as the sale and trafficking of children and the economic exploitation of children through prostitution and recruitment into the military.<sup>32</sup>

The two Conventions aim to prohibit, reduce and eliminate child labour and, at the same time, seek to protect the child from abuse and neglect.<sup>33</sup> As a result, member states that have ratified the Conventions have passed national legislation and adopted programmes to prohibit child labour. Despite these efforts, child labour practices continue, implying that problems and challenges persist. According to Celek, governments have worked with the international community to implement programmes to prevent children from entering the workplace.<sup>34</sup> However, a lack of political power and the will to monitor these programmes and the challenges in enforcing the law have led to the ineffective elimination of child labour.<sup>35</sup> Thus the effectiveness of the current systems is questionable, and this then begs the question as to whether there is a need to review the current systems.

## 5 The need for harmonisation of child labour in the three regional economic communities

While the ILO provides hard laws for the banning of child labour, there are many flaws in these instruments. Member states within COMESA, EAC and SADC have ratified these hard laws and have implemented these into national legislation, thereby complying with their obligations. However, several issues and challenges remain regarding their national laws. These laws have several shortcomings,

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31 As above.

32 Kornikova (n 28) 209.

33 The Minimum Age Convention and the Worst Forms of Child Labour Convention provide children with numerous protections. The Minimum Age Convention sets out the following protections: art 1: minimum age for employment; art 2(3): minimum age for employment should not be less than the age of completion of compulsory schooling; art 3: prohibits work that may jeopardise the health, safety or morals of a child; and art 7: permits children between 13 and 15 years to engage in light work provided such work is not harmful to their health or development and attendance at school is not impacted on. The Worst Forms of Child Labour Convention offers the following protection: art 3: sets out the worst forms of child labour; art 7: requires penal sanctions to be imposed.

34 Celek (n 15) 90.

35 As above.

are vague, and are poorly regulated and implemented, making harmonisation a possible solution.

Within these three sub-regions child labour is regulated at national level, and there is no sub-regional regulation. Children in these RECs engage in many different forms of work in the different economic sectors, which may pose serious harm to their mental, physical and emotional well-being. While there are similarities, the categories of work differ according to the production and economic needs of each country. Agriculture, mining, domestic services and sexual exploitation and trafficking of children are common and, therefore, there should be sub-regional regulation as these are cross-border issues. According to the ILO, agriculture plays the most important role in sub-Saharan Africa: Four out of every five children are engaged in child labour in this sector.<sup>36</sup> According to the International Programme on the Elimination of Child Labour (IPEC), 80 per cent of domestic workers are girls, are from rural areas, and enter the sector aged younger than 15 years.<sup>37</sup> This is further supported by the ILO 2020 statistics, which indicate that 4,4 million girl children aged five to 17 years are engaged in child labour globally.<sup>38</sup> Regional integration through legal harmonisation may be beneficial for the protection of children in these RECs as it will allow for enforcement and uniform regulation on critical issues affecting children. Matters such as illegal cross-border crossings, the sexual exploitation of children and child trafficking may be better controlled, which may ensure that the rights of children are enforced. While it may be argued that national law can be amended to rectify the gaps identified, had this been possible, national governments would already have done so.

Vambe and Saurombe highlight the fact that there are many children who enter South Africa from Zimbabwe, Zambia and even Mozambique.<sup>39</sup> This indicates that the coordination between these countries is a concern. Vambe and Saurombe further note that

border officials are easily bribed and allow children to cross the border into South Africa where these children find work as cheap labourers on white-owned commercial farms, especially in the Limpopo province. When the children complain about low wages, the white farm owners

<sup>36</sup> ILO and UNICEF (n 2).

<sup>37</sup> Emerging good practices on child domestic labour in Kenya, Tanzania, Uganda and Zambia. Publications of the ILO enjoy copyright under Protocol 2 of the Universal Copyright Convention (2006) 2 3.

<sup>38</sup> ILO and UNICEF (n 2).

<sup>39</sup> B Vambe & A Saurombe 'Child labour laws in South Africa, Zambia and Zimbabwe: A comparative analysis' (2019) 16 *Commonwealth Youth and Development* 5, <https://doi.org/10.25159/1727-7140/3317> (accessed 17 May 2021).



threaten to call the police to deport the children back to their countries of origin.<sup>40</sup>

Another noted concern that may be regulated by regional integration is the lack of relevant documentation such as birth certificates. Children who do not possess the relevant documents to legally move between countries face several consequences. They are exploited, encounter both physical and mental abuse, their rights relating to safe working conditions are violated, and sometimes they are separated from their parents when it is found that they illegally entered a country.<sup>41</sup> Vambe and Saurombe argue that Zambia's approach to addressing the problem of child labour is fragmented. Mushota observes and recommends that

there is need for the Zambian Government, through the legislation, to harmonize the different pieces of legislation concerning children into a comprehensive body of child-related laws to avoid confusion of such things as definition of a child and also to ensure conformity with instruments such as the CRC, as regards upholding all children's rights.<sup>42</sup>

Zimbabwe, like Zambia, Malawi and Tanzania, has several laws relating to child labour that have shortcomings. According to Loewenson, cited in Vambe and Saurombe, 'Zimbabwe's legal framework lacks legal controls and enforcement of safe working conditions and poor rates of pay for child workers. As a result, child labour is prone to exploitation.'<sup>43</sup>

These are but a few cross-border issues that require regulation in these three sub-regions. Regional integration through harmonisation aims to ensure better coordination and collaboration between member states.<sup>44</sup> There is a clear gap in regional laws as there are no benchmarks to guide the drafting of national laws. The sub-regional regulation of child labour, therefore, is needed and could be a possible solution to the scourge of child labour.

