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# Human trafficking and forced prostitution under article 4 of the European convention on human rights

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## Abstract

We discuss the issue of bringing human trafficking and forced prostitution within the purview of Article 4 of the European Convention on Human Rights. The judgment of the European Court of Human Rights in *Rantsev v. Cyprus and Russia* marked a turning point by classifying forced prostitution through human trafficking under Article 4. However, in the judgment in *S.M. v. Croatia*, the ECtHR further reinforced its view that human trafficking and forced prostitution constitute a violation of Article 4.

We explain human trafficking and forced prostitution both theoretically and through a number of international legal acts. We then explain Article 4 of the Convention and provide a comprehensive analysis of the material and procedural guarantees against human trafficking and forced prostitution. We also comment on the positive obligations that the ECtHR set for Member States. The authors believe that, despite numerous criticisms, the ECtHR's position is correct and that both human trafficking and forced prostitution violate the principles of democratic society. Therefore, victims must enjoy the protection afforded by Article 4 of the Human Rights Convention and other conventions if their life situation falls within their scope.

**Keywords:** human trafficking; forced prostitution; slavery; Article 4 of the European Convention on Human Rights; positive obligations of states

*On dit que l'esclavage a disparu de la civilisation européenne. C'est une erreur. Il existe toujours, mais il ne pèse plus que sur la femme, et il s'appelle prostitution.*<sup>1</sup>

Victor Hugo, *Les Misérables*

Observing human trafficking and forced prostitution in the context of human rights is not easy. The main aim of this paper is to explain the European Court of Human Rights (ECtHR) case law in relation to human trafficking and forced prostitution under Article 4 of the European Convention on Human Rights (the Convention). The ECtHR has not had many opportunities to evaluate whether or not treatment related to human trafficking and forced prostitution exploitation falls within the scope of the Convention. The jurisprudence gained momentum after the well-known case of *Rantsev v. Cyprus and Russia*<sup>2</sup>, and the criteria for including these terms under Article 4 of the Convention have been further clarified in its latest judgments. After the

<sup>1</sup>“They say slavery has vanished from European civilization. That is wrong. It still exists, but it now preys only on women, and it goes by the name of prostitution.”

<sup>2</sup>*Rantsev v. Cyprus and Russia*, App. no. 25965/04, (Jan. 07, 2010).

*Rantsev* judgment, the ECtHR took an additional step in interpreting Article 4 of the Convention in the *S.M. v. Croatia* judgment.

There are a number of legal and theoretical definitions of these two extremely negative issues in today's world.<sup>3</sup> The literature suggests that human trafficking should be regarded as a global crime.<sup>4</sup> Usually, it is a part of organized crime, but this is not a general rule. Nevertheless, human trafficking and the exploitation of people's vulnerabilities have become an extremely profitable component of organized crime,<sup>5</sup> which was and continues to be a major threat to the legal, economic, and political worlds, prompting the creation of numerous legal documents.<sup>6</sup> Nowadays, the activities of many organized crime groups comprise international smuggling activities such as drug trafficking, illegal immigration, human trafficking for sexual exploitation, arms trafficking, trafficking in stolen vehicles, and other transnational illegal activities such as money laundering and tax evasion, among others.<sup>7</sup> However, human trafficking is not always linked to organized crime, nor does it always have an international dimension, which is important to this Article.

At the EU level, the new EU security strategy takes an important place by prioritizing the protection of society against organized crime, with a special focus on human trafficking.<sup>8</sup> In addition to being important for EU member countries, the EU strategy is also relevant for countries and regions located outside the EU border because it recognizes the need for cooperation with third countries at the global level in order to solve common challenges in a comprehensive response to organized crime that extends beyond the borders of the EU. Through

<sup>3</sup>Brian K. Payne, Willard M. Oliver & Nancy E. Marion, INTRODUCTION TO CRIMINAL JUSTICE: A BALANCED APPROACH 1210 (2019); Bernd Hecker, The EU and the Fight against Organised Crime, in INTERNATIONAL LAW AND TRANSNATIONAL ORGANISED CRIME 76 (Pierre Hauck and Sven Peterke eds., 2016); Kimberley Garth-James, Human Trafficking, in ENCYCLOPAEDIA OF CRIMINAL JUSTICE ETHICS 444–45 (Bruce A. Arrigo, ed., 2014).

<sup>4</sup>Roza Pati, *States' positive obligations with respect to human trafficking: The European Court of Human Rights breaks new ground in Rantsev v. Cyprus and Russia*, 29 BOSTON UNIV. INT. LAW J. 81, 101 (2011). Human trafficking is frequently recognized as one of today's most challenging difficulties and dangers to security, and it is characterized by tremendous reward and minimal risk for perpetrators. SAŠA MIJALKOVIĆ, COUNTERING TRAFFICKING IN HUMAN BEINGS AND SMUGGLING OF MIGRANTS 27 (2009). It also has become one of the most lucrative and rapidly expanding criminal organizations on the planet. Pierre Thielbörger, The International Law of the Use of Force and Transnational Organised Crime, in INTERNATIONAL LAW AND TRANSITIONAL ORGANISED CRIME 361 (Pierre Hauck & Sven Peterke eds., 2016); JAY S. ALBANESE, ORGANIZED CRIME IN OUR TIMES (5th ed., 2007). The Third report on the progress made in the fight against the trafficking of human beings (2020) emphasizes that human trafficking is a highly profitable crime that reaps huge profits for criminals while costing society a lot of money: the global annual profit from people trafficking is estimated to be EUR 29.4 billion, while, in a single year, the entire cost of human trafficking in the EU is estimated to be EUR 2.7 billion (Report COM (2020)).

<sup>5</sup>Hans-Joachim Heintze & Charlotte Lülff, The UN Protocol to Prevent, Suppress, and Punish Trafficking in Persons 2000, in INTERNATIONAL LAW AND TRANSNATIONAL ORGANISED CRIME 150 (Pierre Hauck & Sven Peterke eds., 2016). Small arms and light weapons (SALW), such as automatic rifles and handguns, are used by narcotics and human traffickers, pirates, and terrorists to secure their income sources and leadership, repress rival groups, kidnap for ransom, and frighten state law enforcement agents. See Aaron X. Fellmeth, The UN Protocol against the Illicit Manufacturing and Trafficking in Firearms, Their Parts and Components, and Ammunition 2001 in INTERNATIONAL LAW AND TRANSNATIONAL ORGANISED CRIME 197 (Pierre Hauck & Sven Peterke eds., 2016).

<sup>6</sup>JEAN LOUIS BRIQUET & GILLES FAVAREL-GARRIGUES, INTRODUCTION: VIOLENCE, CRIME, AND POLITICAL POWER IN ORGANISED CRIME AND STATES: THE HIDDEN FACE OF POLITICS 1 (Jean-Louis Briquet & Gilles Favarel-Garrigues eds., 2010).

<sup>7</sup>Edward R. Klemens & Vere M. van Koppen, Careers in Organized Crime, in ENCYCLOPAEDIA OF CRIMINOLOGY AND JUSTICE 285 (Gerben Bruinsma & David Weisburd eds., 2014); James O. Finckenauer & Jay Albanese, Transnational Organized Crime in North America in TRANSNATIONAL ORGANIZED CRIME 2 (Jay Albanese & Philip Reichel eds., 2014); Katrien Luyten & Sofija Voronova, UNDERSTANDING THE EU RESPONSE TO ORGANISED CRIME 4 (2020); John Wilson, Transnational Crime, in HUMAN SECURITY IN WORLD AFFAIRS: PROBLEMS AND OPPORTUNITIES 13 (Alexander Lautensach & Sabina Lautensach eds., 2nd ed. 2020).

<sup>8</sup>Communication From the Commission To The European Parliament the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, COM (2020) 605 final (Jul. 7, 2020). <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0605&from=EN> Accessed: Dec. 10, 2022.

this strategy, the EU envisages a cooperation plan with the EU's neighboring regions, indicating that the partnership between the EU and third countries should be strengthened to increase cooperation in the fight against common threats such as terrorism, organized crime, cybercrime, sexual abuse of children, and human trafficking.

Victims of human trafficking are sometimes pushed into prostitution rings that market themselves on the Internet.<sup>9</sup> According to the Commission's Third report on the progress made in the fight against trafficking in human beings (2020), as required under Article 20 of Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, which refers to EU countries during the COVID-19 pandemic, criminals made use of this opportunity to make vast sums of money and expand their illicit enterprises. They updated their tactics and are more likely to advertise victims online or exploit them in private facilities. While the full extent of the pandemic's impact is not known, it is clear that the crisis has created tremendous obstacles to the fight against human trafficking and has disproportionately affected the most disadvantaged and aggravated people's vulnerability, particularly women and children, to human trafficking.<sup>10,11</sup>

In the field of human rights protection, the key questions that arise are: which Article of the European Convention on Human Rights subsumes human trafficking and forced prostitution, and which is the central part of the discussion in this Article? Human trafficking is perceived as

<sup>9</sup>Payne, Oliver & Marion, *supra* note 3, at 1210.

<sup>10</sup>Third report on the progress made in the fight against trafficking in human beings (2020) as required under Article 20 of Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, Report COM (2020) 661 final (Oct. 20, 2020). <https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:52020DC0661> Accessed: Dec. 10, 2022.

<sup>11</sup>In its reports on the progress made in the fight against trafficking of human beings, the Commission noted that the trafficking of human beings for the purpose of sexual exploitation continues to be the most reported form, making a difference between internal and international trafficking. Internal trafficking means trafficking within the territory of the EU, while international human trafficking includes states outside the EU. According to a 2016 report on human trafficking, there were 15,846 "registered victims" (both identified and presumed) of trafficking in the EU between 2013 and 2014. Sexual exploitation remains the most common form of trafficking (67% of registered victims), followed by labor exploitation (21%). The remaining 12% were identified as victims of human trafficking for other forms of exploitation. This report highlighted the fact that even though investigations in this field require a substantial body of evidence to secure a conviction, the number of prosecutions and convictions for human trafficking remains alarmingly low, especially when compared to the number of victims identified and that, even though investigations in this field require a substantial body of evidence to secure a conviction, the information gathered for the report indicated that Member States are not using enough effective investigative tools and that victims are overburdened both before and during criminal proceedings (Report COM(2016)). The tendencies among registered victims and traffickers in contact with the police and criminal justice system between 2015 and 2016 are similar to those in the prior period. There were 20,532 registered victims of trafficking in the EU, 5979 prosecutions, and 2927 convictions for trafficking in human beings. Over half (56%) of trafficking in human beings was for sexual exploitation, and this remains the most widespread form. The most commonly reported kind of human trafficking is for the purpose of sexual exploitation. There were 9759 victims of sexual exploitation reported in this period; i.e., more than half (56%) of the registered victims of exploitation, primarily women and girls, had a recorded form of exploitation (95% of the registered victims were sexually exploited) (Report COM(2018)).

According to the Third report on the progress made in the fight against trafficking in human beings (2020), as required under Article 20 of Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, a total number of registered victims reported by EU Member States over the last two years (2017 and 2018) was up from the previous reporting periods (14,145). In light of the large number of victims, the number of criminals prosecuted and convicted continues to be low. Sexual exploitation remains the most prevalent form of trafficking. Over half of the victims were EU citizens, and 60% of the victims were trafficked for sexual exploitation. More than 90% of victims of human trafficking for sexual exploitation were women, highlighting the crime's gender element. Women and girls continue to make up the majority of trafficking victims in all forms of exploitation (Report COM(2020)). Finally, the Fourth report on the progress made in the fight against trafficking in human beings (2022) emphasizes that the number of victims of trafficking is slightly higher than in the previous two-year period (14,311). The COVID-19 pandemic probably caused a decrease in the number of victims between 2019 (7777) and 2020 (6534). This report shows a continuous trend; the most prevalent form is the trafficking of persons for the purpose of sexual exploitation (51%).

the most common type of slavery or slave trade in the postmodern era.<sup>12</sup> Academics, researchers, the media, the United Nations, governments, civil society organizations, and policymakers are increasingly labeling human trafficking as a type of modern-day slavery. This could be a troubling trend,<sup>13</sup> primarily taking into account the fact that, from a purely legal point of view, slavery and human trafficking are not the same, and there are existing elements that distinguish these concepts. Moreover, even the Arab Charter on Human Rights separates these two concepts: it could be concluded that it does so because of the emphasis on the prohibition of human trafficking so that it does not come under the interpretation of whether it falls under slavery or not. On the other hand, violence against women is widespread and pervasive in some nations.<sup>14</sup> In the last two decades, numerous criminologists, human rights advocates, and sociologists have investigated the reasons for women falling victim to violent behavior.<sup>15</sup>

For the purposes of a comprehensive analysis of human trafficking and forced prostitution, it is necessary to analyze the material aspects (under which Article 4 of the Convention falls) of human trafficking and forced prostitution and the positive obligations the state has assumed. On the one hand, the analysis of the material aspect of these two extremely negative phenomena solves the legal question of subsumption (why they fall under Article 4 of the Convention) while, on the other hand, a special problem is determining whether the state has complied with its positive obligations. Positive obligations in the field of human trafficking and forced prostitution branch out in three directions, which we will discuss later. It is precisely for this reason that it is necessary to analyze both aspects in this Article, especially taking into account the elaboration of the reasons why the ECtHR considers that certain states have not complied with the obligations imposed by the Convention.

