TACKLING THE RISE OF CHILD LABOUR IN EUROPE: HOMEWORK FOR THE EUROPEAN COURT OF HUMAN RIGHTS

SUZANNE EGAN*

Abstract The phenomenon of child labour is on the rise in Europe in the wake of the economic crisis. Specific action in tackling this practice faces a range of challenges including the often hidden nature of the work, cultural attitudes and gendered constructions of the role of children especially in domestic settings. This article explores the range of international standards and efforts made by numerous human rights tribunals aimed at combating the practice, with particular emphasis on the jurisprudence of the European Court of Human Rights. It concludes that the Court has drawn erratically on its standard methodologies (including the comparative technique) in interpreting Article 4 of the ECHR, thus providing limited guidance to European States in getting to grips with child labour.

Keywords: child labour, European Convention on Human Rights, forced labour, International Human Rights, International Labour Organisation, servitude, slavery.

I. INTRODUCTION

In 2012, Europe proclaimed its three-year strategy on the rights of the child aimed at the overall goal of 'building a Europe for and with children'.[1] One of the principal strategic objectives of that strategy is that of 'guaranteeing the rights of children in vulnerable situations.[2] While the nature and extent of vulnerable situations faced by children is vast, one specific locus of vulnerability is that of child labour—a phenomenon traditionally most prevalent in less developed countries in Sub-Saharan Africa and Asia.[3] Recently, however, the European Commissioner for Human Rights has raised

* University College Dublin School of Law, Suzanne.Egan@ucd.ie. The author is grateful to her colleague, Judy Walsh at UCD and to the two anonymous reviewers for their helpful advice and suggestions. All errors or omissions are my own.

[1] See Council of Europe,' Building a Europe for and with Children' available at <http://www.coe.int/t/dg3/children/StrategyAdopted_en.asp>.

[2] Council of Europe 'Strategy for the Rights of the Child' (2012–2015) at <http://www.coe.int/t/dg3/children/StrategySept2012_en.pdf>.

[3] G Brown (UN Special Envoy for Global Education), 'Child Labour and Educational Disadvantage: Breaking the Link, Building Opportunity' (2011) 17–18, available at <http://educationenvoy.org/wp-content/uploads/2013/10/child_labour_and_education_UK.pdf>.

[*ICLQ* vol 64, July 2015 pp 601–630] doi:10.1017/S0020589315000172

concerns about the limited attention being paid to child labour in Europe, its exponential rise in the wake of the economic crisis and the need for concrete measures and initiatives to avert it.[4] Specific action in this sphere faces a range of challenges including the often hidden nature of the work in question, cultural attitudes and gendered constructions of the role of children especially in domestic settings. Human rights bodies have a particularly vital role to play in placing the issue of child labour in a human rights, child-centred context, by laying down clear standards for legislative and policy interventions by governments. With this theme in mind, this Article presents an overview of the complexities of child labour as a social and cultural phenomenon and international standards aimed at combatting it. It culminates in an analysis of recent case law of the European Court of Human Rights which, it is argued, has drawn somewhat erratically on its standard interpretive methodologies (including the comparative technique), thus producing mixed results when seeking to provide guidance to European States in the specific context of child labour.

II. CHILD LABOUR

The term 'child labour' is used to denote children who are working outside the international legal framework specifically envisaged for children in employment.[5] It can involve many types of work, including work in the agricultural, construction, industrial, manufacturing and retail sectors as well as in domestic service.[6] At the global level, it is estimated that around 167 million children aged 5–17 are involved in child labour.[7] Over half of these children live in the Asia-Pacific region, while in Sub-Saharan Africa the incidence of child labour and participation in hazardous types of work is highest.[8] Statistics in this field, however, are invariably unreliable due to the illegal and often hidden nature of the work and the powerlessness of those affected.[9] In Europe, statistical data is even more elusive[10]—a fact that has been attributed partly to the lack of social sensitivity to this issue.[11] Whereas

[4] N Muižnieks, 'Child Labour in Europe: A Persisting Challenge' (20 August 2013) at < http://www.coe.int/en/web/commissioner/-/child-labour-in-europe-a-persisting-challen-1>.

[5] See ILO Conventions 138 and 182, Section 3(A) below.

[6] Brown (n 3) 26–31.

[7] 'Global Child Labour Trends 2008 to 2012' (ILO and International Programme on the Elimination of Child Labour (IPEC), 2013), available at <http://www.ilo.org/ipec/Informationresources/WCMS_IPEC_PUB_23015/lang--en/index.htm>.

[8] Brown (n 3) 17–20.

[9] ibid 16.

[10] In its most recent global survey of child labour trends, the ILO was unable to generate specific data on Eastern Europe and Central Asian countries nor for industrialized economies generally: 'Marking Progress Against Child Labour: Global Estimates and Trends 2000–2012' (ILO and IPEC 2013) 5 at <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---ipec/documents/publication/wcms_221513.pdf>.

[11] R Rodríguez, H Hägele, H Katteler, G Paone and R Pond, 'Study on Child Labour and Protection of Young Workers in the European Union', Report prepared for the European Commission, DG Employment, Social Affairs and Equal Opportunities, 5–6 (Labour Asociados

in other parts of the world international campaigns aimed at the elimination of the worst forms of child labour are of long-standing, 'social perception in Europe is not alarmed for this reason'.[12] On the other hand, the evidence suggests that far from being a non-issue in Europe, child labour is on the rise, particularly in Eastern and Central Europe since the transition to market economies;[13] and child labour reportedly takes place in all European Union States, with oppressive forms of work being considered acceptable in some States as a source of family income.[14] While economic hardship may be a generic factor predisposing the entry of children into the labour force,[15] migration and child trafficking are further factors that have placed the spotlight on Europe as a destination zone for forced labour and exploitation of children.[16]

One particular form of child labour that is gaining increasing attention is that of child domestic labour. Involving as it does the use of children by third parties or employers to perform domestic tasks that are exploitative, this form of child labour is notoriously most difficult to track because of the often hidden context in which it takes place. Recent attempts to gauge the number of children engaged in domestic work globally have put the figure at approximately 15.5 million (almost half of whom are aged 5–14).[17] Research also suggests that the number of children being forced into domestic work is on the rise, in contrast to the statistic for child labour in other sectors.[18] Cultural variation in perceptions of what is acceptable 'work' for children,[19] combined with patriarchal attitudes towards domestic work as 'women's work', are reflected in the fact that the majority of child domestic workers are girls.[20] Employers

Consultores 2007), available at <http://ec.europa.eu/social/main.jsp?catId=706andlangId=enandintPageId=209>.

[12] ibid 6.

[13] See 'Targeting the Intolerable: A New International Convention to Eliminate the Worst Forms of Child Labour' (ILO 1999), available at <http://info.worldbank.org/etools/docs/library/237384/toolkitfr/pdf/facts.pdf>.

[14] Rodríguez *et al.* (n 11) 91.

[15] ibid.

[16] On the connection between migration and child labour, see H van den Glind, 'Migration and Child Labour: Exploring Child Migrant Vulnerabilities and Those of Children Left-Behind' (ILO and IPEC 2010) available at <http://www.ilo.org/ipecinfo/product/viewProduct.do?productId=14313>. On the linkage between child trafficking and forced labour, see M Vinković, 'The 'Unbroken Marriage': Trafficking and Child Labour in Europe' (2010) 13(2) Journal of Money Laundering Control 87–102.

[17] 'Ending Child Labour in Domestic Work and Protecting Young Workers from Abusive Working Conditions (ILO and International Programme on the Elimination of Child Labour' (IPEC) 2013), available at <http://www.ilo.org/ipec/Informationresources/WCMS_207656/lang--en/index.htm>.

[18] In this respect, the ILO estimates that the number of children in child domestic labour increased by nine per cent between 2008 and 2012: 'Marking Progress against Child Labour' (n 10) 8.

[19] B White, 'Defining the Intolerable: Child Work, Global Standards and Cultural Relativism' (1999) 6(1) Childhood 133.

[20] 'Child Domestic Work', (UNICEF, Innocenti Digest, 2005) available at <http://www.unicef-irc.org/publications/pdf/digest5e.pdf>.

sometimes actively seek out children as employees on the basis that they are 'easier to control and can be paid less'.[21] Domestic work can include a range of activities including 'doing domestic chores, caring for children, tending the garden, running errands and helping their employers run small businesses, amongst other tasks'.[22] What might be innocuous, even beneficial, when performed to a very limited degree in a supportive context, can be transformed into a worst form of child labour or slavery depending on the age of the child, the nature and hours of the work, the working and living conditions and treatment meted out. The ILO has distinguished child domestic labour from 'helping-hand tasks' in the following way:

> In every country of the world, children lend a helping hand in their own home, maybe by preparing the meals or washing the dishes after dinner before going out to play. They may make the bed, for example, hang out the washing, mow the lawn, baby-sit a younger sibling, pick fruit on the family allotment, milk the goat or feed the chickens. In moderation and in particular as long as they do not interfere with the children's education or time to play, such 'helping hand' tasks can be positive experiences … This is not child domestic labour.[23]

By contrast, children engaged in domestic labour may find themselves:

> carrying heavy loads and doing dangerous tasks, using hazardous substances such as cleaning fluids, cooking meals for a whole family and washing their clothes, being woken in the middle of the night to service the master's needs, toiling seven days a week, every week of the year. They are exposed to physical and sexual abuse. They may be confined to the house at all times, have to sleep on the floor in the kitchen, suffer beatings when they are tired and slow, be denied access to family, friends, health-services and decent food, even be deprived of a name, known only by the local word for 'servant'. This is the reality of the lives of many children in child domestic labour … .[24]

Child domestic workers, therefore, are particularly vulnerable to a range of associated rights abuses including physical, psychological and sexual abuse, inhuman and degrading living conditions and denial of access to health care.[25] They are also typically, but not necessarily, deprived of an

[21] 'Claiming Rights: Domestic Workers' Movements and Global Advances for Labor Reform', Human Rights Watch (28 October 2013) 5, available at <http://www.hrw.org/reports/2013/10/27/claiming-rights>.