Specific to child labour and cross-border issues is child trafficking. Child trafficking and sexual exploitation of children are unlawful activities that have been criminalised by international law and are

40 As above.

41 2019 Findings on the Worst Forms of Child (Kenya) Bureau of International Labour Affairs 2, <https://www.dol.gov/agencies/ilab/resources/reports/child-labor/kenya> (accessed 17 May 2021).

42 C. Mushota 'Is the existing Zambian legislation adequate for curbing child-labour and work-family conflict: An analysis of the legal framework in Zambia' LLB dissertation, University of Zambia, 2006 51.

43 As above.

44 I Mwanawina 'Regional integration and *pacta sunt servanda*: Reflections on South African trans-border higher education policies' (2016) 19 *PER/PELJ* 1 2.

not regulated at regional level. Mavunga classifies child trafficking as a form of child slavery, where children are used to obtain a profit through violence, abuse and threats.<sup>45</sup> In Uganda, children are trafficked internally as well as to parts of Central, East and North Africa.<sup>46</sup> Further, children from the Democratic Republic of the Congo (DRC), Kenya, Rwanda and Tanzania are trafficked to Uganda, illustrating that child trafficking is a cross-border issue requiring sub-regional regulation.<sup>47</sup> Literature indicates that Uganda has several laws preventing the trafficking of children, which appear comprehensive. However, the problem lies with the enforcement of the legislation.<sup>48</sup> The first notable challenge is the lack of information on the magnitude of child trafficking at national level; a second challenge is the superficial understanding of trafficking in persons; another challenge is the government's failure to provide victims with adequate care, depending on non-governmental organisations (NGOs) and international institutions to assist; the last is the lack of financial resources and political will to fight child trafficking.<sup>49</sup> The problem highlighted by Mavunga is that of implementation, which is affected by the lack of resources and training of the labour inspectors who are responsible for the enforcement of the laws.<sup>50</sup> Further problems that pose a challenge to implementation of the laws are the dire socio-economic conditions; corruption wherein resources are diverted; and the fact that the implementation of the laws are violated by those meant to be responsible for their enforcement (law enforcement officials and members of the judiciary).<sup>51</sup>

Another issue is the lack of regional regulation of sexual exploitation of children (SEC) as a cross-border issue.<sup>52</sup> Mavunga in passing raises the need for governments to enhance cross-border 'prevention, protection and prosecution'.<sup>53</sup>

Mavunga reflects on the laws of Uganda to illustrate the key deficiencies in the definition of SEC: the failure of the sentencing provisions to consider aggravating factors such as the risk of the offender to society or the severity of the perpetrator's criminal record.<sup>54</sup> Other shortcomings noted are that the legislation focuses

45 RA Mavunga 'The prohibition of child slavery in South Africa, Uganda and Zimbabwe: Overcoming the challenges of implementation of legislation' (2018) LI 1 *Comparative and International Law Journal of Southern Africa* 19 at 22.

46 Mavunga (n 45) 33.

47 As above.

48 As above.

49 Mavunga (n 45) 35.

50 Mavunga (n 45) 37.

51 As above.

52 Mavunga (n 45) 40.

53 As above.

54 As above.]

on the adult as a perpetrator and does not foresee the possibility of children being offenders; it does not criminalise online grooming.<sup>55</sup> Zimbabwean writers suggest that their laws tend to deal more with the immorality of the issue than with the actual exploitation and abuse of SEC; the laws do not criminalise pornography associated with children, which is not in line with international law.

## 6 A general overview of child labour in COMESA, EAC and SADC

### 6.1 COMESA

COMESA's vision, mission and objectives place minimal emphasis on the protection and enforcement of the rights of children. Article 143 of the COMESA Treaty requires the adoption of a Social Charter.<sup>56</sup> The key areas of focus in the Charter relevant to this study are that of employment and working conditions, labour laws, the well-being of the child and education, training and skills development.<sup>57</sup>

While article IX relates to the well-being of the child, there is no mention of the prohibition on child labour. This section requires that special protection be given to a child as well as opportunities created to allow a child to develop to his or her full potential.<sup>58</sup> It does not elaborate on what these special protections are and how it should be afforded to children. This is very broad and leaves much discretion to member states.

The concern regarding this Charter is the lack of solid regulation on the issue of children. The Charter itself is weak as it does not prohibit the engagement of children in employment, which is a major concern as children engage in not only child labour but WFCL. It neither places an obligation or duty on member states to implement such provisions, nor does it establish guidelines on how to enforce, review or monitor child labour laws. Regional regulation is lacking within COMESA on the issue of child labour.

55 RA Mavunga "'Bring back our innocence". Protecting children from commercial sexual exploitation: A case study of three African countries' (2020) 35 *Southern African Public Law* 6412.

56 Preamble to the COMESA Social Charter.

57 As above.

58 Art IX(a) COMESA Social Charter.

## 6.2 EAC

Article 120(c) of the EAC Treaty places a duty on its member states to co-operate with one another in respect of social welfare, to further develop a common approach towards the disadvantaged and marginalised groups of people, in particular children.<sup>59</sup> As a result, the EAC Council of Members established the Sectoral Council on Gender, Youth, Children, Social Protection and Community Development.<sup>60</sup> At the first children's rights conference held in Bujumbura in September 2012, the Bujumbura Declaration on Child Rights and Wellbeing was adopted, which called for an EAC Child Policy.<sup>61</sup>

Its mission is to promote the realisation of the rights of the child to survival, development, protection and participation.<sup>62</sup> The policy does not offer guidance on core issues such as the age of a child and child labour. However, it does in articles 4(4) and 4(6) deal with cross-border children's rights, violations and education. Cross-border violations relate to sexual abuse, commercial sexual exploitation and child trafficking, among other issues.<sup>63</sup> Furthermore, the policy does not set guidelines but offers vague strategies on how to address these issues.