The main body of this article is divided into four parts. Part B briefly describes key judgments; for example, *Rantsev v. Cyprus* and *S.M. v. Croatia*. Part C analyses the material scope of Article 4 of the Convention and examines elements of Article 4—human trafficking and forced prostitution. This part pays special attention to international documents and the judicial practice that bans human trafficking and forced prostitution. The most important part of Part C is the interpretation of human trafficking and forced prostitution under Article 4 of the Convention and the reasoning of the ECtHR. Part D elaborates on state's positive obligations under Article 4 of the Convention. Part E concludes that human trafficking and forced prostitution must be adequately punished. Today, the evolution of the Convention as a living instrument helps to subsume human trafficking and forced prostitution under the scope of Article 4.

<sup>12</sup>Morena Altieri, *The Spread of Slavery in the Age of Globalization*, 4 SSWR 19, 24 (2020); Alexander Proelss & Tobias Hofmann, *The Law of the Sea and TOC*, in *INTERNATIONAL LAW AND ORGANISED CRIME* 438 (Pierre Hauck and Sven Peterke eds., 2016); Amanda Walker-Rodriguez & Rodney Hill, *Human Sex Trafficking* 80, FBI LAW ENFORC. BULL. 1 (2011); Davor Derenčinović, *Not for Sale - On Rights of Victims of Human Trafficking after the ECHR Judgement in Rantsev v. Cyprus and Russia*, 1 CROATIAN ACADEMY OF LEGAL SCIENCES YEARBOOK 53 (2010); Ariela J. Gross & Chantal Thomas, *The New Abolitionism, International Law, and the Memory of Slavery*, 35 LAW HIST. REV. 99, 101 (2017); Marie Vlachová, *Trafficking in Humans: The Slavery of Our Age*, 4 CONNECTIONS 1 (2005); Hans-Heintze & Lülff, *supra* note 5, at 151.

<sup>13</sup>Ramona Vijayarasa & José-Miguel Bello y Villarino, *Modern-Day Slavery - a Judicial Catchall for Trafficking, Slavery and Labour Exploitation: A Critique of Tang and Rantsev*, 9 J. INT'L REL. 39 (2013).

<sup>14</sup>Shivani Rishi, *Sexual Violence and Human Trafficking in India: Legislation, Enforcement, and Recommendations*, 17 LOY U. CHI. INT'L REVIEW 47 (2021).

<sup>15</sup>HUA-LUN HUANG, *THE MISSING GIRLS AND WOMEN OF CHINA, HONG KONG AND TAIWAN: A SOCIOLOGICAL STUDY OF INFANTICIDE, FORCED PROSTITUTION, POLITICAL IMPRISONMENT, "GHOST BRIDES," RUNAWAYS AND THROWN AWAYS, 1900–2000s* 3 (2012).

## A. Brief Overview of *Rantsev v. Cyprus and Russia* and *S.M. v. Croatia*

### I. *Rantsev v. Cyprus and Russia*

In *Rantsev v. Cyprus and Russia*, the applicant's daughter died in unexplained circumstances after falling from a window of private property in Cyprus in March 2001. In February 2001, the owner of a cabaret applied for an "artiste" visa and work permit for Ms Rantseva to allow her to work as an artiste in his cabaret. Ms Rantseva arrived in Cyprus on 5 March 2001, where she stayed in an apartment with other young women working in the cabaret. It's important to note that, in Cyprus, the word "artiste" had become synonymous with the word "prostitute." She began work on March 16, 2001. On March 19, 2001, the cabaret manager was informed that she had left the apartment and taken all her belongings with her. On the same date, the cabaret manager informed the Immigration Office that Ms Rantseva had abandoned her place of work and residence. After locating her in a discotheque ten days later, the cabaret manager took her to the central police station. However, the police officers subsequently allowed her to leave: the cabaret owner collected her around 5.20 a.m. and took her to his private premises. Her body was found in the street below the apartment at or about 6.30 a.m.

An inquest held in Cyprus concluded that Ms Rantseva had died in circumstances resembling an accident while attempting to escape from the apartment in which she was a guest, but no evidence suggested criminal liability of a third person for her death. Although the Russian authorities considered the inquest verdict unsatisfactory, the Cypriot authorities stated that it was final and refused to carry out any additional investigations unless the Russian authorities had evidence of criminal activity. No steps were taken by either the Russian or Cypriot authorities to interview two young women living in Russia, whom the applicant said had worked with his daughter at the cabaret and could testify to sexual exploitation taking place there. Consequently, the ECtHR concluded there had been a procedural violation of Article 2 of the Convention as regards the failure of the Cypriot authorities to conduct an effective investigation into Ms Rantseva's death.

### II. *S.M. v. Croatia*

In *S.M. v. Croatia*, the applicant made a criminal complaint, alleging that, during the summer of 2011, T.M., a former policeman, had physically and psychologically forced her into prostitution. During the summer, T.M. would pick her up every day in front of the place where she lived and take her in his car to provide sexual services for men who had replied to an advertisement on a social network. After a while, he gave her a mobile telephone so that clients could contact her directly and continued to drive her to meet clients in various places. Soon afterward, T.M. rented a flat, where S.M. continued rendering sexual services to men. This arrangement allowed T.M. to have her constantly under his control; he had always been in the flat. He also said that he would install cameras so that he would know what was happening. The applicant had been afraid of T.M. because he had said that he had done the same thing with some other girls whom he would physically punish if they did not listen to him. T.M. had also physically punished her when she opposed him over something. When she refused to provide sexual services to other men, he beat her.

In September 2011, she left the flat, went to her friend's house, and explained what had happened to her. The applicant explained that she had some thirty clients and earned approximately 1,700 euros—half of the amount she had given to T.M. In 2013, the criminal court acquitted T.M. on the grounds that, although it had been established that he had organized a prostitution ring in which he had recruited the applicant, it had not been established that he had forced her into prostitution. He had only been indicted for the aggravated form of the offense. Thus, he could not be convicted of the basic form of organizing prostitution. The State Attorney's Office's appeal against the decision was dismissed. The prosecuting authorities failed to establish numerous facts from the aforementioned events: all these elements could have clarified the



applicant's allegations as regards the circumstances in which she was under T.M.'s control during their stay in the flat. The application relied on Articles 3 and 8 but not Article 4 of the Convention. However, the ECtHR decided to consider the application under Article 4.

## B. Material scope of Article 4 of the Convention

### I. Elements of Article 4

According to generations of scholars, slavery is a loss of status and identity, not a loss of humanity.<sup>16</sup> Until the late eighteenth century, slavery was tolerated almost everywhere in the world.<sup>17</sup> It had numerous forms, and slaves were exploited in a variety of businesses.<sup>18</sup> The most common sorts of slavery were serfdom, forced labor, debt bondage, migrant work, human trafficking, prostitution, forced marriage, child labor, child servitude, and a number of other forms that have been considered by the Working Group on Contemporary Forms of Slavery, including apartheid, colonialism, trafficking in human organs, and incest.<sup>19</sup>

In the Convention, a prohibition of slavery and forced labor is contained in Article 4. The ECtHR has often stated that Article 4 of the Convention, when read in conjunction with Articles 2 and 3, enshrines one of the fundamental values of democratic societies.<sup>20</sup> Article 4(1) provides that no one shall be held in slavery or servitude. Unlike most of the Convention's substantive clauses, Article 4(1) has no exceptions, not even in the event of a public emergency endangering a nation's survival.<sup>21</sup> Although this article prohibits slavery and servitude, the Convention does not indicate how those phrases should be interpreted. Furthermore, whether those terms should be regarded as synonyms or as distinct concepts is unclear.<sup>22</sup> In defining the scope of the term slavery, "the

<sup>16</sup>SEYMOUR DRESCHER, *ABOLITION, A HISTORY OF SLAVERY AND ANTISLAVERY* (2009). For extensive references, see SEYMOUR DRESCHER, *ECONOCIDE: BRITISH SLAVERY IN THE ERA OF ABOLITION* (2010); Joyce E. Cepelin, *Slavery and the Principle of Humanity: A Modern Idea in the Early Lower South*, 24 J. SOC. HIST. 299, 306 (1990); JEAN ALLAIN, *THE DEFINITION OF SLAVERY IN GENERAL INTERNATIONAL LAW AND THE CRIME OF ENSLAVEMENT WITHIN THE ROME STATUTE 10* (2007). Although slavery has existed since ancient times, the 1815 Declaration Relative to the Universal Abolition of the Slave Trade was the first international instrument to condemn it. Today, the prohibition of slavery and forced labor is provided for in many international legal acts: The Slavery Convention of 1926 and the Supplementary Convention of 1956, The Forced Labor Convention (No. 29), The Universal Declaration of Human Rights, The International Covenant on Economic, Social and Cultural Rights, Trafficking Protocol, and the European Convention on Human Rights.

<sup>17</sup>SEYMOUR DRESCHER, *THE MIGHTY EXPERIMENT: FREE LABOUR VERSUS SLAVERY IN BRITISH EMANCIPATION* 9 (2002).

<sup>18</sup>Siddharth Kara, *Designing More Effective Laws against Human Trafficking*, 9 NW J. INT'L HUM. RTS. 127 (2011).

<sup>19</sup>In 2005, the International Labor Organization (ILO) released its first global assessment of modern slavery. Over 12 million people were predicted to be kept in some kind of modern slavery between 1995 and 2004. The ILO amended its estimate in 2012, estimating that roughly 21 million people died between 2002 and 2011 (2012). Researchers have lately determined what is known as the "dark figure" for modern slavery in criminal data. See Ian Turner, *Human Rights, Positive Obligations, and Measures to Prevent Human Trafficking in the United Kingdom*, 1 J. HUM. TRAFFIK. 297 (2015). According to the ILO, in 2016, 40.3 million people were subject to modern slavery: 24.9 million in forced labor and 15.4 million in forced marriages. This number is much larger than the report from 2005. PATRICK BELSER, MICHAËLLE DE COCK & FARHAD MEHRAN, *ILO MINIMUM ESTIMATE OF FORCED LABOUR IN THE WORLD* (2005); Sheldon X. Zang & Samuel L. Pineda, *Corruption as a Causal Factor, in HUMAN TRAFFICKING IN ORGANIZED CRIME: CULTURE, MARKET AND POLICIES* 44 (Dina Siegel & Hans Nelen eds., 2008). Women and girls are disproportionately affected by forced labor, accounting for 99% of victims in the commercial sex industry and 58% in other sectors. International Labour Organization and the Walk Free Foundation, *Forced labour and forced marriage, Global Estimates of Modern Slavery* (2017).

<sup>20</sup>*Siliadin v. France*, App. No. 73316/01 (Jul. 26, 2005); *Stummer v. Austria*, App. No. 37452/02 (July 7, 2011).

<sup>21</sup>*C.N. and V. v. the United Kingdom*, App. No. 4239/08, para. 65 (Nov. 13, 2012). The *C.N. v. United Kingdom* decision is important for specifically affirming that criminal penalties for human trafficking may be insufficient to encompass slavery and servitude offenses. See David Keane, *Abolitionist in Heart but not in Action: Slavery, Servitude and the Status of Article 4 ECHR in IRISH LAW*, 50 I. J. 166, 175 (2013).

<sup>22</sup>Jochen Moerman, *A Critical Analysis of the Prohibition of Slavery and Forced Labour under Article 4 of the European Convention on Human Rights*, 3 IAEHR 89 (2010).

ECtHR accepts the classical definition of slavery from the Slavery Convention<sup>23</sup> and 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,” as stated in the *Siliadin v. France* judgment.<sup>24</sup> The ECtHR applied a stringent interpretation of the 1926 Slavery Convention in the judgment, using the factor of ownership as the sole criterion for slavery.<sup>25</sup> In the same judgment, the ECtHR also stated that, for Convention purposes, “servitude” means an obligation to provide services that are imposed by the use of coercion, which is linked with the concept of slavery.<sup>26</sup> Slavery does not describe or define criminal or human behavior; rather, it denotes a legal situation, meaning that one human being is legally the property of another.<sup>27</sup> On the difference between “slavery” and “servitude” in the Convention, it was observed that the status or condition of servitude does not involve ownership and differs from slavery on that count.<sup>28</sup>

Article 4(2) of the Convention prohibits forced or compulsory labor, but the Convention does not define these terms. However, in the Forced Labor Convention, 1930 (No. 29), “forced or compulsory labor” is explained as all work or services exacted from any person under the menace of any penalty and for which the said person has not offered themselves voluntarily (Forced Labour Convention, Article 2).<sup>29</sup> The work in question must be performed under duress, without the person’s consent, and under the threat of a penalty.<sup>30</sup> The “penalty” may extend as far as physical violence or restraint, but it can also take subtler forms of a psychological nature, such as threats to denounce victims to the police or immigration authorities when their employment status is illegal.<sup>31</sup> It should be noted that while all international treaties contain a prohibition against forced labor, the ILO Convention remains the only international instrument that sets out a substantive definition.<sup>32</sup> However, the ILO Convention does not distinguish between forced and obligatory labor. Nonetheless, in *Van der Mussele v. Belgium*, the ECtHR affirms that the phrases cover separate concepts and, as a result, should not be deemed synonyms but complementary notions.<sup>33</sup> The Convention’s prohibition on forced labor is not absolute. In *S.M. v. Croatia*, the ECtHR emphasized that the purpose of Article 4(3) is not to limit the exercise of the right guaranteed by paragraph 2 but to “delimit” the very content of that right because it forms a whole with paragraph 2 and indicates what the term “forced or compulsory labor” should not to include.<sup>34</sup>

<sup>23</sup>Slavery Convention (1927) Art. 1.

