

## IMPACT OF THE 2000 CHILD LABOR TREATY ON UNITED STATES CHILD LABORERS

Celeste Corlett\*

*We write these words that our hearts would have us shout:  
We must not let this be.  
We cannot waste our precious children,  
Not another one,  
Not another day.  
It is long past time for us to act on their behalf.  
-Nelson Mandela and Graça Machel, UNICEF<sup>1</sup>*

### I. INTRODUCTION

Approximately 800,000 to 1.5 million children<sup>2</sup> from the age of five to fifteen work in harsh conditions in the United States' agriculture industry. Agriculture is one of the most dangerous occupations for workers in the United States.<sup>3</sup> These children often work twelve-hour days, perform difficult physical labor, and risk heat illness, exposure to pesticides, serious injuries, and permanent disabilities.<sup>4</sup> Their life expectancy is only forty-nine years of age.<sup>5</sup> Forty-five percent of these children drop out of school and are sentenced to a lifetime of hard labor in the fields.<sup>6</sup>

Current law permits sweatshop working conditions by exempting

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1. Letter from Nelson Mandela and Graça Machel to UNICEF, At the Service of the Children of the World, at [www.unicef.org/initiative/appeal.htm](http://www.unicef.org/initiative/appeal.htm) (last visited Apr. 19, 2002).

2. Guadalupe T. Luna, *An Infinite Distance?: Agricultural Exceptionalism and Agricultural Labor*, 1 U. PA. J. LAB. & EMP. L. 487, 498 (1998).

3. See *Bills to Ban Oppressive Child Labor in Agriculture and for Other Purposes: Hearing on H.R. 10499 and H.R. 1597 Before the Subcommittee on Agricultural Labor of the House Committee on Education and Labor*, 92nd Cong. 73 (1971) (statement of Robert McMillen, representing AFL-CIO).

4. See generally Lee Tucker, et al., *Fingers to the Bone: United States Failure to Protect Child Farmworkers (2000)* at <http://www.hrw.org/reports/2000/fmwrkt/> (last visited Apr. 19, 2002).

5. Jeanne M. Glader, *A Harvest of Shame: The Imposition of Independent Contractor Status on Migrant Farmworkers and Its Ramifications for Migrant Children*, 42 HASTINGS L.J. 1455, 1460 (1991).

6. See Tucker, *supra* note 4 at 20, III.

children in agriculture from the minimum-age and maximum-hour requirements Congress has enacted to protect children in general.<sup>7</sup> Most children in the agriculture industry are not performing chores on the family farm. They work in an industry dominated by business conglomerates that hire them as cheap laborers.<sup>8</sup> Equally tragic is the grossly inadequate enforcement of the few laws that exist in the United States to protect children working in agriculture.<sup>9</sup>

Former President William Clinton raised hopes that the United States would change the policies that allow children to work in the hazardous conditions of the agriculture industry. Speaking to the International Labour Organisation (ILO), a United Nations agency, Clinton declared:

The time has come to build on the growing world consensus to ban the most abusive forms of child labor. . . . We will not tolerate young children risking their health and breaking their bodies in hazardous and dangerous working conditions for hours unconscionably long--regardless of country, regardless of circumstance. These are not some archaic practices out of a Charles Dickens novel. These are things that happen in too many places today.<sup>10</sup>

The occasion for President Clinton's speech was the signing by ILO member nations of an international child labor treaty on June 16, 1999 in Geneva.<sup>11</sup> The members voted unanimously, for the first time in the ILO's 80-year history, to pass the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (the "Child Labor Treaty" or the "Treaty").<sup>12</sup> The Child Labor Treaty requires ratifying nations to take "immediate and effective measures"<sup>13</sup> to eliminate and prohibit children from performing "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>14</sup>

The United States Senate commended the ILO member states for negotiating this "historic convention."<sup>15</sup> In a unanimous vote, the Senate gave its

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7. See 29 U.S.C. § 213(a)(6) & (b)(12).

8. CONG. REC. E2303 (Nov. 8, 1999) (statement by Rep. Lantos).

9. *Id.*

10. 145 CONG. REC. S7210 (daily ed. June 17, 1999) (statement of Sen. Harkin).

11. *Id.*

12. *Id.*

13. Child Labor Treaty, art. 1. The text of the Convention No. 182, Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor [hereinafter Child Labor Treaty] is reprinted in 38 I.L.M. 1207 (1999).

14. *Id.* art. 3(d).

15. Michael J. Dennis, *The ILO Convention on the Worst Forms of Child Labor*, 93 AM. J. INT'L. L. 943, 948-49 (1999).

advice and consent to ratify the Child Labor Treaty,<sup>16</sup> and President Clinton signed the treaty for ratification.<sup>17</sup> Support for the Child Labor Treaty was so strong that the United States' ratification of the accord was accomplished in a record time of three months.<sup>18</sup> The Child Labor Treaty entered into force on November 19, 2000.<sup>19</sup> However, despite the overwhelming support, the Child Labor Treaty has not led to advances in United States child labor law. Children continue to work in deplorable conditions in one of the most dangerous industries in the country and continue to suffer severe injuries and death as a result.

To understand why the United States strives to eliminate child labor in other countries but fails to protect its own children from equally hazardous work, one must understand how child labor law has developed in this country. After reviewing the history of child labor law, this Note examines the Child Labor Treaty, which proposes to prohibit children from working under hazardous conditions. The Note also analyzes United States policy regarding the ratification of human rights treaties and maintains that such policy effectively nullifies the Child Labor Treaty. Finally, this Note discusses the current status of child laborers in the United States and the opportunity to effectuate the Child Labor Treaty and change United States child labor law.

## II. CHILD LABOR LAW IN THE UNITED STATES

### A. Child Labor Regulations Prior to 1938

Prior to the American Civil War, child labor was virtually unregulated.<sup>20</sup> Children, seven to twelve years of age, comprised the entire workforce in the first factory of the father of American manufacturing, Samuel Slater.<sup>21</sup> With no restrictions on child labor, the working conditions of children in the United States were deplorable.<sup>22</sup> An 1842 study on the working conditions of children in mines reported the state of the children: "Chained, belted, harnessed liked dogs in a go-cart, black, saturated with wet, and more than half naked—crawling upon their hands and feet, and dragging their heavy loads behind them—[the children]

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16. *Id.*

17. *See President Clinton Ratifies ILO Convention Against Worst Forms of Child Labor: Promoting Core Labor Standards Around the World*, U.S. NEWSWIRE, Dec. 2, 1999, at 1999 WL 22284064.

18. *See* Gene Sperling, Transcript of Press Briefing December 2, 1999 on Signing of ILO Convention (Dec. 2, 1999).

19. *See U.S. Ratifies ILO Convention Against Worst Forms of Child Labor*, U.S. NEWSWIRE, Dec. 2, 1999 at 1999 WL 2284063.

20. STEPHEN B. WOOD, CONSTITUTIONAL POLITICS IN THE PROGRESSIVE ERA 5 (1968).

21. WALTER I. TRATTNER, CRUSADE FOR THE CHILDREN 26 (1970).

22. *See id.* at 21-31.

present an appearance indescribably disgusting and unnatural.”<sup>23</sup>

In the early 1900s an anti-child labor movement emerged as many Americans became concerned about the effects of child labor.<sup>24</sup> Rather than keeping “idle hands” busy, instilling skills, and creating productive adults, child labor was producing sick and injured persons dependent on society.<sup>25</sup> As a result, states began passing laws restricting the age, hours and type of work children could perform, and by 1913, several states had laws limiting child labor.<sup>26</sup> Legislation regulating child labor met opposition, mainly from Southern states arguing that the “laws would harm poor families and local industry.”<sup>27</sup> Without federal legislation regulating child labor, those states without child labor laws had the economic advantage of cheap labor as compared to those states with child labor laws.