While it is a positive step in the right direction, the policy is vague and ambiguous in many respects. There is no prohibition on the employment of children, which is a grave concern given the magnitude of the issue. The policy does nothing more than provide in broad terms the need for the protection of the child. One must then question the need for this regional policy as it is unclear, and much is left to the interpretation and implementation by member states.

## 6.3 SADC

The Code of Conduct on Child Labour (2000) deals with the issue of child labour. The Code recognises that laws and regulations are fundamental to the elimination of child labour. It requires national legislation to fix a minimum age of employment for children,<sup>64</sup> but

59 Art 120(c) EAC Treaty; EAC Child Policy (2016) 1.

60 EAC Child Policy 1, <https://bettercarenetwork.org/sites/default/files/Final%2BEAC%2BChild%2BRights%2BPolicy%2B%282016%29.pdf> (accessed 17 May 2021).

61 As above.

62 Art 3(2) Child Policy 2016.

63 EAC Child Policy (n 60) 22.

64 Art 4.2 Code of Conduct on Child Labour 2000.

neither prescribes an age, nor does it offer guidance to member states on how to determine an appropriate age. It prescribes that a list of work considered to be hazardous should be created,<sup>65</sup> but again little guidance is given. The Code, however, does call for a review of existing legislation. However, it fails to mention how the review is to occur, who is to review the legislation, who the member state will be accountable to and which structure within the SADC organ will be responsible.

SADC has been pro-active in addressing the issue of child labour. The Code is a step in the right direction, but has numerous gaps. It attempts to advise member states on the requirements needed but does not provide guidance and places the onus on member states to develop laws. There is an over-reliance on the international legal framework and not enough on the regional legal framework which is lacking considerably.

## 7 Regional integration and harmonisation

The history of the formation of regional schemes can be traced back to the colonial era, where regional schemes were created to preserve the interests of colonial powers over Africa.<sup>66</sup> These regional schemes resulted in the oppression of people and led to the development of a fragmented and disjointed continent. Later on, as states began to gain independence, the focus of the states shifted to developing a consolidated African continent to eliminate the socio-economic inequalities and to focus on development.<sup>67</sup> Despite the shift in focus, many African states experienced several challenges that hampered the progress of developing a consolidated African continent. These included being landlocked with small populations and small markets, which also made economic development problematic.<sup>68</sup> According to Ake, colonialism forced on African states a redistribution of land, forced labour and restricted economic activities.<sup>69</sup> Regional integration was therefore explored as an option<sup>70</sup> to enhance unity and address socio-economic inequalities.

65 As above.

66 PM Lehloenyana & MN Mpya 'Exploring the citizen inclusiveness and micro-economic empowerment aspects of regional integration in Africa law' (2016) 20 *Law, Democracy and Development* 91.

67 BO Fagbayibo 'A politico-legal framework for integration in Africa: Exploring the attainability of a supranational African Union' unpublished LLD thesis, University of Pretoria, 2010 1.

68 Fagbayibo (n 67) 2.

69 C Ake 'Democracy and development in Africa' (1996) *The Brookings Institution* 1 at 3; C Ake *A political economy of Africa* (1981).

70 This is supported by Fagbayibo (n 67) 2.

Harmonisation and, ultimately, uniformity of standards are essential to ensure that regional integration is successful.<sup>71</sup> The harmonisation of laws has two main objectives: unifying laws in instances where there is conflict or inconsistency; and reforming laws when the existing laws are problematic.<sup>72</sup> The ultimate objective in either circumstance is to establish a legal framework and set international standards.<sup>73</sup> According to Nicholson, harmonisation in the legal context is directed 'towards the elimination of discord with a view of avoiding incompatible outcomes associated with the application of rules of different legal systems'.<sup>74</sup> In effect, the different legal systems remain separate but function in harmony with one another.<sup>75</sup> During harmonisation, member states agree on common objectives and standards and may change or adapt their laws to meet these objectives.<sup>76</sup>

Regional integration became an important aspect towards the development of Africa through the establishment of regional blocks known as RECs. The commitment towards coordination, cooperation and harmonisation within the regional blocks is found in the numerous regional treaties and protocols. The principles of coordination and cooperation allow the RECs to meet the goals of regional integration, whereas harmonisation allows for the RECs to harmonise the laws in a particular area common to them. Member states of the three RECs have national laws on child labour. However, these laws have several shortcomings and are vague, and they are poorly regulated and implemented, making harmonisation a possible solution. There are several bases for the rationale of the legal harmonisation of child labour laws. It allows for common objectives<sup>77</sup> on child labour to be agreed upon; for consistency in the adoption,<sup>78</sup> amendments and adaptation to national laws; certainty in the law;<sup>79</sup> the establishment of a sub-regional institutional structure that focuses on child labour; uniformity as member states will have to apply the same laws; and

71 B Fagbayibo 'Rethinking the African integration process: A critical politico-legal perspective on building a democratic African Union' (2011) 36 *South African Yearbook of International Law* 218.

72 L Mistelis 'Is harmonisation a necessary evil? The future of harmonisation and new sources of international trade law' in I Fletcher, L Mistelis & M Cremona (eds) *Foundations and perspectives of international trade law* (2001) 15.

73 As above.

74 C Nicholson 'Some preliminary thoughts on a comparative law model for the harmonisation of laws in Africa' (2008) 14 *Fundamina* 51.

75 JB Rudahindwa 'Legislative versus judicial harmonisation of law: A comparative study of OHADA commercial law and the US uniform commercial code' (2020) 7 *Journal of Comparative Law in Africa* 11.