<sup>24</sup>*Siliadin v. France*, supra note 20, para. 122 (Jul. 26, 2005); Judy Fudge, *Modern Slavery, Unfree Labour and the Labour Market: The Social Dynamics of Legal Characterization*, 27 SOC. LEG. STUD. 422 (2017); SARAH JOSEPH & MELISSA CASTAN, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY 330 (2013); Yoram Dinstein, *The Right to Life, Physical Integrity, and Liberty*, in THE INTERNATIONAL BILL OF RIGHTS 126 (Louis Henkin ed., 1981).

<sup>25</sup>Tenia Kryazi, *Trafficking and Slavery*, 4 INTERNATIONAL HUMAN RIGHTS LAW REVIEW 38 (2015). Regional human rights courts have also supported the 1926 term to define slavery under their own instruments. Sara Palacios-Arapiles, *The Eritrean Military/National Service Programme: Slavery and the Notion of Persecution in Refugee Status Determination*, 10 LAWS 6 (2021). Even though the ECtHR uses the 1926 Slavery Convention to define slavery in *Siliadin v. France*, it states that “the evidence does not suggest that she was held in slavery in the proper sense, in other words, that Mr and Mrs B. exercised a genuine right of legal ownership over her, thus reducing her to the status of an ‘object.’” The 1926 Slavery Convention’s definition of slavery does not require “legal ownership,” only “powers pertaining to the right of ownership.” Jean Allain, *The Definition of Slavery in International Law*, 52 HOW. L. J. 239 (2009); Vladislava Stoyanova, supra note 4, at 804.

<sup>26</sup>*Siliadin v. France*, supra note 20, para. 124; see *Seguin v. France*, App. No. 42400/98 (Mar. 7, 2000).

<sup>27</sup>Frank G. Madsen, *The Historical Evolution of the International Cooperation against Transnational Organised Crime*, in INTERNATIONAL LAW AND TRANSNATIONAL ORGANISED CRIME 6 (Pierre Hauk & Sven Peterke eds., 2016).

<sup>28</sup>D.J. HARRIS, M. O’BOYLE & C. WARBRICK, *LAW OF THE CONVENTION ON HUMAN RIGHTS*, 91 (1995).

<sup>29</sup>Although more than 80 years have passed since the adoption of the ILO’s Forced Labor Convention, millions of people around the world are still subjected to forced labor.

<sup>30</sup>Kryazi, supra note 25, at 44.

<sup>31</sup>C.N. and V. v. France, App. No. 67724/09, para. 77, (Oct. 11, 2012).

<sup>32</sup>Mike Kaye, *FORCED LABOUR IN THE 21st Century* 5 (2001).

<sup>33</sup>Moerman, supra note 22, at 98.

<sup>34</sup>*S.M. v. Croatia*, App. no. 60561/14, para. 120 (Jun. 25, 2020).

In practice, a question that could be asked is whether the term “labor” means physical work only or includes other types of work. In *Van der Musselle v. Belgium*, the ECtHR stated that although it is true that the English term “labor” is frequently used in the restricted sense of manual labor, it nevertheless has the broad meaning of the French word “travail,” and it is the latter sense that should be used in this instance.<sup>35</sup> A problem that could also arise is the delimitation between servitude and forced or compulsory labor. The fundamental distinguishing feature between servitude and forced or compulsory labor within the meaning of Article 4 of the Convention lies in the victims’ feeling that their condition is permanent and that the situation is unlikely to change.<sup>36</sup> Slavery is much more than forced labor. All slavery involves forced labor, but not all forced labor involves slavery. Unlike forced labor, slavery is a permanent situation. Traditionally, a slave master could sell, exchange, or lend child or adult slaves to anyone with impunity – the notion of ownership was complete.<sup>37</sup> It is important to emphasize that forced labor is not equivalent to poor working conditions.<sup>38</sup>

## II. Human trafficking under Article 4 of the Convention

When determining the extent of Article 4 of the Convention, it is important to keep in mind the Convention’s unique characteristics, as well as the fact that it is a living instrument<sup>39</sup> that must be construed in the light of current circumstances; therefore, the increasingly high standards demanded in the field of human rights and fundamental liberties eventually necessitates greater stringency in assessing violations of the fundamental ideals of democratic societies.<sup>40</sup> *Rantsev* is a clear example of the evolutive and dynamic evolution and interpretation of the Convention’s principles.<sup>41</sup> The fact that the Convention does not contain the term human trafficking does not mean that persons subjected to trafficking are deprived of the Convention’s protection.<sup>42</sup> We must draw attention to the ECtHR’s statement in *Christine Goodwin v. the United Kingdom* that “the very essence of the Convention is respect for human dignity and human freedom.”<sup>43</sup> Accordingly, the ECtHR points out that trafficking in human beings is not compatible with democratic societies and that the Convention’s values that this type of trafficking falls under Article 4 of the Convention.<sup>44</sup>

However, the main question that arises is how the ECtHR concluded that human trafficking falls under Article 4 of the Convention. This decision raised basic problems about how the ECtHR approaches Article 4 at a normative level<sup>45</sup>; it was groundbreaking in treating trafficking as a human rights violation and outlining a wide range of related state obligations.<sup>46</sup> In this direction,

<sup>35</sup>*Van der Musselle v. Belgium*, App. no. 8919/80, para. 33 (Nov. 23, 1983).

<sup>36</sup>*C.N. and V. v. France*, *supra* note 32, para. 91.

<sup>37</sup>ANN JORDAN, SLAVERY, FORCED LABOR, DEBT BONDAGE, AND HUMAN TRAFFICKING: FROM CONCEPTUAL CONFUSION TO TARGETED SOLUTIONS 2 (2011).

<sup>38</sup>Belser, De Cock & Mehran, *supra* note 19, at 44.

<sup>39</sup>*Tyrer v. the United Kingdom*, App. no. 5856/72, 25 April 1978, para. 31; FIONA DE LONDRAS & KANSTANTIN DZEHSTIAROU, GREAT DEBATES ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS 72 (2018).

<sup>40</sup>*Rantsev v. Cyprus and Russia*, *supra* note 2, para. 277; *S.M. v. Croatia*, *supra* note 34, para. 288.

<sup>41</sup>JANNEKE GERARDS, GENERAL PRINCIPLES OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 52 (2019).

<sup>42</sup>*Soering v. the United Kingdom*, App. no. 14038/88, para. 87 (Jul. 07, 1989); *Artico v. Italy*, App. no. 6694/74, para. 33 (May 13, 1980).

<sup>43</sup>*Christine Goodwin v. the United Kingdom*, App. no. 28957/95, para. 90 (Jul. 11, 2002).

<sup>44</sup>*Rantsev v. Cyprus and Russia*, *supra* note 41, para. 282; *S.M. v. Croatia*, *supra* note 35, para. 289; *Zoletic and Others v. Azerbaijan*, App. no. 20116/12, para. 154 (Oct. 07, 2021).

<sup>45</sup>Jean Allain, *Rantsev v. Cyprus and Russia: The European Court of Human Rights and Trafficking as Slavery*, 10 HUM. RIGHTS LAW REV. 550 (2010).

<sup>46</sup>Valentina Milano, *The European Court of Human Rights’ Case Law on Human Trafficking in Light of L.E. v. Greece: A Disturbing Setback*, 17 HUM. RIGHTS LAW REV. 707 (2017).



we should start from the mentioned fact that the Convention is a living instrument created to spread common values among the Contracting Parties<sup>47</sup>, which has been emphasized several times in the judicial practice of the ECtHR. Its Preamble points out that further cooperation of the Contracting Parties in the area of human rights protection is required.<sup>48</sup> The ECtHR constantly emphasizes the characteristics of the Convention; that is, it is a living instrument that reflects societal and technological developments and entails determining when it is time for the ECtHR to take a new step in interpreting some phenomenon. As Londras and Dzehstiarou point out, finding the right moment for evolution is crucially important for the effectiveness and legitimacy of the ECtHR.<sup>49</sup>

As seen from numerous ECtHR decisions, the basic technique the ECtHR uses is “consensus,” ensuring that the ECtHR reflects reality rather than creating law.<sup>50</sup> In that way, the ECtHR uses European, international, and internal consensus.<sup>51</sup> We could say that international consensus has a number of benefits because the Convention and its Protocols must be interpreted in harmony with the general principles of international law<sup>52</sup> and ensure that the Convention is developed in a manner consistent with international law.<sup>53</sup> Its usage was crucial to the decisions in *Rantsev* and *S.M.* This gains even more importance because human trafficking and prostitution exploitation as worldwide issues have received greater attention in recent years – a variety of international legal instruments and oversight mechanisms have addressed these challenges, developing the key concepts of effective prevention and suppression.

We must emphasize that the Convention is the only binding instrument for the ECtHR; it does not impact the ECtHR directly or the sources of law it should use when interpreting the Convention.<sup>54</sup> Other international legal acts do not bind the ECtHR, but it often uses them as a substantive argument in its case law.<sup>55</sup> Therefore, the ECtHR relies on international treaties besides the Convention and case law.<sup>56</sup> Accordingly, the analysis of the existing consensus can direct the ECtHR toward an interpretation that is in line with the prevailing approach.<sup>57</sup> As Murray points out, “the consensus doctrine to national courts is undeniable, as it often constitutes the primary determining factor as to whether a right is protected by the Convention.”<sup>58</sup> In the next part of the work, we will deal with the basic international documents that create a consensus on this issue.

<sup>47</sup>See generally: Jared Wessel, *Relational Contract Theory and Treaty Interpretation: End-Game Treaties v. Dynamic Interpretation*, 60 ANN. SURV. AM. L. 149-86 (2004).

<sup>48</sup>De Londras & Dzehstiarou, *supra* note 39, at 74.

<sup>49</sup>*Id.* at 79.

<sup>50</sup>See generally: Fiona de Londras & Kanstantsin Dzehstiarou, *Managing Judicial Innovation in the European Court of Human Rights*, 15 HUM. RIGHTS LAW REV. 523-47 (2015). In *Demir and Baykaya v. Turkey*, the ECtHR stated, “The consensus emerging from specialized international instruments and from the practice of Contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases.” *Demir and Baykaya v. Turkey* (GC) para. 85 (Nov. 12, 2008). See generally: Ineta Ziemele, *European consensus and international law*, in THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND GENERAL INTERNATIONAL LAW 23-39 (Anne van Aaken and Iulia Motoc eds., 2018).

<sup>51</sup>De Londras & Dzehstiarou, *supra* note 39, at 79.

<sup>52</sup>*Marguš v. Croatia*, App. No. 4455/10, para. 129 (May 27, 2014).

<sup>53</sup>De Londras & Dzehstiarou, *supra* note 39, at 84, 85.

<sup>54</sup>Kanstantsin Dzehtsiarou, *What is Law for the European Court of Human Rights?* 49 GEO. J. INT’L L. 89, 97, 99 (2018).

<sup>55</sup>*Id.*, at 114.

<sup>56</sup>Thomas Kleinlein, *Consensus and Contestability: The ECtHR and the Combined Potential of European Consensus and Procedural Rationality Control*, 28 EJIL 871, 878 (2017).

<sup>57</sup>DANIEL PEAT, *COMPARATIVE REASONING IN INTERNATIONAL COURTS AND TRIBUNALS* 141 (2019); Kleinlein, *supra* note 57, at 874.