In 1916, Congress used the Commerce Clause of the United States Constitution to prohibit the interstate transport of articles produced by companies violating a new federal child labor statute.<sup>28</sup> The statute proscribed the employment of children under the age of fourteen, and it prohibited children from working more than forty-eight hours in one week.<sup>29</sup> However, the United States Supreme Court ruled that the legislation was unconstitutional.<sup>30</sup> The Court held that the federal statute transcended Congress’ power under the Commerce Clause and attempted to exert federal power over a local matter.<sup>31</sup> Congress did not succeed in passing federal legislation regulating child labor until the New Deal Era in 1938.<sup>32</sup>

## **B. Regulation of Child Labor During the New Deal Era**

After the Great Depression, the prevailing view in the United States was that government intervention in the economy and industrial reform was needed to improve the economy and the life of the laborer.<sup>33</sup> The New Deal programs included legislation providing child labor standards, fair wages and maximum

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23. *Id.* at 23.

24. *See id.* at 45-55.

25. *See id.* at 49.

26. Andrew J. Samet, *Child Labor and the New Millennium*, 21 WHITTIER L. REV. 69, 74 (1999).

27. *Id.*

28. *See* TRATTNER, *supra* note 21, at 30.

29. *Id.*

30. *See* WOOD, *supra* note 20, at 154.

31. *Id.*

32. *See* Michael A. Pignatella, *The Recurring Nightmare of Child Labor Abuse—Causes and Solutions for the 90s*, 15 B.C. THIRD WORLD L.J. 171, 175 (1995).

33. Patrick M. Anderson, *The Agricultural Employee Exemption from the Fair Labor Standards Act of 1938*, 12 HAMLINE L. REV. 649, 649 (1989).

work hours. Introducing his New Deal legislation, President Franklin Roosevelt proclaimed:

Our problem is to work out in practice those labor standards which will permit the maximum but prudent employment of our human resources to bring within the reach of the average man and woman a maximum of goods and of services conducive to the fulfillment of the promise of American life. Legislation can, I hope, be passed at this session of Congress further to help those who toil in factory and on farm. We have promised it.<sup>34</sup>

However, an environment of discrimination and racism led to many restrictions on New Deal legislation, including child labor laws. Southerners felt that the New Deal programs would destroy the underpinnings of the entire southern economy.<sup>35</sup> The climate of racism was apparent even before the introduction of the Fair Labor and Standards Act of 1938 (FLSA), which dealt with child labor. In 1935, when Congress was considering the Social Security Act, the Southern position was expressed in the *Jackson Daily News*:

The average Mississippian can't imagine himself chipping in to pay pensions for able-bodied Negroes to sit around in idleness on front galleries, supporting all their kinfolks on pensions, while cotton and corn crops are crying for workers to get them out of the grass.<sup>36</sup>

Responding to Southern concerns, Congress excluded agricultural employees from the benefits of the Social Security Act.<sup>37</sup>

Furthermore, payments of relief funds to black families were considerably lower than payments to white families, even though black families in the South were most in need of the funds.<sup>38</sup> Relief payments to black families were kept low to insure that such payments did not exceed the prevailing low agricultural wages.<sup>39</sup> Senators Byrd of Virginia, Hull of Tennessee, and Harrison of Mississippi believed that the spending programs "upset the class distinctions . . . that were [fundamental] of their world."<sup>40</sup>

This blatant racial discrimination was an accepted part of the status quo

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34. *Id.* at 650 (quoting S. REP. NO. 884, 75th Cong., 1st Sess. 1-3 (1937)).

35. See Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335, 1342-1343 (1987).

36. *Id.* at 1364.

37. *Id.* at 1365.

38. *Id.* at 1366-67.

39. *Id.* at 1390 n.240 (citing R. VANCE, THE NEGRO AGRICULTURAL WORKER UNDER THE FEDERAL REHABILITATION ACT 226 (1934)).

40. *Id.* at 1390 n.240.

by the time Congress considered the FLSA in 1938. The FLSA is the federal statute that sets minimum ages for work, maximum numbers of work-hours per day and per week, and the minimum hourly wage. During the debates over the FLSA, Representative Wilcox of Florida expressed his opposition to the statute:

There has always been a difference in the wage scale of white and colored labor. So long as Florida people are permitted to handle the matter, this delicate and perplexing problem can be adjusted. . . . You cannot put the Negro and the white man on the same basis and get away with it. Not only would such a situation result in grave social and racial conflicts but it would also result in throwing the Negro out of employment and in making him a public charge. . . . This bill, like the antilynching bill, is another political goldbrick for the Negro.<sup>41</sup>

Agreeing with his colleague from Florida, Senator “Cotton” Ed Smith from South Carolina added that just like the federal antilynching bills “the main object of [the FLSA] is, by human legislation, to overcome the splendid gifts of God to the South.”<sup>42</sup>

President Roosevelt acquiesced to Congress’ practice of exempting agricultural workers from New Deal legislation. For instance, the Roosevelt Administration’s proposed FLSA exempted agricultural workers from its protections.<sup>43</sup> Notably, the majority of farm workers were either Blacks in the South or Latinos and Asians in the West.<sup>44</sup> Despite Roosevelt’s speech promising to help those who toiled on the farms, he later announced that “there has never been any thought of including field labor in the Wages and Hours Bill.”<sup>45</sup> With virtually no opposition, exemptions for agricultural workers were incorporated into the new FLSA. While the passage of the FLSA was a great victory for most workers, it offered no minimum age, maximum hours, or minimum wage protections for adults and children in agriculture.<sup>46</sup>

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41. *Id.* at 1374-75.

42. *Id.* at 1374 (quoting 81 CONG. REC. 7882 (1937)).

43. *Id.* at 1371-72.

44. *Id.* at 1344-45.

45. Larry Norton & Marc Linder, *Unemployment Compensation and Eligibility: Down and Out in Weslaco, Texas and Washington D.C.: Race-Based Discrimination Against Farm Workers Under Federal Unemployment Insurance*, 29 U. MICH. J.L. REFORM 177, 196 (1996).

46. See Davin C. Curtiss, *The Fair Labor Standards Act and Child Labor in Agriculture*, 20 IOWA J. CORP. L. 303, 307 (1995).

### **C. Current Regulation of Child Labor in Agriculture**

Over the ensuing years, Congress amended the FLSA several times, adding protections for agricultural workers and children. For instance, in 1966, the FLSA was amended to prevent children working on farms from engaging in hazardous occupations, as determined by the Secretary of Labor.<sup>47</sup> The most substantial changes to the FLSA affecting child agricultural workers came in 1974. These amendments prohibited children under the age of twelve from working on any farm.<sup>48</sup> Moreover, children between ages twelve and sixteen could work only on the same farms as their parents.<sup>49</sup>

#### **1. Hazardous Work**

Sixty years after its enactment, the FLSA still carves out exemptions that essentially allow most children to work in agriculture under hazardous conditions, despite amendments to the statute. Section 212 of the FLSA expressly prohibits oppressive child labor, stating, “No employer shall employ any oppressive child labor in commerce or in the production of goods for commerce . . . .”<sup>50</sup> Yet, Section 213(c) exempts the agricultural business, the third most dangerous occupation in the United States,<sup>51</sup> from regulations prohibiting oppressive child labor in certain situations:

##### (c) Child labor requirements

(1) Except as provided in paragraph (2) or (4), the provisions of section 212 [prohibition of oppressive child labor] of this title relating to child labor shall not apply to any employee employed in agriculture outside of school hours for the school district where such employee is living while he is so employed, if such employee—

(A) is less than 12 years of age and (i) is employed by his parent, or by a person standing in the place of his parent, on a farm owned or operated by such parent or person or (ii) is employed with the consent of his parent to a person standing in the place of his parent, on a farm, [description of a small business farm] or (ii) his parent or such person is employed on the same farm as such employee, or

(B) is 12 years or 13 years of age and (i) such employment is

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47. See Pignatella, *supra* note 32, at 181.