76 As above.

77 A Yakubu *Harmonisation of laws in Africa* (1999) 29.

78 Mistellis (n 72) 16.

79 Yakubu (n 77) 29.

fostering legal collaboration, cooperation and respect in member states on the application of the rule of law.<sup>80</sup>

## 8 Defining legal harmonisation

According to Ajai harmonisation is a 'process of welding different types, traditions and standards of laws into a coherent separate whole system of laws by an international organisation that is thereupon directly binding on states'.<sup>81</sup> Bassani and Mattei further refer to harmonisation as the 'convergence of rules only to a limited extent, in order to attain a workable coordination among them'.<sup>82</sup> These definitions suggest different meanings of harmonisation. According to Ajai, harmonisation is a process that fuses different systems into an entirely new system, which is usually regulated by an international institution, whereas Bassani and Mattei suggest that harmonisation results in the limited unification of rules in order to achieve coordination. Ajai's definition sees harmonisation resulting in the creation of a new system, whereas Bassani and Mattei see harmonisation as a limited unification. Harmonisation does not focus on the adoption of a single set of laws; rather, it identifies various ways in which to accommodate the differences in legal systems of member states.<sup>83</sup>

The role of harmonisation in the legal development process depends on the elements of the law that are to be harmonised.<sup>84</sup> Harmonisation can be applied to general or specific areas of law in different countries, thus making the area of law not an essential requirement for the process of harmonisation.<sup>85</sup>

The regional regulation of child labour through legal harmonisation is plausible. Child labour laws may be regarded as specific laws as they regulate a particular area of law, namely, child law and employment

80 Mistellis (n 72) 16.

81 O Ajai 'Agenda for intra-African economic development: Business-legal frameworks, enablers and impediments' (2016) 3 *Journal of Comparative Law in Africa* 21.

82 M Bassani & U Mattei 'The common core approach to European private law' (1997) 3 *Columbia Journal of European Law* 339, <http://www.jus.unitn.it/cardoza/Common.core/Insearch.html> (accessed 10 August 2021).

83 Z Stephen 'Nafta and the harmonisation of domestic legal systems: The side effects of free trade' (1995) 12 *Arizona Journal of International and Comparative Law* 403; T Shumba 'Harmonising the law of sale in the Southern African Development Community (SADC): An analysis of selected models' LLD thesis, Stellenbosch University, 2014 32; G van Niekerk 'The convergence of legal systems in Southern Africa' (2002) 35 *Comparative and International Law Journal of Southern Africa* 314.

84 M Boodman 'The myth of harmonisation of laws' (1991) 39 *American Journal of Comparative Law* 702.

85 As above.

law. Thus, the harmonisation of child labour laws through regional integration will facilitate consistency and coherence or internal harmony, which attempts to reduce conflicts in legal systems.

## 9 Advantages and disadvantages of harmonisation

Legal harmonisation in Africa has many advantages, which allows for political stability, economic development and a sound and secure legal framework, and increases the confidence of potential investors, which is beneficial to Africa's development.<sup>86</sup> Despite the advantages being linked to economic progression, it will have several advantages to the sub-regional regulation of child labour. Currently member states have regulated child labour through legislation and programmes of action, which has not resulted in a decrease. Harmonisation allows for member states to work together by creating uniform rules, establishing certainty in the laws and regulating cross-border issues. According to Yakubu, harmonisation allows for

practical predictable rules for the determination of the appropriate law to apply in solving practical problems on uniform basis; the inter-play of legal collaboration and mutual respect between various legal systems; co-operation and systemisation of rules of law of various states; the avoidance of costly, confusing and delay which are necessary incidents of divergent choice of law rules and the cross-fertilisation of ideas which enriches community laws.<sup>87</sup>

Harmonisation also produces neutral rules, allowing member states to ratify and adopt these to suit the individual needs and requirements of a particular country.<sup>88</sup> The neutrality of the rules allows member states to configure them according to their circumstances. This allows the member state the benefit of conforming to the rules, but with a degree of flexibility. It also fills a legal vacuum that is created by rules that previously did not exist in national laws.<sup>89</sup>

Harmonisation prevents a proliferation of national laws by creating a single law.<sup>90</sup> The advantage of a single set of laws leads to predictability and uniformity in the application of national laws among member states.<sup>91</sup>

Despite the noted advantages, one must be mindful of the disadvantages that arise during the harmonisation process. Diversity

86 Fagbayibo (n 71) 309.

87 Yakubu (n 77) 29.

88 As above.

89 Mistellis (n 72) 16.

90 As above.

91 Yakubu (n 77) 29.



in law can lead to inconsistent application of laws and policy on trade; it can lead to competition in respect of trade and allow stronger states more control than weaker and poorer states.<sup>92</sup> When member states decide to engage with one another, issues may arise that hamper cooperation in terms of which legal system will regulate the relationship.<sup>93</sup> Legal harmonisation results in some member states being subject to unfamiliar rules; therefore one party will be at an advantage over the other in respect of application of the rules and development.<sup>94</sup>

Harmonisation results in the loss of expertise in a particular area as countries have to concede to new laws.<sup>95</sup> The loss of expertise arises as a result of having to adopt or conform to new laws. It also places member states in a challenging position of having to adapt to and implement a new set of rules. Generally, member states have their laws and expertise regulating specific areas of laws. When new laws are implemented due to harmonisation, knowledge, skills and expertise are lost. Changing from one legal system to another involves abandoning a system to which one is accustomed and moving to new rules that may 'seem less adapted to the local culture and environment'.<sup>96</sup> Concern, risk and uncertainty arise when new laws are harmonised and implemented. This occurs when member states are unaware of the outcome of the implementation and the ensuing consequences. Generally, efforts are made when new rules are drafted to ensure that these do not clash with the old rules. This is done to ensure acceptance of the new rules and the effective implementation into national laws.<sup>97</sup> Harmonisation as a process is not easy and that has many negative consequences which member states will have to accept and adjust to. This, however, is not easy, as harmonisation involves several different legal systems, with each member state having its own rules, customs and practices. During negotiations and consultations these must be considered so as to ensure that harmonisation is beneficial to member states. What is required in order to mitigate the challenges highlighted above is synergy. Synergy relates to the interactions or cooperation

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92 J Faria 'Future directions of legal harmonisation and law reform: Stormy seas or prosperous voyage?' (2009) *Uniform Law Review* 5 9.