[22] J Blagbrough, 'Child Domestic Labour: A Modern Form of Slavery' (2008) Children and Society 179, 180.

[23] 'Helping Hands or Shackled Lives: Understanding Child Domestic Labour and Responses to It' (ILO and IPEC 2004) 5, available at <http://www.ilo.org/ipecinfo/product/viewProduct.do?productId=348>.

[24] ibid 9–10. See further for a description of the life of a child domestic worker: 'Lonely Servitude: Child Domestic Labour in Morocco' (Human Rights Watch 2012) available at <http://www.hrw.org/reports/2012/11/15/lonely-servitude>.

[25] ibid 50–7.

education.[26] Even where access to education is nominally permitted, children in domestic labour often experience difficulties with engagement due to the burden of domestic work outside school hours.[27]

III. INTERNATIONAL LEGAL STANDARDS RELEVANT TO CHILD LABOUR

Before turning to a specific analysis of European approaches to child labour, it is important to note that normative action aimed at eliminating child labour has intensified at the international level in the past two decades, driven largely by the prioritization of this issue by the ILO as part of its Decent Work Agenda.[28] While children were largely ignored in the 1926 Slavery Convention aimed at abolishing the discrete concept of slavery,[29] this lacuna was initially addressed in the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery,[30] Article 1(d) of which specifically prohibited the 'exploitation' of children for their labour.[31] Arguably, this provision deliberately set the bar lower, initially, in international law than that which was applicable to adult forms of slavery and slavery-like practices, which were conceptualized as involving concepts of ownership and mandatory residence.[32] Later developments in the field of international labour law have resulted in an impressive array of treaty provisions aimed at clarifying the minimum age for children at work[33] and

[26] 'Ending Child Labour in Domestic Work and Protecting Young Workers from Abusive Working Conditions' (n 17) 37–8.

[27] 'Helping Hands or Shackled Lives: Understanding Child Domestic Labour and Responses to It' (n 23) 50.

[28] See ILO, 'Decent Work Agenda: Promoting Decent Work for All: <http://www.ilo.org/global/about-the-ilo/decent-work-agenda/lang--en/index.htm>. As part of this agenda, the ILO has established a specific International Programme on the Elimination of Child Labour (IPEC); see <http://www.ilo.org/ipec/lang--en/index.htm>.

[29] Slavery, as an institution, was abolished by the 1926 Slavery Convention, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/SlaveryConvention.aspx>.

[30] 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, ECOSOC Res 608(XXI) of 30 April 1956, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/SupplementaryConventionAbolitionOfSlavery.aspx>.

[31] Art 1 defined child labour as including: 'Any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.' For critique of this provision, see K Bales and P Robbins, 'No One Shall be Held in Slavery or Servitude: A Critical Analysis of International Slavery Agreements and Concepts of Slavery' in K Bales, *Understanding Global Slavery: A Reader* (University of California Press 2005) 40, 48.

[32] Art 1(1) of the 1926 Slavery Convention defines 'slavery' as 'the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised'; while the Supplementary Convention itself defined 'serfdom' as 'the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status'.

[33] See, for example, the International Labour Organization (ILO), Minimum Age Convention, C138 (26 June 19) available at <http://www.refworld.org/docid/421216a34.html>.

the boundaries between prohibited practices and regulation of acceptable work vis-à-vis children. In particular, the Worst Forms of Child Labour Convention, C182, (1999)[34] 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'.[35] Crucially, Convention C182 moves beyond a bare prohibition on such forms of child labour, by mandating the taking of positive measures by States for prevention and removal of children from the worst forms of child labour and their rehabilitation.[36] More recently, the ILO has turned its attention specifically to the issue of domestic work by adopting Convention No 189, Concerning Decent Work for Domestic Workers[37] and Supplementing Recommendation 201.[38] The Convention acknowledges at the outset that domestic work continues to be 'invisible' and is mainly carried out by women and girls, many of whom are migrant workers or members of disadvantaged communities and as such, are particularly vulnerable to human rights abuses.[39] As regards children, the Convention obliges all States to take measures to ensure the effective elimination of child labour[40] and to ensure that all domestic workers are afforded a safe and healthy working environment,[41] decent working conditions and if they reside in the household, decent living conditions that respect their privacy.[42]

Legal prohibition of child labour and the development of responses to it must also take account of the development of international law in regard to the wider phenomenon of human trafficking. Indeed, child trafficking has been identified as the cause of the worst forms of child labour.[43] The special vulnerability of

[34] International Labour Organization (ILO), Worst Forms of Child Labour Convention, C182 (17 June 1999) available at <http://www.refworld.org/docid/3ddb6e0c4.html>. See J Kooijmans and H van de Glind, 'Child Slavery Today' in G Craig, *Child Slavery Now: A Contemporary Reader* (The Policy Press 2010) 21.

[35] This category of work is also prohibited under art 3(1) of ILO, C138.

[36] Art 7(2). See generally Y Noguchi, 'ILO Convention No 182 on the Worst Forms of Child Labor and the Convention on the Rights of the Child' (2002) 10(4) IntlJChildren'sRts 355, 360.

[37] Available at <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C189>.

[38] Available at <http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_INSTRUMENT_ID,P12100_LANG_CODE:2551502,en:NO>. The Convention was adopted 16 June 2011 and entered into force 5 September 2013. As regards ratification by European States, Italy and Germany have ratified the Convention. Ireland and Belgium have declared their intention to ratify. The United Kingdom (which abstained from the vote adopting the Convention) rejected a recommendation to consider ratifying it during its UPR: 'Claiming Rights: Domestic Workers' Movements and Global Advances for Labor Reform', Human Rights Watch, 28 October 2013) 7–8. In July 2013, the Council of the European Union adopted a draft decision authorizing EU Member States to ratify C189 which was subsequently endorsed by the European Parliament in November 2013. This development will help 'to pre-empt arguments by member States on potential conflicts between EU Directives and ratification of 189': ibid 7.

[39] Preamble, para 4.

[40] Art 3(c).

[41] Art 13(1).

[42] Art 6.

[43] See M Vinkovic, 'The 'Unbroken Marriage' – Trafficking and Child Labour in Europe' (2010) 13(2) Journal of Money Laundering Control 87, 87.

children in respect of trafficking is reflected in the governing instrument on this issue, the Palermo Protocol 2000.[44] Whereas the overarching definition of trafficking in the Protocol requires that coercive or deceptive *means* are involved to qualify a situation as 'trafficking',[45] the Protocol expressly drops the latter requirement where children are concerned.[46] In other words, all that needs to be shown to demonstrate a case of child trafficking is that the child has been recruited, transported, transferred or kept by a person for the purpose of exploitation.[47] The Protocol goes on to oblige States parties to adopt legislative and other measures to criminalize trafficking,[48] to put in place policies and programmes to prevent it[49] and to consider measures of protection for victims.[50]

The growing recognition of the child as a 'rights holder' within the domain of international human rights law has resulted in a further layer of normative protection for children with the recognition of positive obligations on States where child labour and trafficking is concerned.[51] Not surprisingly, the Convention on the Rights of the Child (CRC), 1989 is at the apex of all instruments dealing with the subject of child labour, embodying as it does the most child-centred approach to the issue.[52] Rather than emphasizing distinctions between types of prohibited practices (as was the focus in earlier instruments), the CRC takes a much wider approach by prohibiting *all* forms of 'exploitation' and by articulating specific obligations of protection and prevention for children as 'rights holders'. While the term 'exploitation' is not itself defined, Article 32 of the CRC requires States parties to recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental,

[44] UN General Assembly, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolTraffickingInPersons.aspx>.

[45] See art 3(a).

[46] See art 3(c), ibid.

[47] Art 3(a) of the Palermo Protocol thus defines 'exploitation' as including 'at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs'.

[48] Art 5.

[49] Art 9.

[50] Arts 6(3) and (5).

[51] 'Supervisory bodies of international instruments … can play a valuable role in more effective law enforcement, pointing at weaknesses in legislation, application and enforcement. They give guidance to governments, but also provide a list of ''what is to be done'' for international agencies and NGOs': J Kooijmans and H Van de Glind, 'Child Slavery Today' in G Craig (ed), *Child Slavery Now: A Reader* (The Policy Press 2010) 21, 35.

[52] UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol 1577, 3, available at <http://www.refworld.org/docid/3ae6b38f0.html>. On the Convention's role and contribution to the protection of children's rights generally, see U Kilkelly, 'The CRC at 21: Assessing the Legal Impact' (2011) 62 NILQ 143–52.

spiritual, moral or social development.[53] The duty to protect the child from abuse and exploitation in the home is explicitly provided for in Article 19 which obliges the States parties to establish effective procedures for the identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment and, as appropriate, for judicial involvement.[54]

The specificity of the range of obligations placed on States by the CRC in the matter of child exploitation is buttressed by the 'best interests principle' in Article 3(1) of the Convention.[55] Broadly stated, the 'best interests principle' requires that the child's interests 'must be the subject of active consideration' and that in all actions concerning children … it needs to be demonstrated that children's interests have been explored and taken into account as a primary consideration'.[56] Article 3(2) expands on the provisions of paragraph 1 by obliging the States parties to the Convention to undertake to ensure the child 'such protection and care as is necessary for his or her well-being', taking into account the rights and duties of parents and others legally responsible for him or her. As to the scope of actions involved, it is clear that the principle must be read expansively as applying to 'all actions' concerning the child, including decisions 'not to take action'. Thus, as recognized by the Committee on the Rights of the Child which monitors the implementation of the Convention by the States parties, 'inaction or failure to take actions and omissions are also ''actions'' … when social welfare authorities fail to take action to protect children from neglect or abuse'.[57] In the context of its General Comments addressed to all of the States parties, the Committee has reminded States that cooperation is also needed to address child protection issues which may cut across national borders, putting children at risk of harm, including trafficking for the purposes of labour exploitation; and that specific legislation, policies, programmes and partnerships may be required to protect children affected by such cross-border, child protection issues.[58]

The CRC is by no means the only treaty body to have drawn attention to the issue of child labour. Most notably, the Committee on the Elimination of All

[53] Art 34 enjoins the States parties to protect children from all forms of economic exploitation, sexual exploitation and sexual abuse; while art 36 enjoins them to protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.