<sup>58</sup>John L. Murray, *Consensus: Concordance, or hegemony of the majority*, in *DIALOGUES BETWEEN JUDGES* 17 (2008). [https://www.echr.coe.int/documents/d/echr/dialogue\\_2010\\_eng](https://www.echr.coe.int/documents/d/echr/dialogue_2010_eng)

### III. International law and instruments banning human trafficking

#### 1. United Nations instruments

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially women and children, supplementing the United Nations Convention against Transnational Organized Crime and the Council of Europe Convention on Action against Trafficking in Human Beings, provides that trafficking in persons shall mean the recruitment, transportation, transfer, harboring, receipt of persons by means of the threat or use of force, or other forms of coercion, abduction, fraud, deception, abuse of power, vulnerability, or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude, or the removal of organs. The crime of human trafficking, as defined in the Palermo Protocol and Anti-Trafficking Convention, consists of three elements: (1) action, (2) committed by certain means, and (3) for the purpose of exploitation.<sup>59</sup> This legal instrument is intended to be the preeminent worldwide crime-fighting convention.<sup>60</sup> Human trafficking, according to the UN definition, is more than just transporting people to a place where they will be exploited in some way; it also includes an active process of recruiting people and housing them using force or other forms of compulsion. Forced labor and various forms of slavery are examples of exploitation.<sup>61</sup>

#### 2. European Union law

The Charter of Fundamental Rights of the European Union (the Charter) has a specific status for the ECtHR. Namely, the Charter contains rights and freedoms under six titles: dignity, freedoms,

<sup>59</sup>Vladislava Stoyanova, *Dancing on the Borders of Article 4: Human Trafficking and the European Court of Human Rights in the Rantsev Case*, 30 NQHR 169 (2012). One of the contemporary world events that is inevitably conducive to human trafficking is migration. Both legal and illegal migration affect every country in the world. Veljko Turanjanin, *Social Implications Caused by State Reaction on COVID-19 and Human Rights in Republic of Serbia*, 45 TEME 1081 (2021). A particularly important consideration is the fact that forms of illegal migration include human trafficking and smuggling. See Alexis Aronowitz, *Trafficking in Human Beings: An International Perspective*, in GLOBAL ORGANIZED CRIME: TRENDS AND DEVELOPMENTS 85 (Dina Siegel, Henk van de Bunt & Damian Zaitch eds., 2003), but these terms are different. Andreas Schloenhardt, *The UN Protocol against Smuggling Migrants*, in INTERNATIONAL LAW AND TRANSNATIONAL ORGANISED CRIME 175 (Pierre Hauck and Sven Peterke eds., 2016); YOSHIFUMI TANAKA, *THE INTERNATIONAL LAW OF THE SEA* 167 (2012); JOSEPH L. ALBINI & JEFFREY SCOTT McILLWAIN, *DECONSTRUCTING ORGANIZED CRIME: AN HISTORICAL AND THEORETICAL STUDY* 110 (2012); HOWARD ABADINSKY, *ORGANIZED CRIME* 289 (2010). In terms of the Protocol against the Smuggling of Migrants by Land, Sea, and Air, smuggling of migrants shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefits, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident (Article 3(a)). As we can note, while smuggling does not involve coercion, the definition of trafficking always has involuntariness as an integral part. Smuggling has a foreign element and a movement or transportation moment, while, on the other side, a person can be trafficked in their very own country, city, or home. Victims of human trafficking often fall within this category of migrants. Vladislava Stoyanova, *Complementary Protection for Victims of Human Trafficking under the European Convention on Human Rights*, 2 GoJIL, 777, 788 (2011). It is of note that human trafficking and irregular migration are major issues that have arisen as a result of increased transnationalism; humans as property for exploitation as prostitutes or cheap labor and commercial smuggling of asylum seekers into Europe are examples of this phenomenon. Arndt Sinn, *Transnational Organised Crime: Concept and Critics*, in INTERNATIONAL LAW AND TRANSNATIONAL ORGANISED CRIME 24, 36 (Pierre Hauck & Sven Peterke, 2016). In this scenario, vulnerability plays a significant role. Nieri Avanesian, *Something to Write Home About: Extraterritorial Jurisdiction Using Rantsev v. Cyprus and Russia for Protection of Armenian Victims of Cross-Border Labor Trafficking*, 46 COLUM. HUM. RTS L. REV. 332, 342 (2015).

<sup>60</sup>Neil Boister, *The UN Convention against Transnational Organised Crime 2000*, in INTERNATIONAL LAW AND TRANSNATIONAL ORGANISED CRIME 126 (Pierre Hauck & Sven Peterke eds., 2016); MILAN SKULIC, *ORGANIZED CRIME* 298 (2015); Palermo Protocol (2000) Art. 3 (a).

<sup>61</sup>Leonard A. Steverson, *Human Trafficking*, in ENCYCLOPEDIA OF TRANSNATIONAL CRIME & JUSTICE 179 (Margaret E. Beare ed., 2012).

equality, solidarity, citizens' rights, and justice. The Charter is consistent with the Convention, and their meaning and scope are the same when the Charter contains rights that stem from it. The Charter strengthens the protection of fundamental rights by making those rights more visible and more explicit for citizens.<sup>62</sup> In Article 5, the Charter prohibits slavery and servitude and provides that no one shall be required to perform forced or compulsory labor. Finally, it explicitly prohibits trafficking in human beings (Article 5). The Preamble of the Convention on Action against Trafficking in Human Beings (Anti-Trafficking Convention), on the one hand, asserts that the trafficking of human beings is a violation of human rights; on the other hand, it emphasizes that trafficking in human beings is a form of slavery. The explanatory report accompanying the Convention on Action against Trafficking in Human Beings states that human trafficking is a modern form of slavery that treats human beings as commodities to be bought and sold and subjected to forced labor, usually in the sex industry.<sup>63</sup>

### 3. Council of Europe instruments

The Council of Europe Convention on Action against Trafficking in Human Beings defines trafficking in human beings as the recruitment, transportation, transfer, harboring, or receipt of persons by means of the threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power, vulnerability, or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person for the purpose of exploitation. Exploitation shall include, 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. As can be seen, this is the same definition as in the Palermo Protocol, but there are differences in the scope of the application because the Convention applies to all forms of trafficking in human beings, national or transnational, whether or not connected with organized crime (Article 2). The Palermo Protocol applies to trafficking in persons involving organized criminal groups, which is generally transnational in nature. In accordance with the above-mentioned definition of human trafficking, exploitation is viewed as fundamental to the trafficking experience.<sup>64</sup>

<sup>62</sup>See generally Sionaidh Douglas-Scott, *The European Union and Human Rights after the Treaty of Lisbon*, 11 HUM. RIGHTS LAW REV. 645 (2011).

<sup>63</sup>The Treaty on the Functioning of the European Union establishes minimum rules concerning the definitions and sanctions in the areas of particularly serious crime. It provides that the area of crime includes, among other things, trafficking in human beings and the sexual exploitation of women and children. The Council of the European Union adopted a Framework Decision on combating trafficking in human beings (Framework Decision 2002/JHA/629 of 19 July 2002), which provides the measures aimed at ensuring approximation of the criminal law of the Member States as regards the definition of offenses, penalties, jurisdiction and prosecution, protection, and assistance to victims. After that, an action plan on best practices, standards, and procedures for combating and preventing trafficking in human beings proposed steps to be taken by bodies, which involved the coordination of EU action, scoping the problem, preventing trafficking, reducing demand, investigating and prosecuting trafficking, protecting and supporting victims of trafficking, returns, reintegration, and external relations. This Framework decision was replaced by Directive 2011/36/EU on preventing and combating trafficking of human beings and protecting its victims (5 April 2011), which defines human trafficking. At the Council of Europe level, there is Recommendation 1325 (1997) on trafficking in women and forced prostitution in Council of Europe Member States; Recommendation 1450 (2000) on violence against women in Europe; Recommendation No. R (2000) 11 of the Committee of Ministers to Member States on action against the trafficking of human beings for the purpose of sexual exploitation; Recommendation 1523 (2001) on domestic slavery; Recommendation Rec (2001) 16 of the Committee of Ministers to Member States on the protection of children against sexual exploitation; Recommendation 1526 (2001) on the campaign against trafficking in minors to put a stop to the east European route: the example of Moldova; Recommendation Rec (2002) 5 of the Committee of Ministers to Member States on the protection of women against violence; Recommendation 1545 (2002) on the campaign against trafficking in women; Recommendation 1610 (2003) on migration connected with trafficking in women and prostitution; and Recommendation 1663 (2004) on domestic slavery: servitude, au pairs and "mail-order brides."

<sup>64</sup>Stoyanova, *supra* note 4, at 781.

#### 4. Other international instruments

The Organisation for Security and Co-operation in Europe (OSCE) established a mechanism to provide assistance to participating states to combat human trafficking (a Special Representative and Co-Ordinator for Combating Trafficking in Human Beings). Its Action Plan is based on the Palermo Protocol's definition of human trafficking. It encourages investigators and prosecutors to carry out investigations and prosecutions without relying solely and exclusively on witness testimony while exploring alternative investigative strategies to preclude the need for victims to be required to testify in court.

#### 5. Relevant human rights instruments

The American Convention on Human Rights states that “no one shall be subject to slavery or to involuntary servitude, which is prohibited in all their forms, as are the slave trade and trafficking in women” (Article 6 of the ACHR). This Article reflects a universally accepted norm in favor of the absolute prohibition of slavery and servitude where human trafficking is prohibited.<sup>65</sup> The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, among others, provides that trafficking in persons is violence against women. The African Charter on Human and Peoples' Rights in Article 5 states that every individual shall have the right to the respect of the dignity inherent in a human being and the recognition of his legal status, and all forms of exploitation and degradation of man, particularly slavery, slave trade, torture, and cruel, inhuman, or degrading punishment, and [such] treatment shall be prohibited. Human trafficking is recognized as a contemporary form of slavery.<sup>66</sup> The Arab Charter on Human Rights in Article 10 provides that:

*All forms of slavery and trafficking in human beings are prohibited and are punishable by law. No one shall be held in slavery and servitude under any circumstances. 2. Forced labor, trafficking in human beings for the purposes of prostitution or sexual exploitation, the exploitation of the prostitution of others, or any other form of exploitation or the exploitation of children in armed conflict are prohibited.*

A similar provision is provided in Article 11 of the Cairo Declaration on Human Rights in Islam. However, as we can see from this provision, the Charter distinguishes between slavery and human trafficking and prohibits both, even though trafficking is a form of modern slavery.<sup>67</sup>

#### 6. International criminal courts

Since we are talking about judicial practice, we will continue from the understanding of the International Criminal Court and the International Criminal Tribunal for the Former Yugoslavia, whose understandings support the positions taken by the ECtHR. First, the Rome Statute considers human trafficking as a form of slavery and criminalizes it. It is a crime against humanity, enslavement, sexual slavery (Article 7(1) of the Rome Statute), and enforced prostitution. As war crimes, it criminalizes sexual slavery and enforced prostitution (Article 8 of the Rome statute).<sup>68</sup>

<sup>65</sup>LUDOVIC HENNEBEL & HÉLÈNE TIGROUDJA, THE AMERICAN CONVENTION ON HUMAN RIGHTS: A COMMENTARY 254 (2022).

<sup>66</sup>RACHEL MURRAY, THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS 68 (2019). The African Protocol on the Rights of Women prohibits trafficking in women and considers it as a violence against women (Article 4(g)). See also: MALCOLM EVANS & RACHEL MURRAY, THE AFRICAN CHARTER ON HUMAN AND PEOPLE'S RIGHTS: THE SYSTEM IN PRACTICE 1986–2006 456 (2008).

<sup>67</sup>Mohamed Y. Mattar, *Human Rights Legislation in the Arab World: The Case of Human Trafficking*, 33 MICH. J. INT'L L. 109 (2011).

<sup>68</sup>KATRIN N. CALVO-GOLLER, THE TRIAL PROCEEDINGS OF THE INTERNATIONAL CRIMINAL COURT: ICTY and ICTR PRECEDENT 177 (2006).

According to Article 7(2), enslavement means the exercise of any or all of the powers attaching to the right of ownership over a person. It includes the exercise of such power in the course of trafficking in persons, in particular, women and children.

Second, the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v. Kunarac, Vuković and Kovač* emphasized that the traditional concept of slavery evolved to encompass various contemporary forms of slavery based on the exercise of any or all the powers attached to the right of ownership. At the same time, it is not possible to exhaustively enumerate all contemporary forms of slavery that are comprehended in the expansion of the original idea.<sup>69</sup> Therefore, slavery encompasses features attached to the right of ownership and situations of absolute control of one person over another, induced through fear, force, or coercion.<sup>70</sup>

Consequently, human trafficking is essentially a modern form of slavery, and we can say that there is an international consensus in this regard. The ECtHR essentially accepts this consensus and primarily considers human trafficking under the auspices of Article 4 of the Convention. We now need to consider the definition of human trafficking according to international documents.

#### IV. The ECtHR's approach

At the outset, Article 4 of the Convention does not mention human trafficking. Article 4 only mentions the terms “slavery,” “servitude,” and “forced and compulsory labor.” In both *Rantsev v. Cyprus and Russia* and, later, *S.M. v. Croatia*, the ECtHR emphasizes that it is unsurprising that the Convention makes no explicit mention of human trafficking because the 1948 Universal Declaration of Human Rights, which served as a model for the Convention, made no express mention of trafficking. In Article 4, the Declaration prohibits “slavery and the slave trade in all their forms.” It is important to emphasize the words in *all their forms*<sup>71</sup> because the concept of slavery under Article 4 of the Declaration covers a range of different practices, including human trafficking.<sup>72,73</sup> This non-derogable right was recognized and replicated in international legal documents.<sup>74</sup> Accordingly, the International Covenant on Civil and Political Rights prohibits slavery and servitude in all forms (Article 8).

In the *Rantsev v. Cyprus and Russia* judgment, the ECtHR defined the term “trafficking of human beings,” stating that human trafficking is based on the use of powers associated with the right of ownership. Human beings are treated as commodities to be bought, sold, and compelled to work for little or no pay, mainly in the sex business but also in other trades. The affirmation of the ECtHR’s decision in the case of *Rantsev* was the most significant advance in the ECtHR’s case law on the topic of human trafficking for the purpose of sexual exploitation. However, in the same judgment, the ECtHR found that, given its role of interpreting the Convention in light of current circumstances, it was unnecessary to determine whether the applicant’s treatment was “slavery,” “servitude,” or “forced and compulsory labor.” Instead, the ECtHR found that human trafficking,

<sup>69</sup>Michelle Jarvis, *An Emerging Gender Perspective on International Crimes*, in G. BOAS & W. SCHABAS, INTERNATIONAL CRIMINAL LAW DEVELOPMENTS IN THE CASE LAW OF THE ICTY 157–92 (2003); See generally: SERGE BRAMMERTZ & MICHELLE JARVIS, PROSECUTING CONFLICT-RELATED SEXUAL VIOLENCE AT THE ICTY (2016). See also: *Prosecutor v. Kunarac*, paras 117 and 119 (Jun. 12, 2002).

<sup>70</sup>Pati, *supra* note 4, at 81.

<sup>71</sup>JOHANNES MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT 41 (1999).