93 Faria (n 92) 9.

94 M Fontaine 'Law harmonisation and local specificities – A case study of OHADA and the law of contract' (2013) 18 *Uniform Law Review* 50.

95 Faria (n 92) 9.

96 Fontaine (n 94) 51.

97 Faria (n 92) 10; Fontaine (n 94) 51.

of regional institutions with national institutions to achieve a specific goal.<sup>98</sup> Strengthening the synergy between sub-regional and national institutions is fundamental to regional integration and harmonisation. Thus, in order for the regional integration of child labour laws to be effective, there has to be cooperation and collaboration between sub-regional and national levels. This will ensure effective implementation of the legal instruments established. This synergy will help ensure compliance.

The powers and functions of sub-regional institutions need to be clear and unambiguous.<sup>99</sup> At the same time, the drafters of sub-regional instruments should be cautious not to draft instruments that 'overtly or tacitly, circumscribe the influence or functions of critical regional institutions'<sup>100</sup> or national institutions. There has to be agreement in respect of functions, responsibilities, application and enforcement of laws. There needs to be a clear division of roles and duties. If child labour is to be successfully regulated for the benefit of the child, the above is essential. Some member states in these three sub-regions have implemented national legislation and policies to curb child labour, but the challenge is the actual implementation. To effectively curb child labour and to regulate it sub-regionally requires commitment and dedication. Stringent penalties need to be considered for non-implementation of policies. Also valuable to regional integration is the setting of uniform legislative norms and standards that member states can progressively realise. The success of harmonisation depends on this engagement, and a failure to consider the interests of each member state will affect the process, the ratification of treaties, and the implementation of the legal framework.

## 10 A model for harmonisation of child labour laws: A lesson from OHADA

### 10.1 An overview of OHADA

OHADA was established on 17 October 1993 in Mauritius and since then has been adopted in West and Central Africa.<sup>101</sup> OHADA

98 M Swart 'Alternative fora for human rights protection? An evaluation of the human rights mandates of the African sub-regional courts' (2013) 3 *Journal of South African Law* 439.

99 Fagbayibo (n 71) 72.

100 As above.

101 B Martor et al *Business law in Africa: OHADA and the harmonisation process* (2002) 5; Rudahindwa (n 75) 2; T Shumba 'Harmonising business laws in the Southern

currently has 17 member states.<sup>102</sup> It is recognised as an African regional body, which has used harmonisation to harmonise its business laws. It is also recognised for its clarity and erudition in harmonising its business laws.<sup>103</sup>

OHADA originated as a result of the political will 'to strengthen the African legal system by means of a secure legal framework and a business environment conducive to facilitating commercial transactions'.<sup>104</sup> After member states gained independence, they attempted to enact legislation to address the main areas, which resulted in plurality, diversity and obsolete legislation, leading to diverse, archaic and fragmented legal systems.<sup>105</sup> The situation was worsened by the withdrawal of investment in Africa as a result of legal and judicial insecurities.<sup>106</sup> As a result, the need for harmonisation emerged because of 'legal diversity, uncertainty and the lack of judicial security due to the inadequate training of judges, the paucity of legal information and a lack of recourses among other things'.<sup>107</sup>

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African Development Community (SADC): Should SADC member states join OHADA?' (2016) 1 *Stellenbosch Law Review* 61.

- 102 At present, OHADA has 17 members: Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo, Côte d'Ivoire, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Niger, Senegal and Togo, <https://www.tradeforum.org/OHADA-Four-Years-On-One-Business-Law-for-16-African-Countries/> (accessed 12 September 2021); P Bahamin 'Joining OHADA' (2013) *The Mining Journal*, [http://www.mining-journal.com/supplements/mj-indaba-supplement-0113/Joining-OHADA?SQ\\_DESIGN\\_NAME=print friendly](http://www.mining-journal.com/supplements/mj-indaba-supplement-0113/Joining-OHADA?SQ_DESIGN_NAME=print%20friendly) (accessed 21 August 2021); B Kahombo 'The accession of the DRC to OHADA: Towards national prosperity by the unification of law?' (2012), <http://www.the-rule-of-law-in-africa.com/wp-content/uploads/2012/08/Balingene.pdf> (accessed 3 September 2021).
- 103 CM Dickerson 'Harmonising business laws in Africa: OHADA calls the tune' (2005) 44 *Columbia Journal of Transnational Law* 62; CM Dickerson 'Perspectives on the future' in CM Dickerson (ed) *Unified business laws for Africa: Common law perspectives on OHADA* (2009) 108.
- 104 Martor et al (n 101) 9; Rudahindwa (n 75) 2; Shumba (n 83) 6.
- 105 R Beauchard 'OHADA nears the twenty-year mark: An assessment' (2013) 4 *World Bank Legal Review* 323. In order of ratification, the OHADA member states are Guinea-Bissau (15 January 1994); Senegal (14 June 1994); Central African Republic (13 January 1995); Mali (7 February 1995); Comoros (20 February 1995); Burkina Faso (6 March 1995); Benin (8 March 1995); Niger (5 July 1995); Côte d'Ivoire (29 September 1995); Cameroon (20 October 1995); Togo (27 October 1995); Chad (13 April 1996); Republic of Congo (28 May 1997); Gabon (2 February 1998); Equatorial Guinea (16 April 1999); Guinea (5 May 2000); and Democratic Republic of the Congo (13 July 2012). See <http://www.ohada.org/etats-parties.html> (accessed 3 September 2021); Rudahindwa (n 75) 2; Shumba (n 101) 61.
- 106 Shumba (n 101) 62; AK Nguru 'The attitude of OHADA law countries towards the CISG' (2016) 3 *Journal of Law, Society and Development* 101.
- 107 MS Tumnde 'The applicability of the OHADA Treaty in Cameroon: Problems and prospects' (2010) 25 *Tulane European and Civil Law Forum* 121; Rudahindwa (n 75) 2; Shumba (n 101) 61.