[54] Art 19(2).

[55] Art 3(1) provides that: 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'. See generally, M Freeman, *The Best Interests of the Child* (Martinus Nijhoff 2007).

[56] UNICEF, *Implementation Handbook for the Convention on the Rights of the Child* (3rd rev edn, UNICEF 2007) 38.

[57] Committee on the Rights of the Child, General Comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1), UN Doc CRC/C/GC/14, para 18.

[58] CRC General Comment No 13 on the right of the child to freedom from all forms of violence: UN Doc CRC/C/GC/13, 18 April 2011, para 76.

Forms of Discrimination against Women (CEDAW)[59] has expressed concern on numerous occasions about the exploitation of children (especially girls) in all forms of labour, including domestic work and has urged States parties to put in place legislative and regulatory frameworks for their protection.[60] In monitoring implementation of Article 10(3) of the *International Covenant on Economic, Social and Cultural Rights*,[61] the Committee on Economic, Social and Cultural Rights has also identified persistent problems of child labour and exploitation of socially vulnerable children in a range of settings, including domestic service.[62] In its recommendations to States, it has stressed the importance of strengthening legislation to combat these problems, establishing labour inspection mechanisms and providing assistance to victims.[63] Article 8 of the International Covenant on Civil and Political Rights (ICCPR) also speaks directly to the issue by prohibiting slavery, servitude and forced or compulsory labour. In the specific context of child labour, Article 8 is buttressed by the general terms of Article 24 ICCPR which guarantees the right of every child to special measures of protection. In *Faure v Australia*, the Human Rights Committee indicated that it would take into account whether the specific labour being assessed for its compatibility with Article 8 involves a 'degrading or dehumanizing aspect'.[64] The Committee clearly conceptualizes the right in Article 8 as involving a range of positive obligations on States in the matter of elimination, prevention and protection.[65]

[59] CEDAW is responsible for monitoring the implementation by States parties of the Convention on the Elimination of All Forms of Discrimination of Women, 18th December 1979, UNTS vol 1249, 13, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx>. Arts 2, 5, 6 and 11 of the Convention are of relevance to this issue.

[60] See, for example, Concluding Observations of CEDAW on Togo's sixth and seventh periodic reports, UN Doc CEDAW/C/TGO/CO/6-7, 8 November 2013, paras 32–33; and Concluding Observations on Paraguay's sixth periodic report, UN Doc CEDAW/C/PRY/CO/6, 8 November 2011, paras 28–29.

[61] Art 10(3) provides that: 'Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.'

[62] See, for example, Concluding Observations of the Committee on Economic, Social and Cultural Rights (CESCR) on Bulgaria's 4th and 5th periodic reports, UN Doc E/C.12/BGR/CO/4-5, 11 December 2012, para 10; El Salvador's 2nd periodic report, UN Doc E/C.12/SLV/CO/2, 24 June 2007, para 23; and Rwanda's second to fourth periodic reports, UN Doc E/C.12/RWA/CO/2-4, 10 June 2013.

[63] See, for example, Concluding Observations of CESCR on Iran's second periodic report, UN Doc E/C.12/IRN/CO/2, 10 June 2013, para 20; and on Chad's initial, second and third periodic reports, UN Doc E/C.12/TCD/CO/3, 16 December 2009, para 21.

[64] *Bernadette Faure v Australia*, Comm No. 1036/2001, UN Doc CCPR/C/85/D/1036/2001 (2005) para 7.5.

[65] In its General Comment 28, for example, it has called on States to inform it of measures taken to eliminate trafficking of women and children, to protect them from slavery, disguised *inter alia* as domestic or other kinds of personal service and on measures of prevention: Human Rights

IV. EUROPEAN LEGAL STANDARDS ON CHILD LABOUR

The developments in international law outlined above provide important guidance for European States in tackling the rise of child labour in their jurisdictions. In addition to widespread ratification of these instruments, European States are also subject to a range of further obligations agreed by the EU and the Council of Europe institutions.[66] Of obvious significance here is the Council of Europe's European Social Charter (Revised),[67] the terms of which offer clear potential as an advocacy tool for challenging the economic exploitation of children.[68] The Revised Charter contains a wide range of labour rights, including a detailed 'core' obligation to provide for the right of children and young persons to protection from economic exploitation. Specifically, Article 7(1) obliges States parties to establish a minimum age of admission to employment as 15 years, subject to exceptions for children employed in 'light work without harm to their health, morals or education'. Article 7(3) obliges them further to ensure that children who are still subject to compulsory education shall not be employed in such work as would deprive them of the full benefit of their education.[69]

Through its monitoring functions under the Charter, the European Committee of Social Rights (ECSR) has provided detailed guidance on the implications of these Articles for the Contracting States. It has indicated that the aim of Article 7(1) in particular is to ensure the *protection* of children from the risks associated in performing work which may have negative repercussions on their health, their moral welfare and their education.[70] As regards the specific issue of

Committee, General Comment 28, Equality of rights between men and women (art 3), UN Doc CCPR/C/21/Rev.1/Add.10 (2000) para 12.

[66] For an early review of the applicable standards, see U Kilkelly, 'Economic Exploitation of Children: A European Perspective' (2003) 22 StLouisUPubLRev 321, 329.

[67] Accessible at <http://conventions.coe.int/Treaty/en/Treaties/Html/163.htm>.

[68] The European Social Charter 1961 is the Council of Europe's foundational treaty binding Contracting States to guarantee a range of socio-economic rights. The European Social Charter (Revised) 1991 augments the original instrument by providing for further rights, as well as establishing a periodic reporting mechanism and an optional collective complaints system. Thirty-three Member States of the Council of Europe have ratified the Revised Charter and are thus subject to the reporting mechanism, while ten further States are parties to the original Charter. Fifteen States have accepted the collective complaints mechanism set provided for in the Revised Charter: <http://www.coe.int/t/dghl/monitoring/socialcharter/presentation/Overview_en.asp>.

[69] The Revised Charter is configured in such a way as to oblige States parties to guarantee a range at least six out of nine core rights (of which art 7 is one), while allowing them to 'pick and choose' to be bound by at least 16 further rights provided for in Part II of the Charter (of which art 17 is one); see Part III, art A(1) of the Revised Charter. Thus, the specific rights in art 7 are supplemented in art 17 (1)(b) by positive obligations on self-selecting States parties: 'to ensure the effective exercise of the right of children and young persons to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities'. This shall include the obligation, either directly or in cooperation with public and private organizations, to take all appropriate and necessary measures designed 'to protect children and young persons against negligence, violence or exploitation'.

[70] Complaint No 1/1998, *International Commission of Jurists v Portugal*, para 26: <https://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/CC1Merits_en.pdf>.

domestic work, the Committee has elaborated that whether particular work constitutes 'light work' will be assessed on the facts of each case, but the nature of the work will be a determining factor.[71] Clearly, the Committee will assess the physical effort involved, working conditions and the possible psychological repercussions on the child, all of which 'may have harmful consequences not only on the child's health and development, but also on its [sic] ability to obtain maximum advantage from schooling and, more generally, its potential for satisfactory integration in society'.[72] Where the work involves excessive hours, it ceases to be light work. As a general guideline, the committee has stated that a situation in which a child of less than 15 years of age is working for 20–25 hours per week during school term or three hours per school day and six to eight hours at weekends is contrary to the Charter.[73] States must not only put in place specific legislation defining the types of work which may be considered light, the conditions under which it may be performed and the maximum permitted working hours, they must also put in place effective supervisory structures to ensure that such legislation is respected and that Article 7 is effectively implemented.[74] Moreover, the duty of protection is a collective one, extending beyond the level of a general Labour Inspectorate but also involving educational and social services.[75] Thus, in assessing whether Article 7 has been complied with in carrying out its reporting functions under the Charter, the Committee routinely questions States on how the conditions under which it is performed are supervised in practice.[76]

The Council of Europe and the European Union (EU) have each generated further instruments in the field of human trafficking that are relevant to the issue of child labour and exploitation. The Council of Europe's 2005 Convention on Action against Trafficking in Human Beings,[77] for example, has broken new ground by being the first international convention to adopt a human rights approach to trafficking.[78] Rather than focusing almost

[71] ibid para 29.
[72] ibid para 30.
[73] ibid para 31.
[74] ibid paras 30–32.
[75] ibid at para 28: 'Although the performance of such work by children may be considered normal and even forming part of their education, it may nevertheless entail, if abused, the risks that Art 7 para 1 is intended to eliminate. The supervision required of States must, in such cases … not just the Labour Inspectorate but also the educational and social services.'
[76] See Committee of Social Rights, *European Social Charter (Revised) Conclusions* (2006) 16, para 39: <http://www.coe.int/t/dghl/monitoring/socialcharter/conclusions/year/2006Vol1_en.pdf>.
[77] Council of Europe, Council of Europe Convention on Action against Trafficking in Human Beings, 16 May 2005, CETS 197, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/197.htm>. See generally, A Gallagher, *The International Law of Trafficking* (OUP 2010) 110–27.
[78] 'Trafficking' is defined in art 4(a) of the Convention in substantially the same terms as art 1 of the Palermo Protocol. Likewise, in regard to child victims under the age of 18 years, the recruitment, transportation, transfer, harbouring or receipt of a child for the purposes of exploitation shall be deemed sufficient to constitute 'trafficking' even if this does not involve any of the means set forth in the definition (art4(c)).