<sup>72</sup>GORDON BROWN, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS IN THE 21st CENTURY: A LIVING DOCUMENT IN A CHANGING WORLD 83 (2016).

<sup>73</sup>The first international instrument addressing trafficking in persons was the International Agreement for the Suppression of White Slave Trade, adopted in 1904, followed by the International Convention for the Suppression of White Slave Trade in 1910. After that, the League of Nations adopted a Convention for the Suppression of Trafficking in Women and Children in 1921, affirmed in the later International Convention for the Suppression of Traffic in Women of Full Age of 1933.

<sup>74</sup>Yasmine A. Rassam, *International Law and Contemporary Forms of Slavery: An Economic and Social Rights-Based Approach*, 23(4) PENN ST. INT’L L. REV. 809, 809 (2005).



as defined by Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention, fell within the scope of Article 4 of the Convention.<sup>75</sup> This judgment, emphasizing positive states' obligations for the protection of victims and potential victims of human trafficking<sup>76</sup>, which we will elaborate on later, leaves us without any further explanation as to why human trafficking is part of Article 4 of the Convention.

As stated above, the criminal offense of human trafficking consists of three elements. The fact that the Convention does not define the concept of human trafficking imposes an obligation to carefully monitor the elements of the criminal offense established in international law because it is impossible to classify behavior or a circumstance as a case of human trafficking unless it meets the elements of the Palermo Protocol and Anti-Trafficking Convention. The most common form is sexual exploitation, but other forms can also appear. The *Chowdury and Others* judgment deals with work exploitation; for example, "... exploitation through work is one of the forms of exploitation covered by the definition of human trafficking, and this highlights the intrinsic relationship between forced or compulsory labor and human trafficking."<sup>77</sup> *Rantsev* deals exclusively with sexual exploitation as the purpose of human trafficking – the notions of "exploitation of the prostitution of others" and "other forms of sexual exploitation" represents parts of the "purpose" element of the definition of trafficking, as emphasized by Judge Koskelo in his Chamber *S.M.* judgment. However, incorporation of all forms of human trafficking within the scope of Article 4, without a thorough *ad hoc* investigation of the facts and circumstances, may be inaccurate and lead to confusion.<sup>78</sup>

The *Rantsev* judgment is without doubt a landmark case and an important contribution to the field of human rights,<sup>79</sup> especially when we speak of positive states' obligations.<sup>80, 81</sup> The *S.M. v. Croatia* judgment went further; it confirms all the earlier positions regarding the understanding that human trafficking falls under Article 4 of the Convention. In *S.M.*, the ECtHR decided to follow the Anti-Trafficking Convention's approach to the manner in which it has been interpreted by the Group of Experts on Action against Trafficking in Human Beings (GRETA) because the Anti-Trafficking Convention applies to all forms of human trafficking, whether national or transnational, whether or not connected with organized crime.<sup>82</sup> In this context, from the perspective of Article 4 of the Convention, the concept of human trafficking relates to both national and transnational trafficking in human beings, irrespective of whether or not it is connected with organized crime.<sup>83</sup> A problem that may appear in this area is that 48 countries ratified the Anti-Trafficking Convention; however, the Council of Europe now consists of only 46 countries.<sup>84</sup> However, since the UN convention is generally accepted, the ECtHR uses all of the instruments at its disposal when bringing a particular case under legal qualification, although it emphasizes that the Anti-Trafficking

<sup>75</sup>*Rantsev v. Cyprus and Russia*, *supra* note 41, paras 281–82. For further discussion on the problem, see Jean Allain, *supra* note 47, at 546.

<sup>76</sup>SIMON MASEY & GLYNN RANKIN, *EXPLOITING PEOPLE FOR PROFIT: TRAFFICKING IN HUMAN BEINGS* 25 (2020).

<sup>77</sup>*Chowdury and Others v. Greece*, App. No. 21884/15, para. 93 (Jun. 30, 2017).

<sup>78</sup>*Kryiazi*, *supra* note 25, at 40.

<sup>79</sup>JULIA M. MURASZKIWWICZ, *PROTECTING VICTIMS OF HUMAN TRAFFICKING FROM LIABILITY: THE EUROPEAN APPROACH* 66 (2019).

<sup>80</sup>Ryszard Piotrowicz, *The European Legal Regime on Trafficking in Human Beings*, in *ROUTLEDGE HANDBOOK OF HUMAN TRAFFICKING* 50 (Ryszard Piotrowicz, Conny Rijken & Baerbel H. Uhl eds., 2018); Rozi Pati, *Trafficking in Human Beings: The Convergence of Criminal Law and Human Rights*, in *THE SAGE HANDBOOK OF HUMAN TRAFFICKING AND MODERN DAY SLAVERY* 292 (JB Clark & S Poucki eds., 2019).

<sup>81</sup>The important judgments are also *J. and Others v. Austria*, App. No. 58216/12, para. 104 (Jan. 17, 2017) and *Chowdury and Others v. Greece*, App. No. 21884/15 para. 93 (Mar. 30, 2017). Additionally, the prior consent of the victim is not sufficient to exclude the characterisation of work as forced labour. See *V.C.L. and A.N. v. the United Kingdom*, App. No. 77587/12, 74603/12, para. 149 (Feb. 16, 2021).

<sup>82</sup>*S.M. v. Croatia*, *supra* note 34, para. 294.

<sup>83</sup>Aronowitz, *supra* note 3, at 86.

<sup>84</sup><https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=197>, Dec. 11, 2022.

Convention is the most comprehensive, taking into account that it applies to both internal and international trade of people. We believe that this is a better approach precisely because trafficking in human beings does not always have to be part of organized crime. Consequently, it is better to take a comprehensive approach to the matter. But this does not exclude the possibility that, in the particular circumstances of a case, a specific form of conduct related to human trafficking may raise an issue under another provision of the Convention.<sup>85,86</sup>

Unlike the previous judgment, in this judgment, the ECtHR still explains its view that human trafficking falls under Article 4 of the Convention, but it goes a step further and brings forced prostitution under the protection of this Article.

## I. Forced prostitution under Article 4 of the Convention

### 1. On prostitution and forced prostitution

The problem of human trafficking for sexual purposes has been considered by a wide range of people and groups to varying degrees over a long period. In simple terms, sex trafficking is the movement of people for the purpose of sexual exploitation. Such exploitation is the (in)direct result of a series of actions taken by perpetrators who seek to profit from specific segments of the population, who, in turn, become entangled in trafficking schemes for a variety of reasons, including ethnic tensions, lack of isonomy, and a low national gross domestic product, mostly in host countries with weak institutions.<sup>87</sup> There are debates about whether violence is always a part of prostitution or not<sup>88</sup> and whether human trafficking is inextricably tied to prostitution.<sup>89</sup> The differences between these two offenses have been debated for many years.<sup>90</sup>

The debate over prostitution exploitation raises some highly delicate issues about how prostitution is treated in general. Different, often opposing, perspectives exist on whether prostitution may ever be voluntary or is always a coercive type of exploitation. In this respect, it is worth noting that different legal systems address prostitution differently, depending on how the relevant culture views it.<sup>91</sup> There is widespread recognition that human trafficking involving

<sup>85</sup>S.M. v. Croatia, *supra* note 34, para. 303.

<sup>86</sup>It could be Article 8 (A.I. v. Italy, App. No. 70896/17 (Apr. 01, 2021); Kaya v. Germany, App. No. 31753/02 (Jun. 28, 2007)), Article 1 (protection of property) of Protocol No. 1 (Tas v. Belgium, App. No. 44614/06 (May 12, 2009), or Article 4 (the right not to be tried or punished twice) of Protocol No. 7 (Alves de Oliveira v. France, App. No. 23612/20 (2021).

<sup>87</sup>Angelo G. Constantinou, *Harming the Very People Whom the Law Is Seeking to Protect: The Nexus between International, European Union and Domestic Law and Human Trafficking and Undercover Police Operations*. 8 NJECL 477 (2017).

<sup>88</sup>According to surveys, the majority of Asian women who presently work as sex workers did so of their own volition (CARLO DEVITO, THE ENCYCLOPEDIA OF INTERNATIONAL ORGANIZED CRIME, 160 (2005); International Labour Organization, A demand side of human trafficking in Asia: Empirical findings, 49–50 (2006); ROHINI & KALYAN SHANKAR, SEX WORK AND ITS LINKAGES WITH INFORMAL LABOUR MARKETS IN INDIA: FINDINGS FROM THE FIRST PAN-INDIA SURVEY OF FEMALE SEX WORKERS 45 (2013); Satarupa Dasgupta, *Commercial Sex Work in Calcutta: Past and Present*, in MAGALY RODRIGUEZ GARCIA, LEX HEERMA VAN VOSS & ELISE VAN NEDERVEEN MEERKERK, SELLING SEX IN THE CITY: A GLOBAL HISTORY OF PROSTITUTION, 1600s–2000 526, 530 (2017); World Health Organization, Sex work in Asia 6 (2001); *Id.* at 575 (2017); *See generally*: Taiwo Olabisi Oluwatoyin & Akinyinka Akinyoade, *Coercion or Volition: Making Sense of the Experiences of Female Victims of Trafficking from Nigeria in the Netherlands*, in AKINYINKA AKINYOADE & J.B. GEWALD, AFRICAN ROADS TO PROSPERITY, PEOPLE EN ROUTE TO SOCIO-CULTURAL AND ECONOMIC TRANSFORMATIONS (2015).

<sup>89</sup>Olivia Hartjen, *Sexkopslagen in the States: An American Version of the Nordic Model to Address Sex Trafficking in the United States*, 54 VAND. J. TRANSNAT'L L. 247 (2021).

<sup>90</sup>Dina Siegel & Yücel Yeşilgöz, *Natashas and Turkish men: New trends in women trafficking and prostitution*, in GLOBAL ORGANIZED CRIME: TRENDS AND DEVELOPMENTS 79 (Dina Siegel, Henk van de Bunt & Damian Zaitch eds., 2003).

<sup>91</sup>Judge Pastor Vilanova (concurring), in S.M. (GC), said: “Nevertheless, the time has come to address the question whether exploitation of prostitution, as such, remains compatible with the European Convention on Human Rights. As a general rule, I do not believe so. Human dignity cannot be paid for. The principle that the human body is not property also remains incompatible with its commodification (*res extra commercium*) and unsuited to the context of a contract of employment, which remunerates the persons concerned for their (physical or intellectual) efforts and not for making their own bodies available to others on the instructions of their employer.”

sexual exploitation is a serious crime. According to the ECtHR's research on the legislation of 39 Council of Europe Member States in Europe, all Member States criminalized human trafficking. Similarly, forcing someone to perform sexual services is illegal in every Member State (forced prostitution). Even where there is no coercion on the individual providing the services, the majority of Member States questioned criminalized participation in the supply of sexual services by another person.<sup>92</sup> Germany, the Netherlands, Slovenia, Spain, and Switzerland are the exceptions. The Member States have diverse ways of determining whether coercion exists, and different national laws may contain different elements that constitute coercion (including extortion, fraud, false promises, exploiting the victim's weakness, movement restrictions, kidnapping, and abuse of authority).<sup>93</sup>

In the legal regulation of prostitution, there are three main approaches: abolitionist, prohibitionist, and regulationist. The abolitionist approach criminalizes the offense of prostitution business or parts of it. It seeks to abolish prostitution by penalizing procurers and pimps rather than prostitutes. Sweden's neo-abolitionist approach takes the abolitionist logic further and penalizes the clients.<sup>94</sup> The prohibitionist approach prohibits prostitution and penalizes prostitutes and pimps alike (though not necessarily clients). Contrary to the abolitionists, the regulatory approach does not want to end prostitution; it wants to recognize the selling and buying of sex as an economic activity with offer and demand regulated through the price on the prostitution market, which is regulated by law. This approach is also known as legalizing and liberalizing prostitution. This idea also entails the distinction between voluntary and forced prostitution, which is the main subject of fierce debate today. Therefore, legalizing prostitution can be seen as an attempt to separate selling sex from sexual exploitation.<sup>95</sup>

On the one hand, voluntary sex workers argue that decriminalization helps all suppliers – voluntary as well as coerced – because it brings the sex market out of the underground; on the other hand, critics argue that decriminalization invites trafficking. Both sides of this debate condemn trafficking, but since traffickers tend to evade prosecution, the search for alternative means has become a controversy about whether all prostitution should be banned. There are two points of contention. First, there is disagreement about the impact of the prostitution policy, with one side arguing that trafficking flourishes in a decriminalized market and the other holding that the use of criminalization is, at best, futile against traffickers. Second, even if criminalization curbs trafficking, a conflict of interest remains as the law comes at the expense of voluntary prostitutes, forcing them underground and putting their safety at greater risk.<sup>96</sup>

Trafficking in human beings for sexual exploitation is a transnational, global epidemic that affects all countries regardless of whether they are the origin or destination of the trafficked individuals.<sup>97</sup> It is the most common form of exploitation of all sexes and ages and is separated into commercial and non-commercial sexual exploitation in the literature. The most common

<sup>92</sup>We have to recall the words from the famous book: "Jenny was not surprised to hear that prostitution was legal: she was surprised to learn that it was illegal in so many other places" (John Irving, *The World According to Garp*).

<sup>93</sup>*S.M. v. Croatia*, *supra* note 34, paras 210–12.

<sup>94</sup>Leo Platvoet, *Prostitution – which stance to take?* 2 (2007).