48. 29 U.S.C. § 213.

49. *Id.*

50. 29 U.S.C. § 212.

51. 29 U.S.C. § 213(c).

with the consent of his parent or person standing in the place of his parent, or (ii) his parent or such person is employed on the same farm as such employee, or

(C) is fourteen years of age or older.

(2) the provisions of section 212 [prohibition of oppressive child labor] of this title relating to child labor shall apply to a child employee below the age of 16 employed in agriculture in an occupation that the Secretary of Labor finds and declares to be particularly hazardous for the employment of children below the age of sixteen, except where such employee is employed by his parent or by a person standing in the place of his parent on a farm owned or operated by such parent or person.<sup>52</sup>

As long as the activity is merely hazardous and not “particularly hazardous,” many groups of children may work in oppressive working conditions under the above exemptions. There is no minimum age requirement to work under hazardous conditions, as long as the child works for his parent on a farm owned or operated by the parent or as long as the child’s parent works on the same farm.<sup>53</sup> The exemption in Section 213(c) of the FLSA allows a child of any age whose parent is a farm worker to work on the same farm as his parent. If a child is twelve or thirteen, then the child need only have the consent of the parent to work on the farm, even if working conditions are hazardous or oppressive. If a child is fourteen, he does not even need parental consent.<sup>54</sup> Most importantly, a child of any age may work under even “particularly hazardous” conditions in the agriculture industry, if the child is employed by his parent or works on a farm operated by his parent.<sup>55</sup> Children are prohibited from working in other hazardous industries, such as mining and manufacturing, regardless who employs them.<sup>56</sup> The government’s recognition of the need to protect children in one hazardous industry but not another is inconsistent at best.

On the face of the law, it appears that by allowing children of any age to work in the fields, even under hazardous conditions, the legislators are simply acknowledging the tradition of a child helping with the chores of a family farm. However, the key to the problem lies in the interpretation of the language working for a “parent on a farm owned *or operated* by [a] parent.”<sup>57</sup> Farm owners often hire farm laborers as “sharecroppers” or independent contractors.<sup>58</sup> The farm owner enters into an agreement with the farm worker indicating that the farm worker will operate an independent farming operation and will pay the farm

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52. 29 U.S.C. § 213(c)(1), (2).

53. See 29 C.F.R. § 570.70(b).

54. 29 U.S.C. § 213(c)(1)(C).

55. 29 U.S.C. § 213(c)(1)(A).

56. See Curtiss, *supra* note 46, at 320-21.

57. See 29 U.S.C. § 213(c)(2) (emphasis added).

58. Glader, *supra* note 5, at 1466.



owner a portion of the crops harvested.<sup>59</sup> In reality, the farm worker, under the guise of an “independent contractor,” is an employee of the farm owner, and the farm owner escapes the FLSA and other labor regulations.<sup>60</sup> As a result, the farm worker, now labeled an “independent contractor,” or “farm operator,” may allow his children, no matter how young, to work under hazardous conditions simply because the parent “operates” the farm.<sup>61</sup>

Due to the exemptions under the FLSA, the case of a young child working under hazardous conditions in the fields does not automatically amount to a violation of the child labor laws. In order for the Department of Labor to intervene, it must determine that the exemptions under the law do not apply.<sup>62</sup> Then, if the farm owner denies any wrongdoing, the case must be resolved in a court, which must determine whether the farm worker’s relationship is one of independent contractor or employee.<sup>63</sup> Each situation must be decided on a case-by-case basis, where each court determines which factors to consider.<sup>64</sup> One court may interpret the FLSA to “effectuate its humanitarian and remedial purposes” and give a narrow interpretation of what constitutes an independent contractor.<sup>65</sup> Yet, another court may provide a broad interpretation and find the worker to be an independent contractor, even though the worker’s only investment in the farm may be a pair of gloves and a pail, as compared to the landowner’s tractors, irrigation equipment, and transport trucks.<sup>66</sup>

The case of *Department of Labor v. Elderkin*<sup>67</sup> illustrates the irrationality of the law. In 1995, at 9:30 p.m., Peter Gage, a ten-year-old, was working on a farm around a dangerous machine—a feeder wagon—when he had an accident.<sup>68</sup> Peter describes the incident: “It caught the strings off my snow suit, pulled me in, kept banging my head against the metal, ripped my right arm off and threw me out the other side.”<sup>69</sup> As a result, the Department of Labor investigated the farm owner. It found that not only Peter, but eight other children, ages seven, ten, and eleven, had worked on the farm, driving a fork lift and tractor, working in a pen

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59. *Id.*

60. *Id.* at 1464-65 & 1467.

61. *Id.* at 1466-67.

62. *See id.* at 1489.

63. *Id.* at 1477.

64. *See generally*, *Antenor v. D&S Farms*, 88 F.3d 925 (11th Cir. 1996); *Castillo v. Case Farms of Ohio*, 96 F. Supp. 2d 578 (W.D. Tx 1999); *Donovan v. Brandel*, 736 F.2d 1114 (6th Cir. 1984); *Mitchell v. Hertzke*, 234 F.2d 183 (10th Cir. 1956); *Secretary of Labor v. Lauritzen*, 835 F.2d 1529, 1534-35 (7th Cir. Ct. App. 1987); *Lopez v. May*, 111 F.3d 633, 639 (9th Cir. 1997); *Usery v. Brandel*, 87 F.R.D. 670, 678 (W.D. Mich. So. 1980).

65. *Antenor*, 88 F.3d at 933.

66. *See Donovan* 736 F.2d at 1118-19.

67. *See In the Matter of: Admin'r, Wage and Hour Div., United States Dep't of Labor v. Elderkin*, 2000 WL 960261, 2 (DOL Adm. Rev. Bd 2000).

68. *See id.* at 3.

69. *Id.* at 6.

with a bull, and operating a chain saw.<sup>70</sup> The farm owner claimed that he had no employees and that he used only independent contractors.<sup>71</sup> The farm owner asserted that Peter was an employee of his father, who was an independent contractor, and thus the farm owner had not violated the child labor laws.<sup>72</sup> The court found that although some factors weighed in favor of the ten-year-old being an independent contractor, the child was actually an employee of the farm owner.<sup>73</sup> The court penalized the farm owner for employing Peter and the other children in dangerous occupations, for employing another child in hazardous work after Peter's accident, and for refusing to provide records requested by the investigators.<sup>74</sup> Had it not been for the accident, Peter and the eight other children may never have been discovered on the farm.<sup>75</sup> However, even after the discovery of children working in hazardous conditions, it took five years for a court to determine that the work was illegal. The reason it took so long is because the labor laws provide for exemptions that allow children to work under such conditions.

Judicial protection of children working in the agriculture industry has proven inconsistent at best. Upon review of "independent contractor" cases with nearly identical facts, one author found inconsistent decisions by the courts.<sup>76</sup> Consequently, both farm owners and farm workers are forced to litigate since there is no clear guidance from the courts as to what constitutes an "independent contractor." Obviously, this places the farm worker at a disadvantage. With low wages and minimal access to legal services, farm workers rarely will be able to seek help through the court system. Even if they could utilize litigation to remedy the harm done to their children, their jobs would be in jeopardy. Having low skills, farm workers are dependent on a system of crew leaders, who have the ability to blacklist complaining workers.<sup>77</sup> If the workers confront their employers or seek assistance from outside agencies, they are often fired.<sup>78</sup>

Moreover, issues of racial stereotyping appear to influence court decisions. Ethnic minorities represent eighty-five percent of farm workers nationally, and in Arizona and California, ninety-nine percent of farm workers are Latino.<sup>79</sup> The opinions of some judges appear to be influenced by factors other than child labor laws. For example, one Department of Labor Administrative Law Judge said in 1989: "It's customary for migrant children to be in the fields with their parents. They probably can't speak English anyway, and would be bored in

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70. *Id.* at 2, 3.