exclusively on prosecution and prevention like the Palermo Protocol, the Council of Europe Trafficking Convention includes legally binding obligations on States to assist victims[79] in their physical, psychological and social recovery. These include obligations to provide appropriate and secure accommodation, psychological and material assistance,[80] counselling and information,[81] and access to education for children.[82] Implementation of the Convention is monitored by the Group of Experts on Action against Trafficking in Human Beings (GRETA)[83] by means of a reporting exercise.[84] Through its monitoring work, GRETA has urged States to pay heightened attention to prevention and protection measures which address the particular vulnerability of children to trafficking and to ensure that the best interests of the child are fully taken into account.[85]

The EU has, in turn, adopted Directive 2011/36/EU[86] which in general terms, has been judged to be 'cautious' concerning assistance to victims of trafficking and as providing 'tentative progress' only beyond the criminal justice approach to human trafficking.[87] In regard to child-victims, however, the Directive does recognize the heightened vulnerability of children to human trafficking[88] and requires Member States to take enhanced measures of assistance, support and protection, including the requirement for a guardian to be appointed as soon as a child is identified as a victim of trafficking.[89] Further, Member States are enjoined to ensure that the best interests of the child are a primary consideration in the application of the Directive[90] and that States should give the benefit of the doubt where there is a doubt as regards age.[91]

[79] Art 4(e) of the Convention defines the term 'victim' as any natural person who is subject to trafficking in human beings as defined in art 4(a).

[80] Council of Europe Convention against Trafficking in Human Beings art 12(1)(a).

[81] ibid art 12(1)(d).

[82] ibid art 12(1)(f).

[83] Art 36 provides for the establishment of GRETA. It is composed of a minimum of 10 members and a maximum of 15, taking into account gender and geographical balance, as well as multi-disciplinary expertise, chosen from the nationals of the States parties to the Convention. For the work of GRETA, see <http://www.coe.int/t/dghl/monitoring/trafficking/Docs/Monitoring/GRETA_en.asp>.

[84] Council of Europe Convention against Trafficking in Human Beings art 38 sets out the procedure.

[85] Report Concerning the Implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Ireland para 73 (26 September 2013) COE: GRETA (2013) 15 available at <http://www.coe.int/t/dghl/monitoring/trafficking/Docs/Reports/GRETA_2013_15_FGR_IRL_public_en.pdf>.

[86] Directive 2011/36/EU of the European Parliament and of the Council of April 5, 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ L 101/1, 15.4.2011.

[87] See S Mullally, 'Combating Trafficking in Human Beings and Protecting its Victims: Limited Progress in the Adoption of a Human Rights-Based Approach' (2012) 30(7) Irish Law Times 102–7.

[88] Recital, para 8.

[89] Art 14(2).

[90] Art 13(1). Although as noted by Mullally, this formulation is obviously weaker than one which would make the best interests of the child *the* primary consideration (n 117).

[91] Art 13(2). Further safeguards are built into art 15 of the Directive as regards the conduct of investigations and trial procedures where child victims are concerned.

At a broader level, the Charter of Fundamental Rights of the European Union has been given binding force since the entry into force of the Treaty of Lisbon in 2009.[92] The Charter requires the EU institutions and the Member States (when implementing EU law) to act in conformity with its provisions.[93] Those provisions include a general prohibition on slavery, servitude, forced labour and human trafficking;[94] the 'best interests of the child' principle;[95] and a specific provision prohibiting child labour and requiring the protection of 'young people' at work.[96] Though the latter provision in particular is expressed as a principle, rather than a right, there is no doubt that these provisions collectively go some way in placing the spotlight on child labour as a phenomenon to be tackled in the EU generally.[97]

There can be little doubt that the standards set forth in the European Social Charter regarding child labour, together with those provided for in the Council of Europe Trafficking Convention, provide important benchmarks for other international standards and supervisory bodies in the field of child labour and exploitation.[98] However, despite the clarity of these standards, and in common with other international instruments outlined above, the instruments' powers of compliance are necessarily limited, based as they are largely on the recommendations of the principal monitoring bodies.[99] The fruits of the EU Directive for child trafficking victims specifically, will likely be context-dependent given the nature of EU directives to leave a wide amount of discretion to the Member States in transposing and implementing their terms.[100] The power of the Court of Justice of the European Union to apply the provisions of the Charter of Fundamental Rights of the European Union to the Member States when implementing EU law undoubtedly brings with it possibilities for heightening standards in this field, though its potential on the particular issue of child labour has yet to be tested.[101] This is why attention inevitably turns to recent developments in this area arising from the Council

[92] European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012P/TXT&from=EN>.

[93] For a broad overview of the provisions of the Charter, see S Douglas Scott, 'The European Union and Human Rights after the Treaty of Lisbon' (2011) HRLR 645, 650–3.

[94] ibid art 5.

[95] ibid art 24(2).

[96] Art 32.

[97] See H Stalford, 'Article 32 – Prohibition of Child Labour and Protection of Young People at Work' in S Peers, T Hervey, J Renner and A Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart 2014) 869, 874–6.

[98] Alston has made this point regarding the European Social Charter generally: P Alston, 'Assessing the Strengths and Weaknesses of the European Social Charter's Supervisory System' in G de Búrca, *Social Rights in Europe* (OUP 2005) 45–69.

[99] ibid 16–18,

[100] K Gromek-Broc, 'EU Directive on Preventing and Combating Trafficking in Human Beings and Protecting Victims: Will It Be Effective?' (2011) 20(64) Nova et Vetera 227–38, available at <http://revistas.esap.edu.co/nova/wp-content/uploads/2012/03/art15-64.pdf>.

[101] Stalford (n 97) 879–82.

of Europe's European Convention on Human Rights (ECHR) with its powerful implementation machinery, involving judicial determinations on State compliance by the European Court of Human Rights. The remainder of this Article critiques the extent to which that Court has done its homework on the phenomenon of child labour and applied its standard interpretive methodologies so as to develop the clear potential of the Convention to bolster existing standards in the field.

A. The European Convention on Human Rights

In considering the phenomenon of child labour, the most obvious Article of the ECHR to consider is the right to be free from slavery, servitude and forced labour found in Article 4 which, in the view of the European Court of Human Rights, 'enshrines one of the fundamental values of democratic societies'.[102] Sitting alongside Article 3 (which prohibits torture, inhuman and degrading treatment or punishment), Article 4 was included in the Convention as one of the classic rights relating to physical integrity and security of the person.[103] Its inclusion was uncontentious for two reasons: Firstly because of the pre-existing recognition of the prohibition in other international law instruments, including the Universal Declaration of Human Rights on which much of the drafting of the ECHR was based; and secondly, by reason of the ideological focus of the drafters of the ECHR to ensure that the atrocities committed during the second world war (including the existence of mass concentration camps) would be guarded against in the drive to create a new European order.[104] In line with the drafting style common to most of the Convention's provisions, Article 4 (1) sets forth the general statement of the right that 'No one shall be held in slavery or servitude'—a right that may be classed as an absolute right in view of its non-derogable status under the terms of Article 15(2). Article 4(2) goes on to provide further that 'No one shall be required to perform forced or compulsory labour'. None of the terms 'slavery', 'servitude' or 'forced labour' are defined in the Convention, although in the case of 'forced labour' a measure of clarity is provided by statements of what is not 'forced labour', as opposed to a positive definition of what it is.[105] Other than this, the three

[102] *Stummer v Austria* (2012) 54 EHRR 11, para 116.

[103] E Bates, *The Evolution of the European Convention on Human Rights* (OUP 2010) 110.

[104] AW Brian Simpson, *Human Rights and the End of the Empire: Britain and the Genesis of the European Convention* (OUP 2001) 157. Indeed, so entrenched was this rationale that in the case of *Iversen v Norway*, the Norwegian government sought to rely on the argument that because of its historic context, as a provision which envisaged the suppression of concentration and labour camps, art 4 '… was never meant to apply to reasonable steps taken by democratic governments to solve pressing humanitarian and social needs': European Commission on Human Rights, Admissibility Decision, No 1468/62, 6 YB 278 (1963), noted in Bates (n 103) 219.

[105] In *Stummer v Austria*, the Court explained in this respect the specific structure of art 4 as follows: Paragraph 3 is not intended to 'limit' the exercise of the right guaranteed by paragraph 2, but to 'delimit' the very content of that right, for it forms a whole with paragraph 2

classifications of prohibited practices were left wide open by the drafters of the Convention for interpretation by the European Court of Human Rights.

Before examining the Court's case law on Article 4 of the ECHR in cases of child labour, it should be recalled that in interpreting the rights in the Convention, the Court routinely draws on a variety of methodological approaches. These approaches are well-known and include the standard rules relating to treaty interpretation,[106] the principle of effectiveness[107] (which emphasizes the importance of giving effect to the 'object and purpose' of the treaty making the rights contained therein 'practical and effective') and the evolutive or 'living instrument' approach.[108] This latter technique was most famously introduced by the Court in the case of *Tyrer v United Kingdom*, when it stated that the Convention is a 'living instrument which … must be interpreted in the light of present-day conditions'.[109] It is used by the Court as a response to the reality that the Convention does not operate in a static environment, tied to standards operating decades ago when it was drafted. Accordingly, it enables the Court to shepherd and copper-fasten evolving developments in the Contracting States in a legal context where legislative action (available in domestic settings) is not a realistic option.[110]

Further, the Court has recognized that in some cases, a relative approach must be taken in interpreting and applying the Convention's terms. Thus, in *Ireland v United Kingdom*, the Court held that in applying Article 3 its assessment of whether treatment at issue falls within the scope of Article 3 will be a relative one, ie 'it depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim'.[111]A good example of the application of this approach to cases involving children is the case of *V v United Kingdom*, in which the Court held that in order to comply with the

and indicates what the term 'forced or compulsory labour' is not to include ('*n'est pas consideré comme "travail forcé ou obligatoire"*'): (n 102) at para 120.

