Chapter Five

The Nature of State Obligations in Relation to Child Labour: Choosing Prosecution over Protection

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I. Introduction

In the past decade, there has been a significant expansion of international legal measures designed to address the problems of exploitative child labour.¹ During that time, there has been a shift of emphasis,² with a move towards more complex and detailed standards. Whereas the International Labour Organisation (ILO) Convention No. 138 of 1973 focussed on the setting of minimum ages for entry into employment, more recent standards focus on removing children from harmful and exploitative labour. Not surprisingly, this change of focus has led to child labour issues being linked to a number of other children’s rights issues, notably trafficking of children and the use of child soldiers.³

Most State obligations in relation to child labour are positive obligations.⁴ Even the most basic obligation, to bring State law into line with international

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² This shift probably has its roots in the adoption of the Convention of the Rights of the Child in 1989, but can be seen most clearly with the ILO’s establishment of the International Programme on the Elimination of Child Labour (IPEC) in 1992.

³ See Cullen, ‘Treaties’ (note 1).

⁴ The inspiration for this chapter lies in Professor Colin Warbrick’s interest in the development of positive obligations under the ECHR, for which see ibid, notably ‘The Structure of Article 8’, 1 (1998) EHRLR 32.

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obligations, goes far beyond an obligation of non-interference. There are still examples of violations of negative obligations. States themselves still use child labour, most obviously where they recruit children under 18 as soldiers. In some cases, as in Myanmar’s use of forced labour, child labour of other kinds is used by States. However, there is a much greater emphasis in recent developments in child labour on positive obligations.

New measures addressing issues of child labour have imposed new positive obligations on States. Whereas the obligations under ILO Conventions up to and including Convention No. 138 emphasised the creation of a legislative framework setting out minimum ages for employment, new treaties, including the ILO’s Convention No. 182 of 1999 on the worst forms of child labour, require a wider range of actions by States parties. These include legislative changes, labour inspection, criminal prosecutions of violators and protective measures for children caught up in exploitative child labour. However, States seem to have made a stronger commitment to addressing the criminal law aspects of child labour than the protective ones. This is reinforced primarily by the greater detail in which the criminal law obligations are drafted in the relevant treaties, including treaties on trafficking in persons, commercial sexual exploitation of children and child soldiers. It has also been argued that the approach of international human rights law generally, and the European Court of Human Rights in particular, privileges criminal law responses to human rights violations. The highly detailed obligations in relation to the prosecution of those who exploit child labour may be contrasted with the vagueness of the obligations of States to protect the victims of abusive child labour. These obligations are relatively under-developed, and States have demonstrated some resistance to such obligations, for example, to provide residence rights for trafficked children. Arguably, protective measures for exploited children

8 The United Kingdom Government has only belatedly accepted the need for even limited residence rights. See ‘Trafficking Victims to be Granted 30-day Stay’, The Guardian, 23 March 2007: http://www.guardian.co.uk/society/2007/mar/23/asylum.humanrights. However, NGOs such as ECPAT UK continue to criticise the United Kingdom for refusing to grant trafficked children permanent residence rights. This policy is also reflected in its reservation to the CRC, which states that ‘The United Kingdom reserves the right to apply such legislation, in so far as it relates to the entry into, stay in and departure from the United Kingdom of those who do not have the right under the law of the United Kingdom to enter and remain in the United Kingdom, and to the acquisition and possession of citizenship, as it may deem necessary from time to time.’ See http://www.ohchr.org/english/bodies/ratification/11.htm#reservations.