71. *Id.* at 2.

72. *Id.*

73. *Id.* at 7.

74. *Id.* at 11, 12.

75. *Id.*

76. Glader, *supra* note 5, at 1479-80.

77. *Id.* at 1490 n.128.

78. *See* Tucker, *supra* note 4 at 3, III.

79. *Id.*

school.”<sup>80</sup> In a Michigan court, a judge found that the primary purpose of farm workers in bringing their children to the fields was “to develop basic skills and family unity.”<sup>81</sup> Such sentiments expressed by judges, who are entrusted with the enforcement of child labor laws, assume that parents prefer their children to work in the fields, earn low wages, and forego educational opportunities. However, it is the extreme poverty of the farm workers that leave parents little choice but to have their children work with them in the fields.<sup>82</sup>

## 2. Minimum Wages, Maximum Hours

Besides allowing oppressive child labor, Section 213 of the FLSA exempts agricultural child laborers from the minimum-wage and maximum-hour requirements. The statute provides in relevant part:

### (a) Minimum wage and maximum hour requirements

The provisions of sections 206 [minimum wage] . . . and section 207 [maximum hours and overtime] of this title shall not apply with respect to . . . (6) any employee employed in agriculture (A) if such employee is employed by an employer [describes small business employer], (B) if such employee is the parent, spouse, child, or other member of his employer’s immediate family, (C) if such employee (i) is employed as a hand harvest laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) commutes daily from his permanent residence to the farm on which he is so employed, and (iii) has been employed in agriculture less than thirteen weeks during the preceding calendar year, (D) if such employee . . . (i) is sixteen years of age or under and is employed as a hand harvest laborer . . . (ii) is employed on the same farm as his parent or person standing in the place of his parent, and (iii) is paid at the same piece rate as employees over age sixteen are paid on the same farm, or (E)

. . .

### (b) Maximum hour requirement

The provisions of section 207 [maximum hours and overtime] of this title shall not apply with respect to . . .

(12) any employee employed in agriculture . . .<sup>83</sup>

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80. Glader, *supra* note 5, at 1481.

81. *Donovan*, 736 F.2d at 1117.

82. *See Tucker*, *supra* note 4, at 20.

83. 29 U.S.C. § 213(a)&(b).

These exemptions allow a child to earn less than minimum wage if the child is employed by his parent. The problems discussed with respect to the hazardous-work exemptions also apply to the minimum-wage and maximum-hour exemptions in that a court has to determine on a case-by-case basis whether an “employee . . . is the child . . . of the employer’s immediate family.” However, the minimum-wage exemptions go even further than the oppressive child labor exemption. The only conditions a farm owner must meet in order to pay piece-rate wages are that the work is normally paid on a piece-wage basis, the worker is permanent (not migrant), and the work is limited to thirteen weeks.<sup>84</sup> These broad conditions allow most farm owners to pay piece-rate wages. The majority of farm workers are not migrant but local workers, so they meet at least one condition.<sup>85</sup> Additionally, although the rate of pay is limited to thirteen weeks at each farm, it is not limited to longer time periods at a variety of farms.<sup>86</sup> According to a 1998 study, agricultural workers aged fourteen to seventeen earn an average of four dollars an hour.<sup>87</sup> With a piece-rate of fifty cents per bushel of chilies, younger children make significantly less than the minimum wage, considering their small size.<sup>88</sup>

The maximum hours exemption for agricultural workers contains no conditions. There are no limits to the number of hours a child may work in a day or week, as long as it is not during school hours. Moreover, regardless of the number of hours a child works, employers are not required to pay overtime.<sup>89</sup> During peak season, farm owners require long hours to harvest the crops in order to avoid crop damage. Human Rights Watch reports sixteen-year-old children working fourteen-hour days, six days a week, from April to November, while harvesting lettuce in Yuma, Arizona.<sup>90</sup> The children are not paid overtime for their eighty-four-hour work weeks, which are legal under the FLSA’s exemptions.

In sum, after sixty years of labor law legislation, children working in the agriculture industry are virtually unprotected from long hours, low wages, and hazardous working conditions. Thus, it was with great hope that child advocates in the United States looked to the Child Labor Treaty for protections afforded to children throughout the world.

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84. See 29 U.S.C. § 213(a)(6)(C)(i), (ii), (iii).

85. See *To Authorize a Limited Waiver of the Child Labor Provisions of the FLSA of 1938 with Respect to Certain Agricultural Hand Harvest Laborers: Hearing on H.R. 632 Before the Subcommittee on Agricultural Labor of the House Committee on Education and Labor*, 94th Cong. 37 (1975) (Statement of Miriam Guido, Migrant Legal Action Program).

86. See 29 U.S.C. § 213(a)(6)(C)(iii).

87. U.S. General Accounting Office, “Child Labor in Agriculture: Characteristics and Legality of Work,” Washington, D.C.: U.S. General Accounting Office, 1998; GAO/HEHS-98-112R, at 7.

88. See Tucker, *supra* note 4, at 17, 18, III.

89. See 29 U.S.C. § 213(a).

90. See Tucker, *supra* note 4, at 19, III.

### III. CONVENTION CONCERNING THE PROHIBITION AND IMMEDIATE ACTION FOR THE ELIMINATION OF THE WORST FORMS OF CHILD LABOUR (THE “CHILD LABOR TREATY”)

#### **A. The International Labour Organisation’s Committee on Child Labour**

The ILO is a United Nations affiliated agency founded in 1919.<sup>91</sup> Its purpose is to improve labor standards and working conditions throughout the world.<sup>92</sup> The ILO fought for workers from “the shipyards of Poland to the diamond mines of South Africa.”<sup>93</sup> It is unique among international organizations because its membership consists of governments, businesses, and labor leaders.

Over the past two years, the ILO Committee on Child Labor created, negotiated and voted on each section of the Child Labor Treaty. The Committee was composed of 217 members: ninety-four government members, fifty employer members, and seventy-three worker members.<sup>94</sup> These members represented governments, business organizations, and worker rights groups of the participating countries. Each group was allocated a number of votes for each member resulting in fifty-four percent of the votes allotted to the government members, twenty-three percent to the employer members, and twenty-three percent to the worker members.<sup>95</sup> The goal of the Child Labor Treaty is to immediately implement action to end exploitive child labor.<sup>96</sup> The members of the ILO adopted the Child Labor Treaty in a unanimous decision.<sup>97</sup>

#### **B. Child Labor Prohibited by the Child Labor Treaty**

The goal of the Child Labor Treaty is to eliminate the worst types of child labor throughout the world. Under the Child Labor Treaty, ratifying states

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91. See Anthony G. Freeman, *Child Labor and Exploitation*, 14 ST. JOHN’S J. LEGAL COMMENT 383, 385 (2000).

92. See *id.*

93. 145 CONG. REC. S7209 (daily ed. June 17, 1999) (recorded speech given by Pres. Clinton to the ILO on June 16, 1999).

94. See *Report of the Committee on Child Labour*, International Labour Conference, 87th Sess., para. 1 (1999) available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc87/com-chil.htm> (last updated Jan. 26, 2000) [hereinafter Committee Report].