[106] See, in particular, art 31 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 12 March 1986, available at <http://legal.un.org/ilc/texts/instruments/english/conventions/1_2_1986.pdf>.

[107] Sometimes referred to as the teleological approach, its deployment was at the heart, for example, of the Court's famous extrapolation of the principle of *non-refoulement* from the bare bones provision of art 3 of the Convention. See, for example, *Soering v United Kingdom* (1989) 11 EHRR 439 at para 87.

[108] See generally S Prebensen, 'Evolutive Interpretation of the European Convention on Human Rights' in P Mahoney and Others, *Protecting Human Rights: The European Perspective. Studies in Memory of Rolv Ryssdal* (Carl Heymanns 2000) 1136.

[109] (1979) 2 EHRR 1 at para 31. See further *Vo v France* (2005) 40 EHRR 12 at [82] and *Mamatkulov and Askarov v Turkey* (2005) 41 EHRR 25 at 121.

[110] As one former judge of the Court has observed: 'It is evident that evolutive interpretation is the appropriate method for interpreting a Convention which deals with situations in society that are subject to constant development … Moreover, a multilateral Convention is a cumbersome instrument whose continual adjustment is a complicated matters, or at least takes a long time: F Matscher, 'Methods of Interpretation of the Convention' in RStJ Macdonald *et al.* (eds), *The European System for the Protection of Human Rights* (Kluwer 1963) 63, 69.

[111] (1979–80) 2 EHRR 25 at para 162.

requirements of a 'fair trial' in Article 6 of the Convention, trial proceedings must take full account of the age, level of maturity and intellectual and emotional capacities of the child in question; and steps must be taken to promote his or her ability to understand and participate in the proceedings.[112] The value of this approach in cases involving children cannot be gainsaid, particularly because the Convention itself makes relatively few distinctions as regards the special vulnerability of children in its terms.[113]

In a similar vein, the Court has recognized that many of the rights in the Convention have horizontal effect and give rise to positive, as well as negative obligations.[114] This approach has also been utilized by the Court to great effect in cases dealing with vulnerable groups, [115] including children. For example, the Court engaged this approach in the case of *Z v United Kingdom*, which concerned the failure of the respondent State's social services to take reasonable steps to protect children from long-term abuse meted out by their parents. In finding a violation of Article 3 of the Convention, the Court held that the positive measures envisaged by the general terms of Article 3 'should provide effective protection, in particular, of children and other vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge'.[116]

The Court has drawn on each of the above principles, sometimes on their own or in combination, to aid it in the interpretive task of delineating the reach of the Convention's provisions or breathing normative life into its more opaque or imprecise terms.[117] In drawing on them, the Court has garnered a reputation in some quarters of being an impressive hub of doctrinal innovation.[118] But at the same time, their deployment has also produced tensions occasionally within the Court itself and to criticism of overt judicial activism and illegitimate 'over-reaching'.[119] This is particularly so in regard to the

[112] (2000) 30 EHRR 121 at 86.

[113] U Kilkelly, *The Child and the European Convention on Human Rights* (Ashgate 2000) 2–4.

[114] See *A v United Kingdom* (1999) 27 EHRR 611, para 22.

[115] L Helfer and A Slaughter, 'Towards a Theory of Effective Supranational Adjudication' (1997) 107 YaleLJ 273, 312.

[116] *Z and Others v United Kingdom*, (2002) 34 EHRR 3 para 73.

[117] See generally D Popovic, 'Prevailing of Judicial Activism over Judicial Self-Restraint in the Jurisprudence of the European Court of Human Rights' (2009) 42 CreightonLRev 361.

[118] T Koopmans, 'The Roots of Judicial Activism' in F Matscher and H Petzhold (eds), *Protecting Human Rights: The European Dimension, Studies in Honor of Gerard Wiarda* (Heymanns 1988) 318.

[119] See for example the joint dissenting opinion of Judges Wildhaber, Costa, Lorenzen, Kovler and Jebens in the controversial Grand Chamber Judgment of the Court in *Hirst v United Kingdom* (2006) 42 EHRR 41 in which the majority found a violation of art 3, Protocol 1 of the Convention to exist in refusing the applicant prisoner the right to vote: 'We do not dispute that it is an important task for the Court to ensure that the rights guaranteed by the Convention system comply with "present-day conditions", and that accordingly a "dynamic and evolutive" approach may in certain situations be justified. However, it is essential to bear in mind that the Court is not a legislator and should be careful not to assume legislative functions. An "evolutive" or "dynamic" interpretation should

evolutive approach, the application of which can be perceived to be unscientific where a thorough-going analysis of contemporary legal developments in the Contracting States is lacking.[120] Likewise, application of the principle of effectiveness and the doctrine of positive obligations can be disparaged where they serve merely as strategies for judicial policy-making, capable of use without any empirical constraint.[121]

Interestingly, and perhaps in response to these criticisms, in recent years the Court has increasingly drawn on a further method to buttress its basic repertoire of approaches; one that if deployed correctly, can provide a clear empirical basis for extending positive obligations, grounding evolutive and effectiveness approaches and which is capable of justification in its own right on practical and principled grounds. That is an approach which looks to other international instruments and the views of authoritative human rights bodies as an aid to interpreting the Convention. In the case of *Loizidou v Turkey*, the Court explained that the rationale for this approach was based on its view that:

> the principles underlying the Convention cannot be interpreted and applied in a vacuum. Mindful of the Convention's special character as a human rights treaty, [the Court] must also take into account any relevant rules of international law when deciding on disputes concerning its jurisdiction.[122]

In subsequent cases, the Court has more typically relied on other international instruments, not as a means of expanding its own jurisdiction, but rather as an aid to interpreting the scope of particular rights in the Convention and their application to particular factual circumstances.[123] Thus, in *Demir and Baykara v Turkey*, in response to an objection by Turkey to the prospect of the Court relying on international instruments other than the Convention to flesh out the precise contents of the right to freedom of association in Article 11, the Grand Chamber of the Court responded that in defining the meaning of terms in the text of the Convention, the Court could and *must* take into account elements of international law other than the Convention, their

have a sufficient basis in changing conditions in the societies of the Contracting States, including an emerging consensus as to the standards to be achieved. We fail to see that this is so in the present case'.

[120] See, for example, the critique of the case of *Marckx v Belgium* in JG Merrills, *The Development of International Law by the European Court of Human Rights* (2nd edn, Manchester University Press 1993) 74. See the account given by Robin White during interviews with the Strasbourg Judges of attitudes to the 'living instrument' concept: 'All agreed that the rights protected were not static, but not all agreed about the right time to move forward, or to pull back': R White, 'Judgments in the Strasbourg Court: Some Reflections' available at SSRN: <http://ssrn.com/abstract=1435197> or <http://dx.doi.org/10.2139/ssrn.1435197>.

[121] Merrills (n 120) 108.

[122] (1997) 23 EHRR 513 at para 43.

[123] Merrills (n 120) at 218 has identified three circumstances in which the Court tends to look to other international instruments: (i) when a provision needing interpretation was inspired by another instrument: (ii) when the Convention omits certain rights guaranteed in another treaty, in order to justify an interpretation that the ECHR does not protect such right: and (iii) to show that a particular interpretation is in harmony with other human rights obligations.

interpretation by competent organs and the practice of European States reflecting their common values'.[124] Clearly perceiving this comparative approach to be a logical corollary of its evolutive and purposive methodologies, the Court justified its reliance on the international law background to the legal question before it as follows:

> Being made up of a set of rules and principles that are accepted by the vast majority of states, the common international or domestic law standards of European states reflect a reality that the Court cannot disregard when it is called upon to clarify the scope of a Convention provision that more conventional means of interpretation have not enabled it to establish with a sufficient degree of certainty.[125]

Further, the Court affirmed that such reliance can even occur in circumstances where the instruments being drawn on have not been ratified by the particular respondent State or indeed by a majority of Council of Europe States generally:

> It will be sufficient for the Court that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of Member States of the Council of Europe and show, in a precise area, that there is common ground in modern societies.[126]

Clearly, the legitimacy of this latter position is more compelling where the instruments being relied upon have indeed been ratified by a majority of Council of Europe States.[127] Extrapolating from Waldron's principled arguments in favour of the comparative method where domestic courts are concerned, such an approach lends itself to consistency and coherence.[128] It makes sense that like cases are treated alike or as Bell explains, that there is

[124] (2009) 48 EHRR 54 at para 85. See further C Barrow, 'Demir and Baykara v Turkey: Breathing Life into Article 11' (2010) EHRLR 419–23.

[125] Court Judgment, ibid para 76.

[126] ibid para 86.

[127] Unfortunately, in propounding it, the authority which the Court relied on is the case of *Marckx v Belgium* regarding the legal status of children born out of wedlock in which the Court based its interpretation of the meaning of 'family life' in art 8 of the Convention on two international conventions of 1962 and 1975 that Belgium, like other States' parties to the Convention, had not yet ratified at the time: (1979–80) 2 EHRR 330 at [20] and [41]. As Merrills notes, the justification adopted by the Court for relying on the international instruments in question in that case (that their mere existence indicated 'common ground' between States on a principle of law that was widely accepted in the domestic law of many of the Contracting States) is less convincing than reliance in cases where the international instrument in question has been widely ratified by Council of Europe States: (n 120) at 224–6.