<sup>95</sup>In the study about sex work in Asia, ILO found that a very small proportion of women (a maximum of 12.5 % in Nepal) reported that they were engaged in sex work against their will (International Labour Organization, *A demand side of human trafficking in Asia: Empirical findings* 49 (2006)). Many organizations at the national level in Europe were set up to represent the social and political interests of sex workers (as they usually identify themselves). Some of them joined one of the international umbrella organizations, such as the International Union of Sex Workers 40 (IUSW) or The Global Network of Sex Work Projects, Erika Schulze et al., *Sexual Exploitation and Prostitution and its Impact on Gender Equality* (2014). Sex workers' organizations argue that putting prostitution and trafficking of human beings on the same footing is unjustified, and refuse stronger regulation of the prostitution business. According to them, statistical data are manipulated and misused to discredit the profession. They request that prostitution be considered apart from trafficking in human beings, and that it is recognized as a myth that most prostitutes are lured into prostitution under duress or false pretenses (*Id.*)

<sup>96</sup>Samuel Lee and Petra Persson, *Human Trafficking and Regulation Prostitution*, 14 AM. ECON. J. ECON. POLICY 87 (2018).

<sup>97</sup>Rashida Manjoo, *Trafficking of Women: Norms, Realities, and Challenges*, 7 ALB. GOV'T L. REV. 6 (2014).

form of sexual exploitation of victims of trafficking is forced prostitution.<sup>98</sup> The enslavement of people who are forced to perform sex activities as part of their servitude to the slaveholder or others is known as sex slavery. It comes in many forms and affects both men and women, although women and girls are disproportionately affected. Today, sex slavery is a vast international phenomenon with serious ramifications for its victims.<sup>99</sup>

While state-imposed forced labor continues to exist, new forms of forced labor are now emerging, much of it imposed by individuals, private groups, and gangs. Most cases of sexual exploitation fall into one of two forms: forced prostitution and forced pornography. Globalization has been accompanied by the increasing internationalization of prostitution, with an increase in the number of foreign prostitutes in many countries. The implication, according to some observers, is that prostitution is now increasingly in the hands of international networks and mafia-type organizations, which not only trade arms and drugs but also traffic young women and girls into forced prostitution. Women often take a loan to pay for the travel costs. However, once in their country of destination, these women have their passports confiscated and must repay the loan by working as prostitutes. But not all forced commercial sexual exploitation is the result of trafficking. In some cases, women and girls are forced into prostitution in their places of origin. Traffickers and pimps almost always use threats and violence against the victims and their families in their home countries.<sup>100</sup>

It is also useful to consider whether the exploitation of prostitution as a whole is in line with the European Convention on Human Rights. This was highlighted in *V.T. v. France* when the ECtHR observed significant variations in the approaches of different legal systems to prostitution. The ECtHR emphasized that forced prostitution was incompatible with a person's dignity. As a result, the ECtHR took a step away from the uncertainty, noting that whether prostitution falls within the scope of Article 4 is determined by the presence of coercion.<sup>101</sup> It held that an issue arises within the purview of Article 3 when a person is forced to engage in or persist in prostitution. Similarly, the ECtHR ruled that the applicant could not be considered to have been compelled into "forced or compulsory labor" within the meaning of Article 4 of the Convention if she was not coerced to continue with prostitution.<sup>102</sup>

## 2. International law and instruments prohibiting forced prostitution

This attitude, for the most part, relies on international consent. In the 1949 Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others, the Preamble states that the traffic in persons for the purpose of prostitution is incompatible with dignity. Article 1 prescribes that "the Parties to the present Convention agree to punish any person who, to gratify the passions of another: (1) Procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person; (2) Exploits the prostitution of another person, even with the consent of that person," while Article 2 states that "the Parties to the present Convention further agree to punish any person who: (1) Keeps or manages, or knowingly finances or takes part in the financing of a brothel; (2) Knowingly lets or rents a building or other place or any part thereof for the purpose of the prostitution of others." The Palermo Protocol does not define the terms *exploitation of the prostitution of others* and *sexual exploitation*, which is highlighted in the interpretative notes of the official records (*travaux préparatoires*) in the negotiation of the Palermo Protocol in the following manner:

<sup>98</sup>Mijalković, *supra* note 4, at 127.

<sup>99</sup>Steverson, *supra* note 62, at 376.

<sup>100</sup>Belser, De Cock & Mehran, *supra* note 19, at 11.

<sup>101</sup>Gillian Kane, *Building a House upon Sand? Human Trafficking, Forced Labor, and Exploitation of Prostitution in S.M. v. Croatia*, 7 ILaRC 77 (2021).

<sup>102</sup>*S.M. v. Croatia*, *supra* note 34, at 299.

[T]he Protocol addresses the exploitation of the prostitution of others and other forms of sexual exploitation only in the context of trafficking in persons and . . . the terms “exploitation of the prostitution of others” or “other forms of sexual exploitation” are not defined in the Protocol, which is therefore without prejudice to how States Parties address prostitution in their respective domestic laws (para. 64, p. 12).

The Joint UN Commentary on the EU Directive on Human Trafficking – A Human Rights-Based Approach, from March 7, 2012, – also repeats that the “[e]xploitation of prostitution of others and sexual exploitation” is not defined in international law. The terms have been intentionally left undefined in the Protocol in order to allow all states, independent of their domestic policies on prostitution, to ratify the Protocol. While the Protocol draws a distinction between exploitation for forced labour or services and sexual exploitation, this should not lead to the conclusion that coercive sexual exploitation does not amount to forced labour or services, particularly in the context of trafficking. “Coercive sexual exploitation and forced prostitution fall within the scope of the definition of forced labour. . . .” But, the UNODC defines the “exploitation of prostitution of others” as the unlawful obtaining of financial or other material benefits from the prostitution of another person. It also defined “sexual exploitation” as the obtaining of financial or other benefits through the involvement of another person in prostitution, sexual servitude, or other kinds of sexual services, including pornographic acts or the production of pornographic materials.”<sup>103</sup>

In 1979, the UN General Assembly adopted the Convention on the Elimination of All Forms of Discrimination Against Women, which, in Article 6, provides that State Parties shall take all appropriate measures, including legislation, to suppress all forms of trafficking in women and exploitation of the prostitution of women. The CEDAW Committee, in its General Recommendation No. 19 on violence against women (1992), held that State Parties are required to take measures to suppress all forms of trafficking in women and exploitation of the prostitution of women. The same Committee, in its background paper concerning Article 6 of the Convention on the Elimination of All Forms of Discrimination Against Women, summarizing the *travaux préparatoires* and the jurisprudence of the Committee, emphasized the need for “adoption or review of legislation to de-criminalize prostitutes and impose severe sanctions [on] pimps, procurers, and traffickers; implementation of measures aimed at improving the economic situation of women and girls so as to eliminate their vulnerability to prostitution and trafficking; the provision of social support and health-care services to prostitutes; implementation of rehabilitation and reintegration measures for women and girls who had been victims of trafficking; and training of border police and law enforcement officials in order that they might recognize and provide support for victims of trafficking. In its approach, the Committee laid particular emphasis on the need to respect the human rights of prostitutes and victims of trafficking.”

Consequently, there is international consent regarding the prohibition of forced prostitution. The question that arises now is whether forced prostitution is covered by the notion of “forced or compulsory labor.” The English word “labour” is often used in the narrow sense of manual work, but it also bears the broad meaning of the French word “travail,” and it is the latter that should be adopted in the present context. Accordingly, the ECtHR finds corroboration of this in the ILO Convention No. 29 (“all work or service” or “tout travail ou service” in French) and Article 4 § 3(d) of the Convention (“any work or service,” “tout travail ou service”), whose activities are in no way limited to the sphere of manual labor. Furthermore, in its Recommendation 1815 (2007) entitled “Prostitution – which stance to take?”, the Parliamentary Assembly stated that all necessary measures must be taken to combat forced prostitution and the trafficking of human beings and noted that, regarding adult voluntary prostitution, the Assembly encourages the Committee of Ministers to recommend that the Council of Europe Member States formulate an explicit policy on prostitution; in particular, they must avoid double standards and policies that

<sup>103</sup>Model Law against Trafficking in Persons, 13–15, 19 (2009).



criminalize and penalize prostitutes. On June 11, 2008, in its reply to the Parliamentary Assembly Recommendation 1815 (2007), the Committee of Ministers noted that the approaches adopted by the 47 Member States of the Council of Europe vary widely in this field. For this reason, a common policy on prostitution can only be formulated with great difficulty. Since there is no uniform position regarding voluntary prostitution, we believe it is included under the concept of labor and is, therefore, protected by the Convention.

## 2. The ECtHR's approach

Forced prostitution in this sphere can be viewed in two ways: through human trafficking and independently. In terms of Article 4, the notion of “forced or obligatory labor” intends to protect against significant exploitation, such as forced prostitution, regardless of whether the circumstances of a case are related to the specific context of human trafficking. Any such behavior may have components that classify it as “slavery” or “servitude” under Article 4 of the Convention or may raise an issue under another provision of the Convention.<sup>104</sup> The ECtHR also points out that the question of whether a particular situation involves all the constituent elements of human trafficking and/or gives rise to a separate issue of forced prostitution is a factual question that must be examined in the light of all the relevant circumstances of a case.<sup>105</sup> Judge Serghides, in *S.M. (GC)*, believes that this field can be used as a direct methodological approach that avoids problems of equating forced or compulsory labor with human trafficking and the exploitation of prostitution. According to him, the question to be asked is whether the applicant’s complaint can be considered to amount to “forced or compulsory labor” within the meaning of Article 4 § 2 of the Convention. This concept is generic, autonomous, and susceptible to evolutive interpretation, allowing the development of the living instrument. The generic nature of the concept is reinforced by the provisions of the next paragraph of the Article, namely paragraph 3 (a)-(d), which expressly excludes from the concept of “forced or compulsory labour” four categories or kinds of work or service ((a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of the Convention or during conditional release from such detention; (b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service; (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community; (d) any work or service which forms part of normal civic obligations. “Human trafficking” and “exploitation of prostitution,” by their very nature, fall within the concept of “forced or compulsory labor.” Such behavior is a serious means of coercing an individual to perform labor against their will. “Forced or compulsory labor” may occur in many different contexts and is not limited to “human trafficking” and/or “exploitation of prostitution.” The very nature of the appalling exploitation of human beings involved in “human trafficking” and/or “exploitation of prostitution” is such that it must automatically fall within the scope of Article 4 (2).”

According to Kane, if the relationship between trafficking and forced labor is intrinsic, and if the exploitation of prostitution must contain an element of coercion, it is unclear when forced prostitution would not be connected to the specific human trafficking context or when this would amount to trafficking.<sup>106</sup> However, the answer to this question of fact depends on the circumstances of the individual case, but we believe that the most common form of human trafficking will, by definition, be forced prostitution.

Another significant point is whether it is necessary to define what “exploitation” is now that the material scope of Article 4 has been broadened to encompass it.<sup>107</sup> Stoyanova believes that if human trafficking is covered by Article 4, it would include not only slavery, servitude, and

<sup>104</sup>*S.M. v. Croatia*, *supra* note 35, para. 300.

<sup>105</sup>*Id.*, paras 302, 303.

<sup>106</sup>Kane, *supra* note 98, at 77.

<sup>107</sup>Stoyanova, *supra* note 60, at 173.

forced labor but also “exploitation” as the goal of human trafficking (as long as the other constitutive elements of human trafficking are fulfilled). Accordingly, defining human trafficking solely in terms of slavery, servitude, or forced labor is unnecessary. Even the ECtHR states that this definition is not necessary. However, exploitation as a goal of human trafficking must be linked to certain acts and means. Although the ECtHR might have broadened Article 4’s material scope to include “exploitation,” this expansion does not cover exploitation as such but only exploitation linked to recruitment, transportation, transfer, and harboring or receipt of persons by means of coercion or deception.<sup>108</sup>

There is a hypothesis that the legalization of prostitution can decrease human trafficking for sexual exploitation.<sup>109</sup> However, we believe that legalization might have no positive effect or, on the contrary, might even trigger an increase in criminal conduct in human trafficking for sexual exploitation. EU Member States report that traffickers tend to drive their victims to countries where prostitution is regulated and lawfully practiced.

Prostitution is legal in some EU Member States, which facilitates traffickers who wish to use a legal environment to exploit their victims. Europol found that in those EU Member States where prostitution is legal, suspects were able to exploit children as well as adult victims in legal businesses such as brothels, red-light districts, and sex clubs, often with the help of business managers because prostitution of minors can be very profitable (Report COM(2018)).<sup>110</sup>

Judge Koskelo, in his Chamber *S.M.* judgment, emphasized that the new and significant development in the scope of Article 4 was introduced without any real analysis, proper discussion, explanation, clarity, or openness. In *Rantsev*, the notions of “exploitation of the prostitution of others” and “other forms of sexual exploitation” represent parts of the “purpose” element of the definition of trafficking. However, in *S.M.*, the ECtHR went far beyond and emphasized that both trafficking *and* the exploitation of prostitution fall within the scope of Article 4.<sup>111</sup> Although a more detailed analysis can be made, it would give the same result, and we believe that the approach taken in *S.M.* is correct. Forced prostitution is and always will be a form of human trafficking. If human trafficking now falls under Article 4 of the Convention, it is inevitable that its form will also fall under the same Article of the Convention.