95. See *id.*

96. See Child Labor Treaty, *supra* note 13, at preamble.

97. See *Child Labor Treaty: Hearing on Child Labor Convention Before the Senate Foreign Relations Committee*, 106th Cong. (1999) (Statement of Thomas Niles, President of the U.S. Council for International Business) [hereinafter Statement of Thomas Niles].

must apply the Treaty's provisions to all children under the age of eighteen,<sup>98</sup> act immediately to prohibit and eliminate the four worst forms of child labor,<sup>99</sup> establish monitoring mechanisms,<sup>100</sup> adopt action programs,<sup>101</sup> take all necessary steps to ensure enforcement of the provisions,<sup>102</sup> and take measures to prevent, remove, rehabilitate and socially reintegrate child workers.<sup>103</sup>

The Child Labor Treaty categorizes the worst kinds of child labor for states in order to concentrate elimination efforts. The worst kinds of child labor are divided into four categories. The first category is "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 labour, including forced or compulsory recruitment of children for use in armed conflict."<sup>104</sup> Many government representatives and worker organizations urged the elimination of all recruitment of children in armed conflict.<sup>105</sup> However, the United States argued that voluntary military enlistment of children aged sixteen and seventeen was not the basis of concern of the Child Labor Treaty's hazardous-work provisions.<sup>106</sup> With respect to military labor, the Child Labor Treaty requires the elimination of forced, not voluntary, military recruitment.<sup>107</sup> However, some governments expressed their commitment to continue working for a ban on *all* military recruitment of children through other United Nations treaties.<sup>108</sup>

The second category of the worst forms of child labor is "the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances."<sup>109</sup> Countries such as Denmark, Finland, and Sweden preferred the word "exploitation" of a child for prostitution instead of the word "use."<sup>110</sup> However, the relevant provision of the Child Labor Treaty maintains the word "use" of a child for prostitution, which is broader than the word "exploitation."<sup>111</sup>

The third category of the worst forms of child labor that the ratifying states must eliminate is "the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the

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98. See Child Labor Treaty, *supra* note 13, art. 2.

99. *Id.* art. 1.

100. *Id.* art. 5.

101. *Id.* art. 6.

102. *Id.* art. 7(1).

103. *Id.* art. 7(2).

104. *Id.* art. 3(a).

105. Committee Report, *supra* note 94, para. 154, 157-159, 161-162.

106. *Id.* para. 151, 152.

107. *Id.* para. 163.

108. *Id.* para. 157, 413, 414.

109. Child Labor Treaty, *supra* note 13, art. 3(b).

110. Committee Report, *supra* note 94, para. 164.

111. *Id.* para. 164.

relevant international treaties.”<sup>112</sup> There was no debate reported concerning this provision of the Child Labor Treaty.<sup>113</sup>

United States laws do not conflict with the first three categories of the worst forms of child labor under the Child Labor Treaty—child slavery, child prostitution, and illicit activities performed by a child. However, the fourth category of child labor—hazardous work—could be interpreted to require the United States to eliminate child labor in the agriculture industry, as it exists today. Because of the significant impact the prohibition of hazardous child labor could have on United States laws and policies, this category merits closer inspection.

### **C. Article 3(d) of the Child Labor Treaty—Hazardous Work**

The fourth category of the worst forms of child labor, Article 3(d) of the Child Labor Treaty, prohibits “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>114</sup> This category generated a great deal of discussion during the committee debates.<sup>115</sup> The employer members expressed “concern” as to whether consensus could be reached on the definition of hazardous work.<sup>116</sup> The United States government member joined in this “concern” and advocated a definition of hazardous work that would be achievable and would “not present technical barriers to ratification.”<sup>117</sup> The United States did not want language in the Child Labor Treaty to prohibit employment of children who were less than fifteen years old, as did a previous treaty—the Minimum Age Convention.<sup>118</sup> The employer members of the Committee did not want Article 3(d) to include children who “worked for their parents on bona fide family farms or holdings.”<sup>119</sup> However, the Vice-Chairperson representing the workers insisted that Article 3(d) apply to children employed on farms that misuse the title “family farm” and, in effect, employ children against the standards of good working conditions.<sup>120</sup> The worker representative emphasized that farms that exploit non-family members and misuse the title “family farm” violate Article 3(d).<sup>121</sup>

Accompanying the Child Labor Treaty is the Worst Forms of Child

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112. Child Labor Treaty, *supra* note 13, art. 3(c).

113. Committee Report, *supra* note 94, para. 167.

114. Child Labor Treaty, *supra* note 13.

115. Committee Report, *supra* note 94, paras. 10, 40, 41, 54, 56, 152, 171-93, 305, Recommendation §II(3), (4).

116. *See* Committee Report, *supra* note 94, para. 54, 55.

117. *Id.* para. 41.

118. Convention Concerning Minimum Age for Admission to Employment, June, 6, 1976, available at <http://ilolex.ilo.ch:1567/scripts/convde.pl?C138>.

119. *See* Committee Report, *supra* note 94, para. 172.

120. *See id.* para. 173.

121. *See id.*

Labour Recommendation (the “Recommendation”).<sup>122</sup> The Recommendation supplements the Child Labor Treaty by providing guidelines for programs of action, a more detailed definition of hazardous work, and an implementation plan for the Treaty.<sup>123</sup> The Recommendation defines hazardous work as work at “dangerous heights or in confined spaces,”<sup>124</sup> “work with dangerous machinery, equipment and tools, or which involves the manual handling or transport of heavy loads,”<sup>125</sup> work that exposes children to hazardous substances,<sup>126</sup> and “work under particularly difficult conditions such as long hours or during the night . . . .”<sup>127</sup>

Given the detailed record regarding what constitutes hazardous work under the Child Labor Treaty, when the United States ratified the Treaty, it agreed to eliminate hazardous child labor domestically. The Recommendation’s additional clarification of what amounts to hazardous work describes the exact conditions under which child laborers work in the agriculture industry in the United States. American children working in agriculture are exposed to pesticides, which are hazardous substances. Children work in extreme weather conditions, for long hours and during the night. They utilize dangerous tools, such as feeder wagons, forklifts, and tractors. All of these conditions, and more, are prohibited child labor under Article 3(d) of the Child Labor Treaty and under the Recommendation. The members of the Committee representing workers made clear that hazardous work includes work on farms, except those farms where the children are relatives of the farm *owners*. Therefore, when the United States signed and ratified the Child Labor Treaty, it agreed to eliminate agricultural child labor as it currently exists under United States law.

Despite appearances, the United States did not implement the protective working conditions for children envisioned by the Child Labor Treaty. Because Article 4(1) of the Child Labor Treaty permits each state to define what constitutes hazardous work,<sup>128</sup> and because, even upon ratification of the Treaty, the United States will not change its domestic laws, the United States has ensured that its current labor laws will not protect children from performing hazardous work.

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122. See Committee Report, *supra* note 94, Proposed Recommendation.

123. See *id.* §II (3), (4).

124. *Id.* Proposed Recommendation at §II(3)(b).

125. *Id.* §II(3)(c).

126. *Id.* §II(3)(d).

127. See *id.* §II(3)(e).

128. See Child Labor Treaty, *supra* note 13, art. 4(1).



#### IV. UNITED STATES RATIFICATION OF HUMAN RIGHTS TREATIES

##### A. United States Human Rights Treaty Ratification Policy Prior to World War II

Prior to the Second World War, United States policy of ratification of human rights treaties was that such treaties preempted state legislation.<sup>129</sup> The United States joined the ILO in 1934 when President Franklin Roosevelt's administration determined that national and international labor standards were a solution to economic decline and that the ILO was the path toward establishing international labor standards.<sup>130</sup> Initially, Roosevelt and his supporters sought national labor standards through the interstate compact process.<sup>131</sup> However, when states failed to agree to interstate compacts regulating labor, they turned to international treaties for solutions.<sup>132</sup> Joseph Chamberlain of Columbia University had suggested that the United States enter treaties to set national labor standards:

If it is within the scope of the treaty power for the United States to enter into a Labor Convention such a convention will override the laws of any state to the contrary. Treaties have frequently had the effect of over-riding state legislation in fields which without the treaty Congress could not have entered.<sup>133</sup>

Initially, American business viewed the ILO as a means to create world labor standards that were equivalent to the United States' standards. American businesses believed that United States labor standards were so superior to other countries, that any international standard would be lower than the American norm.<sup>134</sup> The business community believed that an international treaty requiring other countries to raise their standards to those of the United States would level out the competition.<sup>135</sup> With comparative labor standards and wages, the United States could fairly compete in the market. Moreover, with other countries raising their labor standards, those countries would experience higher standards of living

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129. Edward C. Lorenz, *The Search for Constitutional Protection of Labor Standards, 1924-1941: From Interstate Compacts to International Treaties*, 23 SEATTLE U. L. REV. 569, 587 (2000).