## 10.2 Successes in the harmonisation of business laws in OHADA

OHADA has made significant strides in achieving harmonisation. The first noted success is that it is a fully functioning institutional system, as discussed. OHADA has five key institutions that regulate its operations. The Conference of Heads of State and Government is considered to be the supreme institution; the Council of Ministers is considered the legislative organ; the Common Court of Justice and Arbitration (CCJA) is the judicial branch of OHADA; the Permanent Secretariat is regarded as the executive organ; and the final institution is the Centre for Training. This is significant as many African institutions are yet to achieve this milestone.<sup>108</sup> An institution that is fully operational will therefore have the mechanisms in place to achieve its goals.

OHADA illustrates that its membership is growing. It originally started up with 14 members joining, which has now increased to 17 states.<sup>109</sup> This indicates that countries have noted the benefits and the success of the harmonisation of business laws.

The creation of Uniform Acts is another achievement.<sup>110</sup> OHADA has several Uniform Acts regarding the subject matters listed in article 2 of the Amended Treaty. The Uniform Acts are reviewed regularly and amended whenever necessary.<sup>111</sup> This illustrates a commitment towards monitoring and evaluation. The harmonisation of laws in OHADA has led to the creation of certainty and has reduced unpredictability.<sup>112</sup> According to Beauchard, legal certainty results in laws and decisions being public and publicly available; are definite and clear in their applicability;

the decisions of courts are enforced and, to the greatest extent possible, reasoned, so as to provide relevant information on the compliance of conduct with law; and the persons or officials associated with the application and enforcement of those laws must be easily identifiable and properly trained and equipped to accomplish their duty.<sup>113</sup>

OHADA adopted nine Uniform Acts to regulate the harmonisation of business laws.<sup>114</sup> These established a comprehensive, definitive and coherent framework.<sup>115</sup> The creation of a legal framework is essential

<sup>108</sup> Shumba (n 101) 70; Ajai (n 81) 23.

<sup>109</sup> Beauchard (n 105) 323; Shumba (n 101) 71.

<sup>110</sup> As above.

<sup>111</sup> Shumba (n 101) 71.

<sup>112</sup> Beauchard (n 105) 327; Shumba (n 101) 72.

<sup>113</sup> Beauchard (n 105) 327.

<sup>114</sup> Martor et al (n 101) 6, art 5 Amended Treaty.

<sup>115</sup> Beauchard (n 105) 328. Examples include: •The General Commercial Law Act provides the fundamental rules of business activity: merchant status, commercial leases, commercial sale of goods, agency, businesses and movables registry and microbusiness. •The Companies Act provides for various limited liability

for harmonisation. The Uniform Acts, once adopted by the Council of Ministers at an organisational level, become enforceable and binding for all member states, which are then required to apply these Uniform Acts into national legislation.<sup>116</sup> This follows the principles of harmonisation that require neutral laws be developed and applied into national laws. The Uniform Acts nullify all previous legislation of the member states in respect of that particular area of law.<sup>117</sup> According to article 10 of the Amended Treaty, the Uniform Acts apply directly to member states. This implies that national legislation in that area of law will no longer be applicable after the Uniform Act is adopted. The member state is permitted to implement other legislation, provided that the legislation complies with the Uniform Act.<sup>118</sup> Thus, OHADA's harmonisation process complies with the requirements for harmonisation, thereby making its experience relevant to the harmonisation of child labour laws.

The Uniform Acts provide member states with simple and modern laws compared to fragmented and uncertain national laws.<sup>119</sup> This is positive as it illustrates the importance of reviewing laws in order to ensure that they are updated and that they remain relevant to the issues they regulate. Member states, therefore, can disregard the national laws and adopt the more modern laws, if needed.

The lack of access to legal information was a notable challenge. This was a result of the unavailability of materials that governments did not provide, and the low salaries of the judges meant that they could not purchase their own materials.<sup>120</sup> Due to the lack of access to legal information, legal experts were unaware of the relevant laws and, therefore, could not apply the laws correctly. OHADA through the Regional School of Magistracy (ERUSMA) created access to

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structures that protect business operators. •The Secured Transactions Act provides for various securities protecting creditors against the risk of defaults of their debtors and sets the conditions for the development of commercial lending. •The Accountancy Act provides for uniform accounting standards based on the true and fair view standard. •The Simplified Debt Collection Procedures and Enforcement Measures provides operators with modern legal remedies, such as seizures and garnishments, which are available to unpaid judgment creditors to compel judgment debtors to pay up, if need be with the assistance of the police.'

116 EA Fredericks 'The conflicts rule in respect of contractual capacity in the preliminary draft Uniform Act on the Law of Obligations in the OHADA region' (2018) 1 *SA Mercantile Law Journal* 139.