Furthermore, we agree with Judge Pastor Vilanova’s concurring opinion in GC’s *S.M.*, which states that exploitation of prostitution is the unlawful obtaining of financial or other material benefits from the prostitution of another person, which should be presumed to be contrary to Article 4 of the Convention, while the “sole exception should be prostitution entered into with free, informed, and express consent, which cannot be characterized as forced labor. All other forms of prostitution without consent, therefore, come within the scope of the application of Article 4. No form of implicit consent can be accepted, nor can it justify the exploitation of one person by another. Silence or lack of resistance must never be regarded as implicit consent. Otherwise, the way would be wide open to all manner of abuse, to say nothing of all the evidential difficulties that the victims themselves would face.”

<sup>108</sup>*Id.* at 172.

<sup>109</sup>Thomas Feltes & Robin Hofmann, *Transnational Organised Crime and its Impact on States and Societies*, in *INTERNATIONAL LAW AND TRANSNATIONAL ORGANISED CRIME* 47 (Pierre Hauck & Sven Peterke eds., 2016).

<sup>110</sup>Europol, Situation Report on Criminal Networks Involved in the Trafficking and Exploitation of Underage Victims in the European Union, (2018); European Commission, Report COM(2018) 777. Second report on the progress made in the fight against trafficking in human beings (2018) as required under Article 20 of Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims (2018).

<sup>111</sup>Judge Koskelo, in her dissenting opinion on the Chamber’s judgment in *S.M.*, also thinks that it would lead to the requirement that such exploitation be qualified as a criminal offense, which raises issues under Article 7 of the Convention. However, we believe that forced prostitution has to be prescribed as a criminal offense as it is incompatible with democratic society.

### 3. Impossibility of justification of human trafficking and forced prostitution

Forced labor and forced prostitution are not and cannot be justified under the Convention. These negative phenomena violate human dignity and are incompatible with the Convention. Several international and regional treaties and instruments contain the word “dignity.” Although the Convention does not explicitly address that idea, the ECtHR highlighted that the Convention’s core values included regard for human dignity.<sup>112</sup> Accordingly, criminal justice must serve to uphold human rights for them to be justified, and human rights cannot be effectively protected without criminal justice.<sup>113</sup> Human dignity is crucial in relation to modern slavery; it is defined as any factual hypothesis in which people are not regarded as the *stricto sensu* property of their owners.<sup>114</sup> Therefore, no form of human trafficking or forced prostitution can be justified under Article 4 of the Convention.

## 4. States’ positive obligations under Article 4 of the Convention

### 1. Positive obligations under the Convention in general

Every recognized right of one party imposes a duty on the other party to respect it. One of the most interesting concepts is that every right can entail three types of obligations: the “obligation to respect,” which forbids state organizations and agents from committing violations; the “obligation to protect,” which requires the state to protect the owners of rights from third-party interference and to penalize those who violate these rights; and the “obligation to implement,” which calls for particular positive actions to ensure that the right is fully realized and implemented.<sup>115</sup> According to the Convention, states have two types of obligations – positive and negative. In theory, the Convention is a framework primarily, but not exclusively, concerned with safeguarding human rights defined as negative liberties, which, as a result, demands governments act as guarantors of non-interference in individuals’ free choices. It is possible to arrive at a position where human rights are better safeguarded by using a principled approach that sees the Convention as imposing some positive responsibilities. Since positive requirements emphasize governments and other executive agencies’ obligations to take proactive measures to preserve rights, their implementation means that duty-bearers must intervene to prevent human rights breaches and make essential reparations once they have occurred.<sup>116</sup> By using the concept of positive obligation, the ECtHR was able to enhance, and in some cases extend, the substantive requirements of the Convention text and link them to procedural responsibilities that are separate and distinct from those covered by Articles 6 and 13. The aim was to ensure that individuals could effectively exercise their secured rights.<sup>117</sup>

First, we should define the term “positive obligation.” Such a definition can be reconstituted from the *Belgian linguistic case*<sup>118</sup> in which the applicants, taking this as the basis for their complaints, argued that such obligations should be recognized as “obligations to provide something.” In the view of the ECtHR, the prime characteristic of positive obligations is that, in practice, they require national authorities to take necessary measures to safeguard a right or,

<sup>112</sup>Svinarenko and Slyadnev v. Russia, App. nos. 32541/08 and 43441/08 para. 118 (ECtHR ECHR 2014); C.R. v. the United Kingdom, Series A no. 335 C para. 42 (Nov. 22, 1995); S.W. v. the United Kingdom, Series A no. 335 B para. 44 (Nov. 22, 1995); Pretty v. the United Kingdom, App. no. 2346/02 para. 65 (2002 III).

<sup>113</sup>See generally: ALBIN DEARING, JUSTICE FOR VICTIMS OF CRIME: HUMAN DIGNITY AS THE FOUNDATION OF CRIMINAL JUSTICE IN EUROPE (2017).

<sup>114</sup>Pasquale de Sena, *Slaveries and new slaveries: Which role for human dignity?*, 64 QIL 7, 16 (2019).

<sup>115</sup>JEAN-FRANÇOIS LYOTARD & AKANDJI-KOMBE, POSITIVE OBLIGATIONS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS, A GUIDE TO THE IMPLEMENTATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 5 (2007).

<sup>116</sup>David Russell, *Supplementing the European Convention on Human Rights: Legislating for positive obligations*, 61 N.I.L.Q. 281 (2010).

<sup>117</sup>Jean-François & Akandji-Kombe, *supra* note 116, at 6.

<sup>118</sup>Case “Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium” v. Belgium, Application no. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64, 23 July 1968.

more precisely, to adopt reasonable and suitable measures to protect the rights of the individual. All positive obligations have the same goal – to ensure the effective application of the Convention and the effectiveness of the rights it protects.<sup>119</sup> The notion of positive obligations has been developed through the case law of the ECtHR.<sup>120,121</sup> Its development has brought minimum standards for criminal laws.<sup>122</sup> In simple words, positive obligations require states to take action, as developed in connection with numerous Convention Articles and Rights.<sup>123</sup> The challenge of studying positive obligations lies in the fact that, at their core, is an omission,<sup>124</sup> but “causation by omission raises theoretical difficulties that go beyond the area of ECHR law.”<sup>125</sup> Positive obligations are familiar and well-documented, though sometimes uncertain,<sup>126</sup> concepts in domestic situations but have rarely been applied in interstate situations.<sup>127</sup>

In *Siliadin v. France*, the ECtHR noted that the fact that a state refrains from infringing guaranteed rights does not suffice to conclude that it has complied with its obligations under Article 1 of the Convention.<sup>128</sup> The ECtHR held that limiting compliance with Article 4 of the Convention, leading to direct action by state authorities, would be inconsistent with the international instruments concerned explicitly with this issue and render it ineffective.<sup>129</sup>

## 2. The specific positive obligations under Article 4 of the Convention

The ECtHR advocates a comprehensive response to human trafficking, which includes three aspects: prevention, victim protection, and prosecution and punishment of traffickers.<sup>130</sup> In essence, the positive obligations of the state are similar to the obligations imposed by both the Anti-Trafficking Convention and the Palermo Protocol and consist of the criminalization of human trafficking, the prosecution of perpetrators of criminal acts of human trafficking, and the protection of victims of human trafficking.<sup>131</sup> According to the Anti-Trafficking Convention and the Palermo Protocol, the obligations of states can be summarized as the obligation to prevent human trafficking,<sup>132</sup> the

<sup>119</sup>*Id.* at 6 and 9; Veljko Turanjanin, *Life Imprisonment without Parole: The Compatibility of Serbia’s Approach with the European Convention on Human Rights*, 42 LIVERP. LAW REV. 243, 254 (2021).

<sup>120</sup>Boris Topić, *State’s Responsibility for Business-Related Human Rights Violations in the Light of the Strasbourg Court’s Case-Law*, 10 UNION UNIVERSITY LAW SCHOOL REVIEW (Pravni zapisi) 75 (2019).

<sup>121</sup>IN PRACTICE, IT IS NOT EASY IN SOME CASES TO DISTINGUISH POSITIVE AND NEGATIVE OBLIGATIONS (Maria-Artemis Kolliniati, *Human Rights and Positive Obligations to Healthcare* 26 (2019)).

<sup>122</sup>ANDREW ASHWORTH, POSITIVE OBLIGATIONS IN CRIMINAL LAW 209 (2013).

<sup>123</sup>Liora Lazarus, *Positive Obligations and Criminal Justice: Duties to Protect or Coerce?* in PRINCIPLES AND VALUES IN CRIMINAL LAW AND VALUES IN CRIMINAL LAW AND CRIMINAL JUSTICE: ESSAYS IN HONOUR OF ANDREW ASHWORTH 135 (Lucia Zedner & Julian V. Roberts eds., 2012).

<sup>124</sup>Vladislava Stoyanova, *Fault, knowledge and risk within the framework of positive obligations under the European Convention on Human Rights*, 33 LJIL 603 (2020).

<sup>125</sup>Laurens Lavrysen, *Causation and Positive Obligations under the European Convention on Human Rights: A Reply to Vladislava Stoyanova* 18 HUM. RIGHTS LAW REV. 706 (2018).

<sup>126</sup>Vladislava Stoyanova, *Common law tort of negligence as a tool for deconstructing positive obligations under the European Convention on Human Rights*, 24(5) IJHR 632 (2020).

<sup>127</sup>Donald Shaver & Leo Zwaak, *Rantsev v. Cyprus and Russia: Procedural Obligations of Third Party Countries in Human Trafficking under Article 4 ECHR*, 4 IAEHR 118, 119 (2011).

<sup>128</sup>*Siliadin v. France*, *supra* note 20, para. 77; Holly Cullen, *Siliadin v. France: Positive Obligations under Article 4 of the European Convention on Human Rights*, 6 HUM. RIGHTS LAW REV. 585 (2006); DIMITRIS XENOS, THE POSITIVE OBLIGATIONS OF THE STATE UNDER THE EUROPEAN CONVENTION OF HUMAN RIGHTS 84 (2012).

<sup>129</sup>*Siliadin v. France*, *supra* note 20, para. 89.

<sup>130</sup>Pati, *supra* note 4, at 95. See also Concurring opinion of Judge Turković in *S.M. v. Croatia* (GC).

<sup>131</sup>States under the American Convention on Human Rights also have positive and negative obligations, where Article 6 is to be read in conjunction with Article 1-1 of the ACHR and the general obligations to ensure, protect, and guarantee the prohibition of slavery (*Hacienda Brazil Verde Workers v. Brazil*, Series C No. 318, para. 317, (Oct. 20, 2016) and Article 19, when victims of the prohibited practice are children (*Hacienda Brazil Verde Workers v. Brazil*, *supra* note, para. 318; see also LUDOVIC HENNEBEL & HÉLÈNE TIGGROUDJA, THE AMERICAN CONVENTION ON HUMAN RIGHTS: A COMMENTARY 260 (2022)).

<sup>132</sup>Chapter II of the Anti-Trafficking Convention; Chapter III of the Palermo Protocol.

obligation to criminalize human trafficking,<sup>133</sup> the obligation to protect victims of human trafficking,<sup>134</sup> the obligation to conduct an investigation,<sup>135</sup> and the obligation to cooperate.<sup>136</sup>

In discussing European states' substantive duties to prevent trafficking, relying on the Anti-Trafficking Convention and the Palermo Protocol, the ECtHR has classified these obligations into three groups: the positive obligation to put in place an appropriate legislative and administrative framework, the positive obligation to take operational measures, and the procedural obligation to investigate. The classification imposed by the ECtHR implies placing the given obligations on the level of human rights, and failure to comply with any of the mentioned obligations will violate Article 4 of the Convention. However, we can assume that the largest number of violations will refer to the positive obligation to take operational measures and the procedural obligation to investigate. Also, it is important to emphasize that the same principles apply to both human trafficking and forced prostitution. Unlike the material aspect of Article 4, where the ECtHR made a step forward in interpretation, there is no room for interpretation or revisiting a well-established approach concerning the procedural obligations under this Article.

### 3. The positive obligation to put in place an appropriate legislative and administrative framework

Until recently, Article 4 of the Convention was a rarely invoked provision. However, in light of the abuses to which migrants in European host countries are being subjected, Article 4 has sprung into life. As a result, the ECtHR delivered several judgments on Article 4.<sup>137</sup> *Siliadin v. France* was the first case in which the ECtHR was called on to consider whether Article 4 imposed positive obligations on states, and the ECtHR concluded that it did.<sup>138</sup> Having given a positive answer to the question, the ECtHR then examined, in particular, whether the harm inflicted by private parties on the applicant qualified as slavery, servitude, or forced labor.<sup>139</sup> The ECtHR confirmed that Article 4 entailed a specific positive obligation on Member States to penalize and prosecute effectively any act aimed at maintaining a person in a situation of slavery, servitude, or forced or compulsory labor.<sup>140</sup> The ECtHR has taken a similar view in a few other cases. In *C.N. and V. v. France* case, it found that "States are required to put in place a legislative and administrative framework that prohibits and punishes forced or compulsory labor, servitude and slavery."<sup>141</sup> In *C.N. v. The United Kingdom*, the ECtHR emphasized that the "Government was under a positive obligation to enact domestic law provisions specifically criminalizing the conduct prohibited by Article 4. In order to comply with this obligation, Member States are required to put in place a legislative and administrative framework to prohibit and punish trafficking."<sup>142</sup> In light of the cited judgments, it is clear that states have a positive human rights obligation to criminalize abuses falling within the material scope of Article 4.<sup>143</sup>

<sup>133</sup>Chapter IV of the Anti-Trafficking Convention; Article 5 of the Palermo Protocol.