130. *See id.* at 569, 591-92.

131. *See id.* at 582-86. The interstate compact process was an attempt to create uniform labor laws among the states by way of agreements establishing minimum standards for labor laws. *See generally id.* at 582-87.

132. *See id.* at 587.

133. J.P. Chamberlain, *The United States and the International Labor Organization*, 17 AM. LAB. LEGIS. REV. 171, 175 (1927) (citations omitted).

134. *See Lorenz, supra* note 129, at 588.

135. *See id.*

and provide more markets for the American exporter.<sup>136</sup> Thus, with the support of the business community, the United States Department of Labor and other federal agencies began working toward the regulation of labor through international treaties.

## **B. United States Human Rights Treaty Ratification Policy After World War II**

After World War II, American business attitudes, and thus United States policy, toward the ILO changed dramatically. Businesses viewed the ILO as a threat to free enterprise.<sup>137</sup> Between 1948 and 1951, the ILO passed conventions giving workers the right to freely associate and organize, and it called for equal pay for equal work.<sup>138</sup> In 1953, in response to the business community's fear of these and other ILO conventions, Senator John Bricker sought to amend the United States Constitution in order to restrict international agreements that had the potential to infringe on the power of the states.<sup>139</sup> Bricker argued that such treaties could lead to the dismantling of state segregation laws.<sup>140</sup> Although President Dwight Eisenhower's administration defeated the constitutional amendment, it maintained:

Treaties should be designed to promote United States interests by securing action by foreign governments in a way deemed advantageous to the United States. Treaties are not to be used as a device for the purpose of effecting internal social changes, or to try to circumvent the constitutional procedures established in relation to what are essentially matters of domestic concern.<sup>141</sup>

Accordingly, for the next forty years, ratification of substantive conventions was non-existent.<sup>142</sup>

## **C. United States Human Rights Treaty Ratification Policy Today**

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136. *See id.* at 589.

137. *See id.* at 599.

138. *See id.* at 600.

139. *See* Elizabeth M. Calciano, *United Nations Convention on the Rights of the Child: Will It Help Children in the United States*, 15 HASTINGS INT'L AND COMP. L. REV. 515, 521 (1992).

140. Dorothy Q. Thomas, *Advancing Rights Protection in the United States: An Internationalized Advocacy Strategy*, 9 HARV. HUM. RTS. J. 15, 20 (1996).

141. *Id.* at n.21 (quoting 11 F.A.M. 700, 796 (State Dept. Circular No. 175)).

142. *See* Lorenz, *supra* note 129, at 602.

It was not until the Carter Administration (1976-1980) that the United States ratified any meaningful human rights conventions.<sup>143</sup> However, the United States often attached “reservations” or “understandings” to such treaties, which ensured that a treaty would not lead to the amendment of domestic law upon ratification.<sup>144</sup> A “reservation” is a formal declaration limiting or modifying the effects of a treaty.<sup>145</sup> An “understanding” is a device used to set forth a state’s interpretation of a treaty provision.<sup>146</sup> President Carter supported the policy by which the United States would not change its laws upon ratification of a treaty (the “no-change policy”).<sup>147</sup> Arthur Rovine, a legal advisor of the State Department, defended such policy:

What is so difficult about a human rights treaty is that the Senate cannot bring itself to approve the instrument unless it is completely innocuous . . . . The Senate has very strong feelings about legislating on domestic matters by way of treaty, and it has very strong feelings about what is a proper subject for the treaty power. Yes, we have often made law, new law, by treaty, but we have not created new U.S. law by treaty in the human rights area, and that is where we really confront our basic problem with the U.S. Senate. Many Senators feel, very simply, that human rights law is not a proper subject for the treaty power. They say that there are severe limits to the extent to which a nation can and should shape its domestic social, economic, and political order by making a treaty. Such order can and should be dealt with by local committees, towns, and cities, states and even by the federal government.<sup>148</sup>

In 1991, President George Bush, acting in accordance with the “no-change policy,” presented to the United States Senate for ratification the International Covenant on Civil and Political Rights, with reservations guaranteeing that no changes would result in the domestic laws of the United States.<sup>149</sup> Moreover, prior to the adoption of the Child Labor Treaty, President Bill Clinton submitted the Women’s Convention with similar reservations, which perpetuated the “no-change policy.”<sup>150</sup>

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143. Thomas, *supra* note 140, at 20.

144. See Stanford Fox, *To Ratify the Convention*, 5 GEO. J. ON FIGHTING POVERTY 267, 268 (1998).

145. BURNS WESTON, ET AL., INTERNATIONAL LAW AND WORLD ORDER, 93 (3rd Ed. 1997).

146. *Id.*

147. See Fox, *supra* note 144, at 268.

148. Fox, *supra* note 144, at 269.

149. *Id.*

150. *Id.*

#### **D. United States Ratification Policy as it Applies to the Child Labor Treaty**

The unofficial United States policy of prohibiting treaties from creating new domestic law or changing current law is perfectly illustrated by the government's treatment of the Child Labor Treaty. Article 3(d) of the Child Labor Treaty prohibits child labor in hazardous conditions, and the worker representatives of the ILO Committee on Child Labor made clear that Article 3(d)'s prohibitions include child labor on farms that are not bona fide family farms.<sup>151</sup> Nevertheless, Article 4(1) allows each signatory state to apply its own interpretation of what constitutes hazardous work:

The types of work referred to under Article 3(d) shall be determined by national laws or regulations or by the competent authority, after consultation with the organizations of employers and workers concerned, taking into consideration relevant international standards, in particular Paragraph 3 and 4<sup>152</sup> of the Worst Forms of Child Labour Recommendation, 1999.<sup>153</sup>

Before the Child Labor Treaty was ever presented to employer and worker representatives for interpretation, the United States representatives had assumed they would negotiate a treaty that would not change the laws of the United States. One American negotiator, Michael Dennis, explained that the United States had to establish that Article 3(d) excludes the family farm since United States law exempts work by children "employed by a parent or by a person standing in the place of a parent on a farm owned or operated by such parent or person."<sup>154</sup> This interpretation allows virtually anyone on the farm to employ children. An employer does not have to be the child's relative since such employer can "stand[ ] in the place of a parent."<sup>155</sup> Moreover, if the farm is "operated by [a] parent," such parent is an "independent contractor" and can lawfully employ his own children. Thus, regardless how the worker representatives interpreted the Child Labor Treaty, the United States government

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151. See Committee Report, *supra* note 94, para. 172.

152. Paragraphs 3 and 4 of the Child Labor Treaty explain that this Treaty complements the Convention on Minimum Age and the Recommendation concerning Minimum Age for Admission to Employment. It states that education, removal of children from all such work, provisions of rehabilitation and social integration for the children and addressing the needs of their families are all important for the elimination of child labor. See Child Labor Treaty, *supra* note 13, preamble.

153. *Id.*

154. Dennis, *supra* note 15, at 945, n.17.

155. See 29 U.S.C. § 213(c)(A)(1).

representatives never intended that the Treaty change domestic child labor laws.