117 Martor et al (n 101) 6; Fagbayibo (n 71) 313; Ajai (n 81) 21; Yakubu (n 136) 29.

118 Article 10 of the Amended Treaty.

119 Rudahindwa (n 103) 17.

120 X Forneris 'Harmonising commercial law in Africa: The OHADA' (2001) 46 *Juris Periodique* 79-80, <http://www.ohada.com/imprimable.php?vu=10&articlebiblio=480> (accessed 3 September 2020); Shumba (n 101) 72.

materials and laws in the OHADA official journal which allows legal information and materials to be disseminated.<sup>121</sup>

### 10.3 Challenges to harmonisation in OHADA

Despite the overall successes, there have been challenges that must be highlighted, as these may be relevant to the regional regulation of child labour through harmonisation in the three sub-regions.

While OHADA is fully operational, budgetary constraints to implement the Uniform Acts are a challenge.<sup>122</sup> The lack of capacity to carry out the different functions of the organs is another challenge.<sup>123</sup> The Permanent Secretariat is understaffed and lacks funds to carry out some of its functions. Without adequate funds and capacity, the fulfilment of OHADA's objective may be problematic.<sup>124</sup>

The CCJA has experienced an increase in cases, which can be viewed as positive. However, this has resulted in a backlog of cases due to the CCJA being understaffed.<sup>125</sup> The role of the CCJA was intended to create uniform interpretation and application of the Uniform Acts. This, however, has resulted in capacity issues.<sup>126</sup> According to Beauchard and Kodo, OHADA institutions require substantial modification and reform to enhance their efficiency and effectiveness.<sup>127</sup>

There is an unclear relationship between the OHADA Treaty and other national laws and treaties. The Uniform Acts are considered supreme and mandatory under the OHADA Treaty. However, the supremacy of the OHADA and other national constitutions has not been resolved.<sup>128</sup> Clarity is key to legal certainty and, therefore, the

121 Beauchard (n 105) 331; Shumba (n 101) 73.

122 Dickerson (n 103) 72; Shumba (n 101) 73.

123 Shumba (n 101) 73.

124 As above.

125 Ajai (n 81) 23. Since OHADA was launched, 'the workload of the CCJA has steadily increased. By 31 December 2009, the CCJA had rendered 467 decisions, including nine consultative opinions, 400 judgments and 58 orders.' R Beauchard & MJV Kodo 'Can OHADA increase legal certainty in Africa?' (2011) 17 World Bank Justice and Development Working Paper Series 17/2011, <http://siteresources.worldbank.org/EXTLAWJUSTINST/Resources/172011CanOHADAINcrease.pdf?resourceurlname=17-2011CanOHADAINcrease.pdf> (accessed 3 September 2020).

126 Rudahindwa (n 75) 21.

127 Ajai (n 81) 2321; Beauchard & Kodo (n 125) 5.

128 JA Penda & MS Tumnde 'Problems of Implementation of OHADA in Anglophone Cameroon' (OHADATA reference number: D-04-13); CM Dickerson 'The introduction of OHADA law in Anglophone countries: Linguistic challenges' (2008) *Revue de droit des affaires internationales* 743 (OHADATA reference number: D-10-22); NE Enonchong 'The harmonisation of business law in Africa: Is article 42 of the OHADA Treaty a problem?' (2002) 51 *Journal of African Law* 95;

lack of clarity on this issue may result in uncertainty and confusion. Furthermore, provisions of the Uniform Acts also can conflict with the norms of other RECs.<sup>129</sup> Shumba argues that 'coordination of laws is needed to ensure that the laws enacted in the different regions are not in conflict with the OHADA Treaty and its Uniform Acts as this can be a source of legal uncertainty'.<sup>130</sup>

The resistance of national courts to apply and enforce OHADA laws is another challenge.<sup>131</sup> During the drafting of the OHADA Treaty the sovereignty of the supreme courts as courts of final instance over business laws was removed, resulting in defiance and hostility towards the CCJA and a deliberate unwillingness to apply the Uniform Acts.<sup>132</sup> Domestic courts tend to pass judgments using national laws despite the existence of Uniform Acts. A further problem is that Supreme Courts and parties to a dispute refuse to accept the exclusive jurisdiction of the CCJA in respect of matters within OHADA laws.<sup>133</sup>

## 11 Benefits of the harmonisation of child labour laws

As children are the most vulnerable members of a community, they are most in need of protection and care.<sup>134</sup> Children have the right to be protected from economic exploitation and from work that is considered dangerous to their health and well-being.<sup>135</sup> Numerous international and regional conventions have attempted to offer protection and care of children as well as to prevent the violations of their fundamental human rights. While there has been significant legal development, children continue to experience abuse, exploitation and have many of their rights violated. Children are exposed to various forms of abuse, including poor pay, hazardous working conditions, physical, mental and verbal abuse as well as

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TJ Nyambo 'The legal system of trial in Cameroon: Implementing the OHADA Treaty in Anglophone Cameroon' (2001) 47 *Juris Périodique* 105; Shumba (n 101) 74.

129 Beauchard (n 105) 330; Shumba (n 101) 87.

130 Shumba (n 101) 75.

131 Dickerson (n 103) 58; Shumba (n 101) 75.

132 M Frilet 'Legal innovation for development: The OHADA experience' in H Cisse et al (eds) *World Bank Legal Review Volume 4: Legal innovation and empowerment for development* (2012) 340; Dickerson (n 103) 58; Shumba (n 101) 75.

133 Shumba (n 101) 75. According to Shumba: 'The reluctance of national courts to accept the jurisdiction of the CCJA as court of last instance is evident in cases where the supreme courts continue to exercise that jurisdiction over matters that fall within the ambit of OHADA laws.'