[128] J Waldron, 'Treating Like Cases Alike in the World: The Theoretical Basis of the Demand for Legal Unity' in S Muller and S Richards (eds), *Highest Courts and Globalisation* (Hague Academic Press 2010) 109. See further A Hol, 'Highest Courts and Transnational Interaction: Introductory and Concluding Remarks' (2012) 8 Utrecht Law Review 1.

'a common enterprise between legal systems'[129] or in this case, between international legal instruments.[130]

The comparative approach and the principle of effectiveness in particular are mutually reinforcing methodologies. Even in cases where apparently contradictory instruments are simultaneously applicable, the Court will strive to achieve a 'combined and harmonious' interpretation of those instruments, together with the Convention, provided that the Court can, in so doing, achieve an interpretation of the Convention that is practical and effective.[131] In this respect, Helfer and Slaughter have commented that the Court's policy of 'thoughtful convergence'[132] has enhanced its authority and helps to contribute to a 'global community of law' that is better equipped to insulate itself from political interference.[133]

The trend of reliance on related international law and human rights instruments has been especially marked in regard to cases dealing with the rights of the child, particularly those dealing with access and custody in interpreting Article 8 of the ECHR.[134] Although some uncertainties prevail as regards the weighting of the best interests principle in the Court's case law, it has continuously applied the principle that in all cases concerning children, their best interests must be paramount.[135] As Van Beuren notes, all of the States parties to the ECHR are simultaneously parties to the CRC, making the latter Convention a natural candidate for providing 'an additional instrument of legitimacy and guidance with which to protect the human rights of children'.[136] Given the depth and range of rights in the CRC, together with the best interests principle, its use as a reference point by the Court in interpreting the ECHR can manifestly influence a positive outcome in cases

[129] J Bell, 'The Argumentative Status of Foreign Legal Instruments' (2012) 8 Utrecht Law Review 9, 14. See further GL Neuman, 'Human Rights and Constitutions in a Complex World' (2013) 50 Irish Jurist 1–10 on the value of mutual dialogue between human rights tribunals at the national, regional and international level.

[130] See in this context the discussion of the European Court of Human Rights' experience in regard to cross-fertilization with other expert human rights bodies in V Mantouvalou, 'Labour Rights in the European Convention on Human Rights: An Intellectual Justification for the Integrated Approach to Interpretation' (2013) 13(3) HRLR 529, 538–41.

[131] *X v Latvia*, Grand Chamber Judgment of the European Court of Human Rights, 26 November 2013, App No 2785309, para 93.

[132] Helfer and Slaughter (n 115) 281.

[133] ibid 282 and see generally 366ff.

[134] The Court has regularly held that the positive obligations in art 8 of the ECHR regarding a parent's right to be reunited with his or her child must be interpreted in the light of the CRC and the Hague Convention of 25 October 1980 on the civil aspects of international child abduction: See, for example, *Maire v Portugal* (2006) 43 EHRR 13; *Maumousseau and Washington v France* (2010) 51 EHRR 35.

[135] *Neulinger and Shuruk v Switzerland*, App No 41615/07, Grand Chamber Judgment of the European Court of Human Rights, 6 July 2010, para 135.

[136] G Van Beuren, *Child Rights in Europe* (Council of Europe Publishing 2007) 19. See further U Kilkelly, 'The Best of Both Worlds for Children's Rights: Interpreting the European Convention on Human Rights in the light of the UN Convention on the Rights of the Child' (2001) HumRtsQ 23 (2), 308–26.

involving children. With these observations in mind, it is worth testing whether this approach has helped the Court to adapt the hitherto dormant provisions of Article 4 to cases dealing with child labour.

1. Child labour and the European Court of Human Rights

For many years, Article 4 of the ECHR lay bereft of interpretation, reflecting the hidden nature of many of the practices which were yet to emerge as modern manifestations of the traditional notions of slavery and labour abuse that it was intended to address. Initial case law of the former European Commission on Human Rights was concerned mainly with testing the limits of permissible work obligations for adults in professional fields of employment.[137] It was not until the case of *Siliadin v France* that the European Court of Human Rights had to assess the application of Article 4 to any case concerning a child.[138] In that case, the applicant was a 15-year-old Togolese girl who had been brought to France with the consent of her family to work as a housemaid and to look after four children for 15 hours a day, seven days a week, without pay for several years. She claimed before the European Court of Human Rights that Article 4 ECHR had been violated in her case since the only penalty imposed on her employers was a civil one to pay compensation.

The Court held unanimously that there had been a violation of Article 4 by reason of the State's failure to put in place criminal law legislation sufficient to protect the applicant child from treatment which amounted to servitude and forced labour. As such, the ruling was a welcome first step in elucidating the relevance of Article 4 to domestic service involving children. Arguably, however, the Court's failure to apply the various interpretive methodologies described above in a coherent manner resulted in a judgment that failed to fully maximize the reach of the Convention to the facts at hand. On the one hand, the Court applied its comparative approach to deduce positive obligations from the text of Article 4 to adopt criminal law provisions to protect minors in Siliadin's situation. But as Cullen notes, the Court appears to have been reluctant to ensure that the positive obligations extended beyond the adoption of criminal law measures to ensuring compensation for victims.[139] A fuller engagement with the range of positive obligations envisaged by the gamut of international instruments described above might have prompted the Court precisely in that direction. In particular, a consideration of the wide spectrum of positive obligations identified by the European Committee on Social Rights (ECSR) implicit in the Convention's sister instrument —the

[137] See the cases of *Iversen v Norway*, Admissibility Decision of 17 December 1963, A 1468/62 (1963) Yearbook of the European Convention on Human Rights 278; and *Van der Mussele v Belgium*, Admissibility Decision of 23 November 1983, Series A No 70 (1984) 6 EHRR 163.

[138] (2006) 43 EHRR 16.

[139] H Cullen, '*Siliadin v France*: Positive Obligations under Article 4 of the European Convention on Human Rights' (2006) HRLR 585, 589–91.

European Social Charter—as well as those identified by the Committee on the Rights of the Child in regard to the CRC would have greatly illuminated the possibilities for similar development of Article 4 of the Convention.

The same is true as regards the Court's application of the comparative approach to elucidate the core content of each of the terms prohibited by Article 4. By reference to the 1926 Slavery Convention, the Court notoriously decided that the applicant had not been subjected to slavery because the couple who employed and exercised control over her did not have "a genuine right of legal ownership over her, thus reducing her to the status of an 'object'".[140] With reference to the Supplementary Convention on the Abolition of the Slave Trade, the Court held that *Siliadin* had been a victim of servitude as prohibited by Article 4 which it held consists of an obligation to provide one's services by the use of coercion, as opposed to legal ownership.[141] Further, it entails the obligation of a 'serf' to live on another's property and the impossibility of changing his or her status, as was the case in regard to the applicant.[142] Finally, the Court held that she had also been subjected to forced labour by reference to the definition in the 1930 Forced Labour Convention, viz. 'all work or service which is exacted from a person, involuntarily and under the menace of any penalty'. Using that definition, the Court held that she had satisfied the double requirement to show that she had been doing the work against her will and that she had effectively been under a menace of penalty since the threat about her immigration status was always in the atmosphere and referred to by the perpetrators.[143]

Far from raising concerns about overt judicial activism, the judgment in *Siliadin* evidences a remarkable level of judicial restraint to the interpretation of the concepts in Article 4. While it mentions the fact that the Convention is a living instrument which must be interpreted in the light of present-day conditions, the judgment fails to apply the evolutive method with reference to current data available on the nature and scale of domestic labour abuse. Further, the court's application of the comparative method is also deficient in that the substantive judgment makes no mention of the Palermo Protocol or the (admittedly newly drafted) Council of Europe Trafficking Convention, despite the fact that the facts of the case had all the hallmarks of a child-trafficking situation (where the question of consent is irrelevant). Likewise, no reference is made to the 1999 ILO Convention on the Worst Forms of Child Labour which, as outlined above, contains examples of slavery like practices that could have informed the reasoning of the Court in its interpretation of the terms.[144] Rather, the Court indulges in an almost

[140] *Siliadin* (n 138) para 122.
[141] ibid paras 124–125.
[142] ibid paras 123–129.
[143] ibid paras 118–20.
[144] Cullen (n 139) 591.

https://doi.org/10.1017/S0020589315000172 Published online by Cambridge University Press

mechanical invocation of definitions of slavery, servitude and forced labour forged in instruments drafted decades ago.[145]

It is submitted that a better approach to interpreting the concepts in Article 4 would have been to adopt similar reasoning to that which the Court routinely adopts in interpreting Article 3 of the Convention. In that context, the Court has long since based its consideration of whether ill-treatment constitutes 'torture', 'inhuman' or 'degrading' treatment or punishment by reference to the severity of the treatment in tandem with the relative assessment of the particular circumstances approach outlined above. In *Selmouni v France*, the Court combined this reasoning with its 'living instrument' approach in holding that certain acts which were classified in the past as 'inhuman and degrading treatment' as opposed to 'torture' could be classified differently in future.[146] This was so because the increasingly high standard required in regard to human rights protection 'correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies'.[147] Moreover, in Article 3 cases, the fact that treatment is meted out to children is consistently regarded as a factor that will tip the balance in deciding whether it violates Article 3 and the extent to which it violates that Article. By analogy, therefore, a logical approach for the Court in analysing Article 4 cases would be to conceptualize slavery, servitude and forced labour along a spectrum of actual control exercised by the perpetrator together with a consideration of the severity of exploitation at issue. Such a spectrum test should be supplemented by a relative assessment of the individual characteristics of the victim.