In accordance with Article 4(1) of the Child Labor Treaty, the United States selected a group of “organizations of employers and workers” to determine the type of work that is hazardous for American children. This advisory group, the Tripartite Advisory Panel on International Labor Standards (TAPILS) of President Clinton’s Committee on the ILO, consisted of attorneys for the United States Secretary of Labor, United States Secretary of State, United States Secretary of Commerce, President of the AFL-CIO,<sup>156</sup> and President of the United States Council for International Business.<sup>157</sup> In accordance with the “no-change policy” for human rights treaties, TAPILS advised President Clinton that ratification of the Child Labor Treaty would not require any changes to domestic law.<sup>158</sup> Although American child laborers in the agriculture industry are exposed to hazardous substances, work twelve-hour days, and handle dangerous machinery, which risks serious injury and death and which the Child Labor Treaty and Recommendation expressly prohibit, TAPILS ignored these apparent contradictions.

Based on the advice of TAPILS, President Clinton requested the Senate’s advice and consent to ratify the Child Labor Treaty with the following understanding:<sup>159</sup>

The United States understands that Article 3(d) of Convention 182 does not encompass situations in which children are *employed by a parent or by a person standing in the place of a parent on a farm owned or operated by such parent or person*, nor does it change, or is it intended to lead to a change in the agricultural employment provisions or any other provision of the Fair Labor Standards Act in the United States.<sup>160</sup>

TAPILS recommended that the exact FLSA language be included in the understanding in order to make clear that the negotiating history of the Child Labor Treaty was consistent with United States law.<sup>161</sup>

During the Senate proceedings to ratify the Child Labor Treaty, Thomas Niles, the business representative on TAPILS, testified before the Senate

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156. The AFL-CIO stands for the American Federation of Labor and Congress of Industrial Organizations, which is a large labor union.

157. *See Child Labor Treaty: Hearing on Child Labor Convention Before the Senate Foreign Relations Committee*, 106th Cong. (1999) (Testimony of Alexis M. Herman, Secretary of Labor).

158. *See Dennis, supra* note 15, at n. 30.

159. President William Clinton, Letter of Transmittal from the White House to the Senate (Aug. 6, 1999) Whitehouse Publications (letter on file with author).

160. 145 CONG. REC., S14226 (daily ed. Nov. 5, 1999) (Resolution of the Ratification) (emphasis added).

161. *See* Statement of Thomas Niles, *supra* note 97.

Committee on Foreign Relations regarding the Treaty and promoted the “no-change policy.” Niles reminded the Senate that the United States is reluctant to ratify ILO treaties and said that “in large part, this has been due to concern by the business community that domestic labor and employment law should not be made through the ratification of [ILO] conventions.”<sup>162</sup> Accordingly, the Child Labor Treaty gives governments the power to decide what types of work constitute hazardous work, and the legislative history makes clear that the Treaty does not apply to family farms or undertakings.<sup>163</sup> Further, Niles explained that the business community played a critical role during the negotiation process to ensure that the Child Labor Treaty did not conflict with United States law and practice.<sup>164</sup> Senator Jesse Helms, Chairman of the Senate Foreign Relations Committee, stressed that the negotiators consulted regularly with the Senate Foreign Relations Committee during the negotiations of the Treaty to make certain that the Treaty followed the Fair Labor and Standards Act.<sup>165</sup> Senator Helms assured the Committee that “nothing in this treaty even implies that young people will be prohibited from working on family farms even if they are under 16 years of age.”<sup>166</sup>

Furthermore, Niles noted that if, after the United States ratified the Child Labor Treaty, the ILO’s Committee of Experts (COE) concludes that the United States is in violation of the Treaty, the COE’s conclusions will not be binding on the United States.<sup>167</sup> Only one country has ever taken an ILO case involving the issue of interpretation to the International Court of Justice.<sup>168</sup>

In their testimony, Niles and Senator Helms explained that the ILO Committee on Child Labor negotiated with the United States and other countries the various terms and conditions of the Child Labor Treaty and promised to prohibit hazardous work conditions for children. Yet, during the negotiations, the Senate Foreign Relations Committee and the business negotiators had no intention of prohibiting the employment of American children in the third most hazardous occupation in the United States. Niles and Helms’ testimony implies that the ILO and the COE have weak enforcement powers and that the United States need not be concerned if the ILO finds the country to be in violation of its promise under the Child Labor Treaty to eliminate hazardous child labor.

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162. *Id.*

163. *See id.*

164. *See id.*

165. *See* Child Labor Treaty: Hearing on Child Labor Convention Before the Senate Foreign Relations Committee, 106th Cong. (1999) (Statement of Senator Jesse Helms, Chairman of the Foreign Relations Committee).

166. *Id.*

167. The Committee of Experts is a committee of the ILO comprised of 20 international law experts.

168. *See* Statement of Thomas Niles, *supra* note 97.

### **E. Impact of the Child Labor Treaty, United States Labor Laws and Policies on Child Labor in Agriculture**

Exemptions in United States labor law allow children to work in the agriculture industry under deplorable conditions, which harm their health and education. Child laborers suffer the impacts of the law. For example, in Casa Grande, Arizona, on a day when the heat rose to 110 degrees in the shade, a fourteen-year-old pitched watermelons and chopped cotton for twelve hours a day.<sup>169</sup> The fourteen-year-old described the job of pitching watermelons: “Now that’s some hard work. You throw it down the line, one to the other, standing about five feet apart. . . . You can faint.”<sup>170</sup> In another case, children, ages eight, twelve and sixteen, dragged thirty to forty pound baskets of beans around the fields from five-thirty in the morning until “they [couldn’t] stand no more,” working ten to twelve-hour days.<sup>171</sup> Moreover, children have died from devastating accidents on the fields. A nine-year-old child was killed when he was accidentally run over by a tractor while working in a blueberry field.<sup>172</sup> In Utah, a child, who had been picking fruit and pruning trees, died from a massive brain hemorrhage after being sprayed twice in one week with pesticides.<sup>173</sup>

Human Rights Watch<sup>174</sup> conducted a recent study on child labor conditions in the United States agriculture industry.<sup>175</sup> The study reports that the annual income of a farm-worker family, where both parents work, is \$14,000 per year.<sup>176</sup> In some states, the annual income is even lower, such as in Arizona, where it is only \$6,200 per year.<sup>177</sup> Agricultural work rarely pays more than the minimum wage, and on many occasions the workers are paid *less* than the minimum wage.<sup>178</sup> Furthermore, the agriculture industry often pays workers a piece-rate wage, which frequently results in less than the minimum wage, especially for children.<sup>179</sup> Even if children work twelve-hour days, they do not earn overtime wages because federal law exempts the agriculture industry from

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169. See Tucker, *supra* note 4, at 17, III.

170. See Tucker, *supra* note 4, at 17, III.

171. RONALD B. TAYLOR, SWEATSHOPS IN THE SUN: CHILD LABOR ON THE FARM, 63-66 (1973).

172. 145 CONG. REC. E2303 (daily ed. Nov. 8, 1999) (statement of Rep. Lantos).

173. *Id.*

174. Human Rights Watch was founded in 1978 to assist local groups in Moscow, Warsaw, and Prague, which had been set up to monitor compliance with the human rights provisions of the landmark Helsinki accords. Today they are the largest United States based human rights organization. About HRW, *Who We Are, What We Do* at <http://www.hrw.org/about/about.html> (last visited Mar. 4, 2002).