134 Shumba (n 101) 3.

135 HM Njoloma 'Child labour in Malawi's agriculture sector: The socio-economic and HIV/AIDS impact nexus' paper delivered at the National Conference on Eliminating Child Labour in Agriculture in Malawi (2012) 8.

poor working conditions, all of which are detrimental to their health, growth and development.<sup>136</sup>

Legal harmonisation attempts to reduce conflicts in existing legal systems by establishing common, minimum standards that take precedence over the national laws of member states.<sup>137</sup> It can be inferred that harmonisation has an important role in the harmonisation of laws. It does not matter which type of law is to be harmonised. What is essential is that harmonisation will be used to facilitate consistency and coherence or internal harmony, which attempts to reduce conflicts in legal systems.

There are several bases for the rationale of the harmonisation of child labour. First, it will allow for common objectives around the issue of child labour to be agreed upon. This will ensure better regulation and compliance with the international norms. Second, it will ensure consistency in the adoption, amendments and adaption to national laws. Third, it will allow for certainty in the law as the international and regional instruments on child labour are vague. Fourth, harmonisation will allow for the establishment of a sub-regional institutional structure that will focus primarily on the issue of child labour. The ILO currently is the international structure responsible for overseeing the progress of member states. However, as the ILO does not have authority to impose sanctions, there is very little it can do. Harmonisation will allow for the development of a regional institutional structure that should have autonomy to impose sanctions as this institution will have the necessary power to regulate and control. Fifth, it will allow for the regulation of child labour on a uniform basis as member states will have to apply the same laws. Uniform choices on laws and rules will ensure cost saving. Lastly, it will foster legal collaboration, co-operation and respect among the member states on the application of the rule of law. The harmonisation of child labour laws allows for certainty, uniformity and consistency in practices.

## 12 Lessons from OHADA on legal harmonisation

The success of OHADA in the harmonisation of business laws offers several lessons for the three RECs. It is essential to highlight some of the factors that may be useful for the harmonisation of child labour laws in these regions.

<sup>136</sup> Celek (n 15) 90.

<sup>137</sup> Fagbayibo (n 71) 310.



## 12.1 Planning stage

The negotiation and consultation stages were the first step towards the harmonisation of business laws. In order to reach consensus and agreement, this stage must be conducted comprehensively and in good faith. During the consultation, while a single set of laws was formed, the relevant national laws of member states were considered and accommodated in the proposed legal framework. Simple and modern laws were adopted, as it made the application and interpretation of these laws easier and less complicated. The regional integration of child labour laws through legal harmonisation is achievable provided that proper planning is undertaken by the member states, which encourages consultation with the member states. The initial buy-in of member states is fundamental to setting the foundation. Without this commitment it is unlikely that harmonisation will be successful.

## 12.2 Institutional structure

OHADA and the three sub-regions were established to achieve different goals. OHADA was established as a regional organisation and, therefore, is a regional harmonisation project for business laws. This establishes the need for a strong regional institution to harmonise child labour laws. The three RECs are regional institutions, but were formed individually to ensure economic regional integration and development by cooperation and coordination. The legal harmonisation of child labour laws, therefore, is not an aim of these institutions.<sup>138</sup> The methods of achieving the goals of the three RECs are different. Where OHADA uses harmonisation of business laws to achieve economic development and regional integration, the RECs use various types of cooperation for development.<sup>139</sup> There are differences in the goals and objectives of OHADA and the three RECs. This is important as the RECs are institutions designed for regional integration. Thus, the process and method for achieving harmonisation and economic integration are different, as discussed above.

The role of the CCJA has been an integral part of the enforcement of the Uniform Acts as a court of final instance. This has assisted harmonisation.

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<sup>138</sup> Art 53 OHADA Treaty; Shumba (n 101) 77.

<sup>139</sup> Fagbayibo (n 71) 316.

It is agreed and accepted that there are several courts in the three RECs and that another court is not needed due to budgetary constraints, and duplication of roles and responsibilities and capacity. However, these already established courts focus on economic regional integration and may be unable to address the human rights and other related issues of child labour. Similar to OHADA's experience, national courts should be courts of first instance on child labour issues, with appeals being referred to the regional court. The regional court should function as a final court of appeal and allow direct access. Direct access should be granted in matters that fall within the exclusive jurisdiction of the regional court or when substantial injustice will arise.

### **12.3 Uniform Acts**

The Uniform Acts are binding on all member states once they have been adopted, thereby making the Uniform Acts instrumental in the success of harmonisation in OHADA. The Uniform Acts are regularly evaluated and reviewed, which ensures that the laws remain relevant and are amended according to the development of the issue and the circumstances of member states. Harmonisation led to the creation of certainty and the removal of unpredictability. A further lesson that can be drawn from the Uniform Acts is the requirement that these must be published in a language common to the member states to ensure understanding and the correct interpretation and application of the applicable laws.

## **13 Conclusion**

In this article the legal harmonisation of child labour laws through regional regulation was examined. While it may be argued that member states have implemented laws, the lack of direction from the international community is a concern. Harmonisation allows for the regulation of child labour laws to be specific to the needs of Africa. It will allow for the enactment of laws that consider and accommodate the characteristics and factors of an African society. It is not suggested that the international framework, goals and principles be ignored; rather, these are argued to be important and must be considered in shaping Africa's regulation. Harmonisation is a more practical solution to the regional regulation of child labour within the three RECs as it will allow the member states in these sub-regions to engage in discussions regarding their existing laws on child labour. It will allow the member states to identify and select the norms and standards that are to be adhered to. This will also ensure compliance

with the international legal norms and standards. Harmonisation will allow for consensus and agreement to be reached. Member states will, therefore, not lose their independence or sovereignty. Still, they will be able to regulate child labour, which is a serious continental problem affecting the rights, welfare and protection of children.