Applying this spectrum test in combination with the relative assessment approach to the facts of *Siliadin*, it is submitted that the virtual imprisonment of a 15-year-old girl in a household, performing myriad household chores, 15 hours a day, seven days a week would more readily be imagined as a modern form of slavery. The conclusion that the Court pays insufficient attention in fact to the status of an applicant as a child in these cases is fortified by its subsequent decision in *CN v United Kingdom*.[148] This case involved very similar facts to those arising in *Siliadin*, save that the applicant in this case was an adult female. In analysing whether there had been a violation of Article 4 of the Convention by reason of the failure of the State to investigate properly her situation, the Court held that there had been a credible suspicion that the applicant had, like *Siliadin*, also been held in domestic servitude.[149] Surely the status of an

[145] In this respect, it has been criticized in particular for adopting a definition of slavery as involving 'a genuine right of legal ownership' which appears to be narrower than the definition supplied in the Slavery Convention and which bears no relationship with the reality of modern legal systems in Europe where no such right arises: see J Allain, '*Rantsev v Cyprus and Russia*: The European Court of Human Rights and Trafficking as Slavery' (2010) HRLR 546, 557.

[146] 28 July 1999, (2000) 29 EHRR 403, para 101.

[147] ibid.

[148] (2013) 56 EHRR 24.

[149] ibid para 72.

applicant as a child should make a material difference to the court's determination in these cases? Applying the spectrum/relative assessment approach and taking account of prevailing standards in Europe, the acute loss of power and agency of the vulnerable child logically warrants the more condemnatory designation of slavery.

The shortcomings identified in the Court's judgment in *Siliadin* were to a large extent ameliorated by its subsequent judgment in the case of *Rantsev v Cyprus and Russia*.[150] Although not dealing with child labour (but rather with the plight of a young, Russian woman who became the victim of human trafficking in Cyprus) the Court took the opportunity in that case to expand greatly on the first steps taken in *Siliadin* to develop the potential influence of Article 4 of the Convention in preventing modern forms of slavery and protecting its victims.[151] Combining all of the principal methodologies outlined above—the principle of effectiveness, the evolutive method and the comparative approach—the Court concluded that human trafficking (as defined in the Palermo Protocol and the Council of Europe Anti-Trafficking Convention) fell within the scope of Article 4 of the ECHR, without considering it necessary to specify whether the trafficking about which the applicant had complained actually constituted 'slavery', 'servitude' or 'forced and compulsory labour'.[152] While it would undoubtedly have been more helpful if the Court had identified which particular concept specified in Article 4 had been breached on the facts, the statement that it was *unnecessary* to do so indicates that the Court does not necessarily equate trafficking essentially with slavery, as argued by Allain.[153] Rather, it indicates that the Court understands the potential for trafficking to take shape in many different guises and levels of egregiousness. It is unfortunate that the Court did not take the opportunity in *Rantsev* to articulate such manifestations in accordance with the spectrum test advocated above.[154]

More significantly, the *Rantsev* case emphatically builds on *Siliadin* by expanding on the range of positive obligations inherent in the terms of Article 4 as regards victims and potential victims of trafficking.[155] Taking into account evidence of the nature and proliferation of human trafficking, previous case law on Articles 2 and 3 of the Convention, as well as the provisions of the Palermo Protocol, the Court held that in addition to criminal

[150] (2010) 51 EHRR 1.

[151] See generally R Piotrowicz, 'States' Obligations under Human Rights Law towards Victims of Trafficking in Human Beings: Positive Developments in Positive Obligations' (2012) 24 IJRL 181–201.

[152] *Rantsev* (n 150) paras 272–282.

[153] Allain (n 145) 553–4.

[154] The reluctance to do so may have been due to the paucity of factual evidence available in the case regarding the precise nature of the exploitation visited on the victim in this case.

[155] See generally R Pati, 'States' Positive Obligations with Respect to Human Trafficking: The European Court of Human Rights Breaks New Ground in *Rantsev v. Cyprus and Russia*' (2011) 29 Boston University Law Journal 79.

law provisions, Article 4 ECHR requires States to take operational measures to protect victims of trafficking or potential victims.[156] Amongst those obligations identified by the Court that have potentially wider application than the specific crime of trafficking include the observation by the Court that the obligation to take action arises where the State authorities are aware or ought to be aware of the circumstances giving rise to a credible suspicion that an identified individual has been, or is at a real and immediate risk of being exploited.[157] The authorities are then obliged to take appropriate measures to remove the individual from that situation of risk.[158] These measures include ensuring the physical safety of victims and officials must be trained in this area. Further, Article 4 also entails procedural obligations to investigate allegations of trafficking (and by inference, other infractions of Article 4), according to the same investigative obligations as have been identified with respect to Articles 2 and 3.[159] This obligation does not necessarily have to be triggered by a complaint from a victim or next of kin; once the matter has come to the attention of the authorities, they must act on their own motion.[160] Recognizing the often cross-border nature of the phenomenon, the Court also held that States are obliged under Article 4 to cooperate with the relevant authorities of other States concerned in the investigation of events occurring outside their territories;[161] while countries of origin, in particular (in this case, Russia) are obliged specifically to investigate the operation of networks on their territories engaged in the recruitment of victims.[162]

Stoyanova is critical of the Court in *Rantsev* for adopting the human trafficking context as a frame of reference in analysing and adjudicating on the alleged violations at hand, rather than simply examining whether the particular factual circumstances of the case amounted to a violation of Article 4.[163] In her view, the adoption of the trafficking lens inevitably led the Court to apply an anti-immigration and anti-prostitution agenda, eschewing in the process substantive engagement with the meaning of the concepts articulated in Article 4.[164] She argues that the Court should have discarded the trafficking lens, clarified the scope of the existing concepts and assessed whether the regulatory framework in place in Cyprus offered the necessary protection and assistance, especially in regard to vulnerable

[156] *Rantsev* (n 150) para 286.
[157] ibid.
[158] ibid para 287.
[159] ibid para 288.
[160] ibid para 288.
[161] ibid para 289.
[162] ibid paras 307–309.
[163] V Stoyanova, 'Dancing on the Borders of Article 4: Human Trafficking and the European Court of Human Rights in the Rantsev Case' (2012) 30(2) Netherlands Quarterly of Human Rights 163.
[164] ibid 177–80.

https://doi.org/10.1017/S0020589315000172 Published online by Cambridge University Press

migrant workers.[165] Moreover, she speculates that the trafficking lens led the Court to impose a more demanding test on States in terms of their positive obligations in respect of Article 4, ie that a violation may be established where it can be shown that the authorities knew or ought to have known of a 'credible suspicion' of a real and immediate risk of trafficking rather than an *actual* risk of this occurring.[166] While agreeing that a greater focus on the material content of the concepts in Article 4 would undoubtedly have been more helpful in elucidating the material scope of Article 4, the alternative perspective offered here is that the adoption of a trafficking lens is a form of 'relative assessment' that was crucial to the identification of the legal obligations inherent in Article 4. By recognizing the special vulnerability of the applicant as a victim of human trafficking, the Court went on to elaborate highly specific positive obligations which are vital in tackling the hidden nature of that phenomenon. Human trafficking in all its guises (including for the purposes of labour exploitation) is notoriously difficult to detect, precisely because of the physical and/or psychological power exerted over victims by their traffickers. As Gallagher notes, detection is exponentially more difficult prior to the actual exploitation phase,[167] thus making the obligation to investigate and identify situations of human trafficking and the adoption of the 'credible suspicion' standard all the more important. This is particularly true in cases of child trafficking where the victim herself might have no conception that she is a 'victim' of trafficking, much less of any crime proper.[168] Moreover, had the trafficking lens not been adopted, it is doubtful that the Court would have been inspired to extend the positive obligations of investigation to the State of origin (Russia) or to consider the importance of cross-border cooperation between States in combatting the phenomenon.

These observations are put in sharp relief on close analysis of the Court's most recent judgment in *CN and V v France* involving children in domestic labour.[169] The case concerned two sisters from Burundi who were 'brought' as children to France by their aunt after the civil war which had claimed the lives of their parents. At the time of their arrival in France, the children were aged 16 and 10 respectively. Their aunt was married to a former government minister from Burundi who was working in the diplomatic service. The couple had seven children, one of whom was disabled. When the girls arrived, they were housed 'in deplorable conditions of hygiene in an unheated, insalubrious basement' in circumstances where they had no access

[165] ibid.
[166] ibid 192–3.
[167] Gallagher (n 77) 282–3.
[168] See E Goździak, 'Identifying Child Victims of Trafficking: Towards Solutions and Resolutions' (2010) 9(2) Criminology and Public Policy 245.
[169] App No 67724/09, Judgment of the European Court of Human Rights, 11/10/2012, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-114032#{"itemid":["001-114032"]}>.

https://doi.org/10.1017/S0020589315000172 Published online by Cambridge University Press

to a bathroom and had to fetch a pail of water from the kitchen to wash themselves.[170] Both girls were forced to work as housemaids to varying degrees. The first applicant was never sent to school. She spent all day doing housework and looking after the couple's disabled child.[171] The second applicant was sent to primary school, but when she got home from school, she would have to help her sister with domestic chores. Both were unpaid and not given any days off.[172] The aunt constantly threatened the girls with being sent back to Burundi and each alleged that she had been physically and verbally abusive to them on a daily basis. The second applicant claimed further that the work she had to do for the couple led her into difficulties at school; that she had suffered from the neglect of her health and development; and that she had been deprived of all the leisure, games and other activities normally enjoyed by children her age.[173] An initial investigation by the child police protection services a year after the girls' arrival resulted in no action being taken.[174] Action was finally taken by the Nantes public prosecutor some three years later, following representations by an NGO.[175] The couple's diplomatic immunity was lifted and they were eventually prosecuted and convicted by the domestic criminal court for treatment contrary to human dignity and further, in the aunt's case, of aggravated wilful violence against the second applicant. While the latter conviction was upheld, the former conviction against both parties was later overturned on appeal.[176] Relying on Article 4 of the ECHR, the applicants claimed that France had failed in its positive obligations to protect them from being held in servitude and subjected to forced or compulsory labour at the hands of their aunt and uncle. While neither child argued before the Court that they had been subjected to slavery, they did put forward the claim that their situation had all the hallmarks of human trafficking.[177]