175. See generally Tucker, *supra* note 4.

176. See Tucker, *supra* note 4, at 2, III, n.11.

177. *Id.*

178. *Id.*

179. *Id.*

paying overtime.<sup>180</sup> Children often work just to help with the necessities of life. Children in agriculture, in contrast to non-agricultural employees, may work an unlimited number of hours each day and week, in dangerous conditions since the FLSA imposes no maximum-work-hour requirement.<sup>181</sup> The Human Rights Watch study reports that thirty-seven percent of child farm workers work full time during the school year and that the dropout rate is forty-five percent.<sup>182</sup> With no limits to the number of hours children may work and due to the extreme poverty among their families, it is no wonder that, as adults, eighty percent of farm workers function at a fifth-grade literacy level or less.<sup>183</sup>

Further, Human Rights Watch has found that children were suffering in one of the most dangerous occupations in the United States.<sup>184</sup> As farm workers, children use knives, work near heavy machinery, climb ladders, and are exposed to pesticides.<sup>185</sup> One hundred thousand children annually endure agriculture-related injuries in the United States.<sup>186</sup> They are allowed to reenter pesticide sprayed fields at the same time as adults.<sup>187</sup> The Environmental Protection Agency studies on “safe reentry” into pesticide sprayed fields are based on a 154-pound adult male, not on a ten-year-old child.<sup>188</sup> Farm workers frequently have no washing facilities, a fact that virtually guarantees that they will ingest the pesticides on the produce they just picked or absorb the chemicals through the skin.<sup>189</sup>

By its own laws, the United States recognizes the need to prohibit oppressive child labor.<sup>190</sup> Also, it seeks to eliminate hazardous child labor in other countries. Recently, Congress appropriated 167 million dollars toward eliminating child labor in foreign countries.<sup>191</sup> Previous funds already helped 9,000 children in Bangladesh leave sweatshop work and obtain education, and 7,000 children in Pakistan are going to school instead of stitching soccer balls.<sup>192</sup> Congress committed millions of dollars toward the elimination of labor in foreign countries because “[t]hat is what the American people want. They have said time and again they want child labor reduced, they do not want to buy articles of clothing, sporting goods, and other commodities that are made with child

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180. *Id.*

181. *See id.* at 8, III.

182. *See* Tucker, *supra* note 4, at 20, III.

183. *See id.*

184. *Id.* at 12, III.

185. *Id.*

186. *Id.*

187. *See id.*

188. *See* Tucker, *supra* note 4 at 4, III.

189. *See id.* at 8, III.

190. 29 U.S.C. § 212(c)(1998).

191. 135 CONG. REC. H4092 (daily ed. June 8, 2000) (statement of Cong. Obey).

192. *Id.*



labor.”<sup>193</sup> This public sentiment is evident in the Nike, Walmart and Levi’s boycotts that led to substantial changes in child labor conditions in other countries.<sup>194</sup>

With concern for child laborers, Congress mandated that the United States Department of Labor study the exploitation of child labor in other countries.<sup>195</sup> In its second report, *By the Sweat and Toil of Children Volume II: The Use of Child Labor in U.S. Agricultural Import and Forced and Bonded Child Labor* (the “Report”), the Department of Labor surveyed the agriculture work performed by children in foreign countries.<sup>196</sup> The Report found that ten-year-old children worked on a short-term basis during the harvest season, picking fruits and vegetables.<sup>197</sup> Children worked “long hours without rest.”<sup>198</sup> The Report states: “[F]atigue makes them more susceptible to accidents. Dangerous working conditions, excessive physical strain, malnutrition, and regular exposure to . . . toxic chemicals lead to lung, skin, and respiratory diseases, back injuries, and permanent physical handicaps and deformities.”<sup>199</sup> The Report further informs that “children exposed to [toxic chemicals] tend to become ill or disabled much more quickly than do adults with similar exposure . . . [T]he probability of their developing cancer is greater than that of adults having equal exposure.”<sup>200</sup> These findings are nearly identical to the results of the Human Rights Watch study of American farm worker children.<sup>201</sup> Therefore, the same exploitation of child labor the United States condemns in other countries, it exempts from protective labor laws within its own borders.

## V. CONCLUSION

Through the Child Labor Treaty, the United States has an opportunity to prohibit oppressive child labor in foreign countries and domestically. While Article 3(d) of the Child Labor Treaty prohibits child labor under hazardous

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193. *Id.*

194. Christopher M. Kern, *Child Labor: The International Law and Corporate Impact*, 27 SYRACUSE J. INT’L L. & COM. 177, 191-92 (2000).

195. *See* Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 1995. Department of Labor Appropriations Act, Pub. L. No. 103-333, 108 Stat. 2539 (Sept. 30, 1994).

196. *See generally* U.S. DEPT. OF LABOR, *BY THE SWEAT AND TOIL OF CHILDREN VOLUME II: THE USE OF CHILD LABOR IN U.S. AGRICULTURAL IMPORT AND FORCED AND BONDED CHILD LABOR* (1995).

197. *Id.* at 40.

198. *Id.* at 22.

199. *Id.* at 22.

200. *Id.* at 32.

201. *See generally* Tucker, *supra* note 4.

conditions, the United States attached an “understanding” to the Treaty, maintaining that Article 3(d) does not change, nor intends to change, “the agricultural employment provisions or any other provision of the Fair Labor Standards Act in the United States.”<sup>202</sup> This understanding contradicts the United States’ recognition of the need to eliminate oppressive child labor. The exemptions of agricultural workers from the FLSA, which sets labor standards such as minimum ages and maximum hours, are based on discriminatory practices prevalent over sixty years ago. Fifty years ago, legislators began to block effective human rights treaties because they perceived that such treaties would destroy the system of segregation in the United States. Even in modern times, some courts have interpreted the restrictions against child labor in a manner that reflects racial stereotypes. The time has come to protect all child laborers, including agricultural workers, in the United States. It is time for the country to eliminate the worst form of child labor and become a true leader of the world.

Although TAPILS advised former President Clinton that United States law and practice do not expose children to hazardous work conditions, this view can be revised. Article 4(3) of the Child Labor Treaty holds that work determined to be hazardous “shall be periodically examined and revised as necessary.”<sup>203</sup> As Human Rights Watch maintains, child labor law must be adjusted to protect children working in the agriculture industry.<sup>204</sup> The child labor laws must be amended specifically to eliminate the employment of agricultural child laborers under the age of sixteen, the only exception being that of a child of a farm landowner. A child should work no more than twenty hours per week and should work a limited number of hours during the school day. Moreover, no child under eighteen years of age should work in hazardous conditions.

Just as Congress has appropriated millions of dollars to eliminate child labor in other countries, it should commit funds to assist child agricultural workers in the United States obtain an education. Congress can use these funds to subsidize the wages of agricultural workers so that they are not reliant on the wages of their children. To ensure that foreign countries do not obtain an unfair advantage by utilizing child laborers, the United States can label agricultural products to indicate that no child laborers were used in the production of the goods. Just as many consumers prefer “pesticide free” produce, many will prefer “child labor free” produce.

Customary international law is defined as the “uniformities in state behavior rather than formal writings.”<sup>205</sup> These uniformities are evident in the consistent, repetitive practices to which states generally acquiesce. The United States and over one hundred other countries have agreed to eliminate oppressive

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202. 145 CONG. REC. S14, 226 (daily ed. Nov. 5, 1999) (Resolution of the Ratification).

203. Child Labor Treaty, *supra* note 13, art. 4(3).

204. *See* Tucker, *supra* at note 4, II.

205. WESTON, ET AL., *supra* note 145, at 107.

child labor. The United States has worked toward that goal in many ways. Now, it must accomplish the goal of eliminating oppressive child labor domestically, and it can start by eliminating the exemptions that allow children to work in agriculture.

On Thanksgiving Day, 1960, Edward R. Murrow aired the documentary, *Harvest of Shame*, drawing attention to the deplorable conditions of migrant workers. Unfortunately, his closing remarks remain pertinent today:

A hundred and fifty different attempts have been made in Congress to do something about the plight of the migrants. All except one has failed. The migrants have no lobby. Only an enlightened, aroused and perhaps angered public opinion can do anything about the migrants. The people you have seen have the strength to harvest your fruit and vegetables. They do not have the strength to influence legislation. Maybe we do.<sup>206</sup>

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206. Glader, *supra* note 5, at 1490 n.39.