Bearing in mind the foregoing analysis of the range of interpretive techniques available to the Court, contextual information and even the progression in the Court's own case law from *Siliadin* to *Rantsev*, the judgment in *CN and V v France* represents a very unfortunate step backwards for the plight of children in hidden situations of domestic abuse and particularly so for those who are trafficked for this purpose. This is so because of the reasoning of the

[170] This description comes from the Judgment of the Nantes Criminal Court which subsequently convicted the couple of having subjected the applicants to treatment contrary to human dignity: ibid para 44.
[171] ibid.
[172] ibid.
[173] ibid para 82.
[174] ibid para 16.
[175] ibid paras 21 and 22.
[176] ibid paras 46–47. The appeals were upheld on the basis that while the living conditions of the applicants were 'poor, uncomfortable and blameworthy' they did not reach the requisite criminal standard.
[177] ibid para 83.

https://doi.org/10.1017/S0020589315000172 Published online by Cambridge University Press

Court in deciding whether each of the two applicants had been subjected to servitude and forced labour within the meaning of Article 4 ECHR and because of the limited reach of its analysis in respect of the positive obligations inherent in that provision. As to the first issue, it is striking that despite the applicants' arguments, the Court declined to conceptualize the case as one of human trafficking on the basis that it had more in common with the *Siliadin* case than with *Rantsev*, concerning as it did 'activities related to "forced labour" and "servitude", legal concepts specifically provided for in the Convention'.[178] Accordingly, the Court began its analysis with the categorization of 'forced labour' and 'servitude' which it had applied in the earlier case of *Siliadin*. Reasoning that the type and amount of work involved helps to distinguish between 'forced labour' and a 'helping hand' which can reasonably be expected of family members, the Court held that while the older child had been subjected to forced labour, the treatment of the younger girl was not sufficiently excessive to amount to forced labour within the meaning of Article 4.[179] This conclusion appears to be noticeably at odds with the reality of the younger child's situation as accepted by the domestic courts. What is particularly striking is that there is hardly a mention of the child's status as a minor (aged at the time of the events between 10 and 14 years of age). There is no allusion at all to the CRC or relevant international instruments outlined above in regard to acceptable conditions of work for children. Clearly, the application of a relative/child-centred lens in combination with a fuller appreciation of the legal and factual context of human trafficking for the purposes of domestic labour would have alerted the Court to the hidden nature of this phenomenon and more importantly to prevailing standards in the field. These include, as noted earlier, an outright ban on work of any description for children under the age of 13.

On servitude, the Court held that the fundamental distinguishing feature between it and forced labour lay in the feeling induced in the victim that their condition is permanent and unlikely to change. While this can be based on objective factors (such as the obligation to live on another's property) it can be sufficient if the feeling 'is brought about or kept alive by those responsible for the situation'.[180] In this sense, the Court appears to have moved in the direction of a spectrum test by characterizing 'servitude' as an 'aggravated' form of forced or compulsory labour without the rigid categorization given to it 'to live on another's land' applied in *Siliadin*.[181] Applying this reasoning to the facts at hand, however, the Court held that while the older child had accordingly been kept in a state of servitude, the younger child had not, since

[178] ibid.

[179] ibid paras 75–79. The second requirement to show that the work was done 'under threat of penalty' was satisfied in the first applicant's case because of the constant threat made to the two applicants that they would be sent back to Burundi.

[180] ibid para 91.

[181] ibid paras 90–91.

she had attended school and her activities had not been as confined as that of her older sister.[182] Again, the failure to take a child-centred view and to consult relevant international instruments in the field resulted in a conclusion that falls far short of those standards as they have been applied by other human rights bodies, including the Court's sister body, the ECSR. Clearly, the ability to attend school is not the distinguishing factor in that Committee's view, but rather whether the work involved is detrimental to the child's health and development and her ability to obtain maximum advantage from schooling and to integrate satisfactorily in society.[183] The maximum guideline of 20–25 hours per week envisaged by the ECSR for 'light work' seems easily to have been exceeded in this case as regard of the second applicant, though the Court appears to have paid little attention to the precise hours involved.

The Court's findings in regard to the positive obligations owed by the State were equally truncated by its failure to fully explore the legal and factual context of the case at hand. On this front, it held that the domestic law in place was the same as in the *Siliadin* case, as a result of which there had been a violation of Article 4 in regard to the first applicant as regards the State's obligation to put in place a legal and administrative framework to effectively combat servitude and forced labour.[184] While this is a positive result on the facts, the judgment fails to engage substantially with the realities of child domestic labour and trafficking by neglecting to specify the need for States to lay down standards for permissible 'light work' involving children. Indeed, the only other explicit obligation even considered by the Court was whether the State had failed to investigate fully a situation of potential exploitation. In this respect, despite pointers given by the third party interveners regarding the special measures and procedures required by the Council of Europe Trafficking Convention to identify child victims of trafficking,[185] the Court merely applied the principles set forth in *Rantsev* regarding measures of investigation. Taking account of the investigations that had been carried out, it held that there was no evidence of unwillingness on the part of the authorities to identify and prosecute the offenders, particularly in view of the applicants' personal failure to alert them to the full extent of their situation.[186] This focus on the perceived lassitude of the victims is strikingly at odds with contemporary understanding of the range of reasons why abuse victims (especially foreign born child victims of trafficking) may be reluctant or even incapable of self-identifying.[187] This is presumably the reason why other human rights bodies,

[182] ibid paras 92–93.
[183] *International Commission of Jurists v Portugal* (n 70) para 30.
[184] ibid paras 107–108.
[185] ibid para 103.
[186] ibid para 110.
[187] See H Clawson, N Dutch, A Salomon and L Goldblatt Grace, 'Study of HSS Programs Serving Human Trafficking Victims' (US Department of Health and Human Services 2009) 18–22 available at <http://aspe.hhs.gov/hsp/07/humantrafficking/final/index.pdf>.

such as the Committee on the Rights of the Child, the ECSR and GRETA have stressed the best interests of the child principle in interpreting analogous provisions and have emphasized the need for States to put in place effective and coordinated supervisory structures extending beyond the level of a general Labour Inspectorate but also involving educational and social services. As numerous case studies have shown, training of law enforcement officers and immigration officials at border entry points is also particularly important to improve identification of children being trafficked across borders for the purposes of exploitation.[188] Had the Court applied a child-centred lens and fully taken account of the challenges faced and procedures necessary to identify child victims of labour abuse in all its various guises, it might have recognized the potential for reading child-specific obligations into the text of Article 4 in that respect.

The unfortunate result of the *CN & V v France* case is that it constituted a missed opportunity for the Court to build on the *Rantsev* judgment by taking a far tougher stand in respect of what would appear to have been a classic case of the type of domestic child labour exploitation happening in Europe and identified at the outset of this Article. The *Rantsev* case demonstrated that when account is taken of the extent and nature of a particular problem as well as the full range of comparative instruments designed to tackle it, the resulting analysis by the European Court of Human Rights leads to more extensive and context-specific outcomes. A similar observation can be made in regard to cases dealing with the phenomenon of domestic violence[189] and reception conditions for asylum seekers.[190] The failure to situate the facts of the case in the particular context of child labour as well as to take account of other international instruments aimed at combatting it probably contributed to what appears to be a wholly inadequate response to the situation of the younger child and to limited obligations generally. This is particularly regrettable given the Court's influence in shaping substantive law and policy in Europe and beyond.

V. CONCLUSION

Writing in 1979, Judge O'Donoghue in the case of *Ireland v United Kingdom* observed in relation to the interpretation of Article 3 of the ECHR that: 'One is not bound to regard torture as only present in a mediæval dungeon where the appliances of rack and thumbscrew or similar devices were employed.'[191]

[188] See the detailed case study referenced by Goździak (n 168) which bears a marked resemblance to the facts of *CN and V v France*.

[189] See for example the Court's analysis in *Opuz v Turkey* in which it took account at the outset of the gravity of the general problem of domestic violence affecting all of the Member States of the Council of Europe: (2010) 50 EHRR 28, para 132.

[190] See *M.S.S. v Belgium and Greece* (2011) 53 EHRR 2, para 255.

[191] *Ireland v United Kingdom* (n 111) at 115–116.

https://doi.org/10.1017/S0020589315000172 Published online by Cambridge University Press

Apparently, the Court has heeded that advice, as interpretation of the latter provision has been explicitly adjusted to reflect a very high standard of protection against the full spectrum of ill-treatment envisaged by its terms and particularly as regards children. Clearly, the Court has had less opportunity to consider the terms of Article 4 so that interpretation of its concepts and material scope is still evolving. As the foregoing analysis has demonstrated, however, recent case law has been erratic in its response to the phenomenon of child labour—an increasingly common but clandestine practice in Europe, often linked to the rise of human trafficking. In view of its role and capacity as the region's principal human rights court, the European Court of Human Rights has the capacity to greatly influence law and policy in Europe in tackling this phenomenon. In order to do so, the Court needs to be conscious of the phenomenon at large and to draw on the full range of interpretive tools at its disposal so as to give contemporary relevance to the concepts and parameters of Article 4. In this respect, it has been argued that the Court should draw more systematically on its comparative method by taking comprehensive account of specific provisions identified in relevant international instruments regarding children as well as their interpretation by other authoritative human rights bodies. Further, the Article has argued by analogy with the development of Article 3 case law, that there is great scope for developing the content of Article 4 in a more coherent manner by adopting a spectrum test in combination with a relative assessment approach. Such a double-edged approach would undoubtedly help to bring to the fore the particular vulnerability of children to labour exploitation and to a higher standard of protection in their case.