<sup>134</sup>Chapter III of the Anti-Trafficking Convention; Chapter II of the Palermo Protocol.

<sup>135</sup>Chapter V of the Anti-Trafficking Convention.

<sup>136</sup>Chapter VI of the Anti-Trafficking Convention; Chapter III of the Palermo Protocol.

<sup>137</sup>Vladislava Stoyanova, *Article 4 of the ECHR and the obligation of criminalising slavery, servitude, forced labour and human trafficking*, 3 CJICL 408 (2014).

<sup>138</sup>INTERNATIONAL LABOUR ORGANIZATION, FORCED LABOUR AND HUMAN TRAFFICKING, CASEBOOK OF COURT DECISIONS, A TRAINING MANUAL FOR JUDGES, PROSECUTORS AND LEGAL PRACTITIONERS 31 (2009).

<sup>139</sup>Stoyanova, *supra* note 60, at 172.

<sup>140</sup>*C.N. and V. v. France*, *supra* note 32, para. 91.

<sup>141</sup>*Id.* at 105.

<sup>142</sup>*Id.* at 66.

<sup>143</sup>Stoyanova, *supra* note 139, at 408.



It is not easy to distinguish between substance and procedure in ECtHR case law.<sup>144</sup> The leading cases in which the ECtHR elaborated on and affirmed the positive obligation of criminalizing abuses were *X v. The Netherlands* and *M.C. v. Bulgaria*.<sup>145</sup> The ECtHR's case law also shows that the ECtHR views criminalization as having an important value for the individual victim. Criminal law makes it possible for the victim to see the abusers convicted and sentenced.<sup>146</sup> What is important to emphasize is that the aforementioned principles are equally relevant when it comes to human trafficking and the exploitation of prostitution.<sup>147</sup> Setting a legislative framework and criminalizing human trafficking and forced prostitution should not be controversial in today's society. The position of the ECtHR is indisputable in that the first positive procedural obligation of the state must be the criminalization and sanctioning thereof.

In the *Rantsev* case, the ECtHR took a number of positions that serve as key provisions for the positive obligations of states. Importantly, the ECtHR observed that the Palermo Protocol and the Anti-Trafficking Convention themselves refer to the need for a comprehensive approach to combat trafficking, including measures to protect victims and punish traffickers. In this regard, the ECtHR concluded that the range of protections set out in national legislation must be adequate to provide practical and effective protection of the rights of victims or potential victims of trafficking. Recognizing the problem of businesses that are frequently used as a cover for human trafficking, the ECtHR took the important position that, in addition to criminal law aimed at punishing traffickers, states must regulate this sort of business. Given the complexity of the problem of trafficking, the ECtHR formed the view that only a combination of measures addressing all three aspects of positive obligations can be effective in the fight against trafficking. Therefore, the ECtHR emphasized that the duty to penalize and prosecute trafficking is only one aspect of Member States' general undertaking to combat trafficking and that the extent of the positive obligations arising under Article 4 must be considered within this broader context.<sup>148,149</sup>

#### 4. The positive obligation to take operational measures

It is not enough for the state to simply criminalize human trafficking and forced prostitution. In *Rantsev*, the ECtHR established a positive obligation for states to take operational measures for the protection of victims of trafficking. Therefore, it must be demonstrated that the state authorities were aware, or should have been aware, of circumstances leading to a credible suspicion that an identified individual was at real and immediate risk of being trafficked or exploited.<sup>150</sup> If the response is affirmative, the authorities will have violated Article 4 of the Convention if they failed to take reasonable actions to remove that individual from that situation or risk. Consequently, it must be proven that the state knew or should have known about the harm.<sup>151</sup> Furthermore, the state must not remain passive but should constantly

<sup>144</sup>Laurens Lavrysen, *Positive Obligations and the Criminal Law: A Bird's Eye View on the Case Law of the European Court of Human Rights*, in COERCIVE HUMAN RIGHTS: POSITIVE DUTIES TO MOBILISE THE CRIMINAL LAW UNDER ECHR 31 (Laurens Lavrysen & Natasa Mavronicola eds., 2020).

<sup>145</sup>Stoyanova, *supra* note 139, at 413.

<sup>146</sup>*Id.* at 415.

<sup>147</sup>Choudury and Others v. Greece, App. No. 21884/15, paras 86–89 and 103–104 (Mar. 30, 2017).

<sup>148</sup>*Rantsev v. Cyprus and Russia*, *supra* note 41, paras 284–85.

<sup>149</sup>In *Rantsev*, the Cypriot legislation reflected the provisions of the Palermo Protocol. It prohibits trafficking and sexual exploitation, with consent providing no defense to the offense, so this law was declared as suitable by the Council of Europe Commissioner. However, the general and administrative framework and the adequacy of Cyprus's immigration policy had a number of weaknesses; Cyprus did not afford Ms Rantseva practical and effective protection against trafficking and exploitation.

<sup>150</sup>For example, in *L.E. v. Greece*, it took nine months to recognize the status of a victim was not reasonable, which, according to Article 4, was violated.

<sup>151</sup>Vladislava Stoyanova, *Causation between State Omission and Harm within the Framework of Positive Obligations under the European Convention on Human Rights*, 18 HUM. RIGHTS LAW REV. 314 (2018).

anticipate new potential harms.<sup>152</sup> States must also provide relevant training to law enforcement and immigration officials.<sup>153</sup> However, given the challenges of policing modern societies, the ECtHR stated that the obligation to take operational measures must be understood in a way that does not place impossible or disproportionate burdens on the authorities.<sup>154</sup>

Stoyanova emphasized that it should be underscored that when the ECtHR applies the positive obligation of taking protective, operational measures, the criteria triggering this obligation do not necessarily include demonstrating that the individual was held in slavery, servitude, or forced labor.<sup>155</sup> The ECtHR noted that the preventative measures include those that strengthen coordination at the national level between various anti-trafficking bodies and discourage the demand for all forms of exploitation of persons.<sup>156</sup>

### 5. The procedural obligation to investigate

As mentioned, the ECtHR has frequently identified positive obligations, but procedural obligations have been rare. In *Rantsev v. Cyprus and Russia*, it found that Article 4 includes a “procedural obligation to investigate situations of potential trafficking”<sup>157</sup> where there is a credible suspicion that an individual’s rights under the Article have been violated. This obligation exists regardless of whether it is about human trafficking, domestic servitude, or forced prostitution.<sup>158,159</sup> Unlike the Palermo Protocol, the Anti-Trafficking Convention explicitly requires each Member State to establish jurisdiction over any trafficking offense committed in its territory. The investigation must meet all investigatory parameters that have crystallized in the practice of the ECtHR.<sup>160</sup> In other words, for the investigation to be effective, it must be independent of those implicated in the events. It must be capable of leading to the identification and punishment of individuals responsible, an obligation of means but not of results. A requirement of promptness and reasonable expedition is implicit in all cases, but where the possibility of removing the individual from the harmful situation is available, the investigation must be undertaken as a matter of urgency. The victim or the next-of-kin must be involved in the procedure to the extent necessary to safeguard their legitimate interests.<sup>161</sup> It is essentially about the fact that these criminal offenses cannot be left to private prosecution lawsuits; they must be subject to a criminal *ex officio* prosecution.

The same obligation applies whether the Member State is the destination, origin, or the transit state.<sup>162</sup> It is necessary to emphasize that the obligation to conduct an investigation is not limited

<sup>152</sup>Laurens Lavrysen, *Protection by the Law: The Positive Obligation to Develop a Legal Framework to Adequately Protect the ECHR Rights*, in HUMAN RIGHTS AND CIVIL RIGHTS IN THE 21st CENTURY 93 (Brems and Haec eds., 2014).

<sup>153</sup>*Rantsev v. Cyprus and Russia*, *supra* note 2, paras 286–87. Although under Article 10 of the Palermo Protocol, states undertake to provide or strengthen training for law enforcement. Immigration and other relevant officials prevent trafficking in person, but this was not the case in Cyprus; the authorities did not even question Ms Rantseva at the police station, no statement was taken from her, and the police made no further inquiries into the background facts. Accordingly, there was a violation of Article 4 in this respect because the authorities failed to take appropriate measures within the scope of their powers to remove the individual from that situation or risk (see also *C.N. v. the United Kingdom*, *supra* note 21, para. 67).

<sup>154</sup>Bernhard Hofstötter, *European Court of Human Rights: Positive Obligations in E. and others v. the United Kingdom*, 2 I. CON 528 (2004).

<sup>155</sup>Stoyanova, *supra* note 139, at 421.

<sup>156</sup>V.C.L. and A.N. v. the United Kingdom, App. No. 77587/12 74603/12, para. 153 (Feb. 16, 2021).

<sup>157</sup>A.T. Gallagher, *Chapter 4 State Responsibility for Trafficking*, in THE INTERNATIONAL LAW OF HUMAN TRAFFICKING 246 (2010); Shaver & Zwaak, *supra* note 129, at 130.

<sup>158</sup>S.M. v. Croatia, *supra* note 34, para. 307.

<sup>159</sup>The Inter-American Court of Human Rights also recognized the need to investigate, punish, and provide reparations (Lavrysen, *supra* note 146).

<sup>160</sup>Paul Lemmens & Marie Courtoy, *Positive Obligations and Coercion: Deterrence as a Key Factor in the European Court of Human Rights Case Law*, in COERCIVE HUMAN RIGHTS: POSITIVE DUTIES TO MOBILISE THE CRIMINAL LAW UNDER ECHR 55 (Laurens Lavrysen & Natasa Mavronicola eds., 2020).

<sup>161</sup>Paul and Audrey Edwards v. the United Kingdom, App. No. 46477/99, paras 70–73, (Mar. 14, 2002).

<sup>162</sup>Shaver & Zwaak, *supra* note 129, at 129; *Rantsev v. Cyprus and Russia*, *supra* note 41, paras 289.

to the state's territory; in cross-border trafficking cases, Member States are also subject to a duty to cooperate effectively with the relevant authorities of other states concerned in investigating events that occurred outside their territories.<sup>163</sup> Thus, all states that are part of the cross-border trafficking chain are placed under an equal obligation to cooperate effectively with other states in the chain to conduct an effective investigation. A domestic investigation alone cannot, by definition, be considered effective.<sup>164</sup> Legal and policy developments over the past decade have affirmed that the obligation to investigate and prosecute trafficking also requires attention to the treatment of and cooperation with victims, training, empowerment, specialization of criminal justice officials, integration of a gender perspective, the rights of suspects, the right to a fair trial, sanctions, asset confiscation and disposal, and international cooperation.<sup>165</sup>

We conclude by saying that, in the *Rantsev* case, the ECtHR established new states' duties in the area of human trafficking. However, it is important to place these specific obligations within the context of general state responsibilities in the field of human rights. As noted, states have a positive obligation to put in place appropriate legislative and administrative frameworks to combat human trafficking. They also have positive obligations to take protective measures on behalf of the victims of human trafficking and procedural obligations to investigate human trafficking. The ECtHR also established a duty of cooperation between states in cases where events related to human trafficking may occur outside the state's own territory.<sup>166</sup> The *Rantsev* case and the others that followed, especially *S.M.*, prove that states must comply with their positive obligations under international law. It is only then that a state can claim to be serious in its efforts to combat human trafficking.<sup>167</sup>

### C. Conclusion

Forced or compulsory labor can occur in a variety of scenarios, including, but not limited to, human trafficking and/or forced prostitution. One of the key issues related to human trafficking and forced prostitution in the context of human rights is whether and in what way these phenomena fall under the protection of the European Convention on Human Rights. The evolution of the Convention as a living instrument helped in subsuming human trafficking and forced prostitution under the scope of Article 4. The alternative to evolution is that the ECtHR will not be able to respond to contemporary developments.<sup>168</sup> In *Rantsev v. Cyprus and Russia*, the ECtHR began to develop criteria through which victims of human trafficking and forced prostitution were brought under the protection of Article 4 of the Convention. However, in *S.M. v. Croatia*, the ECtHR went a step further in holding that victims of forced prostitution fell under the protection of Article 4, regardless of trafficking. It is the right step towards better protection for victims of human trafficking. We believe that all forms of prostitution without consent fall within the scope of the application of Article 4 and that there is no form of implicit consent for the justification of the exploitation of one person by another. The ECtHR developed three types of positive procedural obligations for states, which logically derive from each other. We believe that it is completely unacceptable for states not to criminalize human trafficking and forced prostitution and not to provide adequate protection to victims of these crimes. At the same time, the ECtHR's request that states must conduct *ex officio* investigations when there is a suspicion of human

<sup>163</sup>Zoletic and Others v. Azerbaijan, *supra* note 45, para. 191.

<sup>164</sup>Shaver & Zwaak, *supra* note 129, at 129.

<sup>165</sup>United Nations, Human Rights, Office of the High Commissioner, Human Rights and Human Trafficking Fact Sheet No. 36 (2014).

<sup>166</sup>*Rantsev v. Cyprus and Russia*, *supra* note 2, para. 257; *Pati*, *supra* note 4, at 131.

<sup>167</sup>*Id.* at 140.

<sup>168</sup>*De Londras & Dzehstiarou*, *supra* note 39, at 91.

trafficking and forced prostitution is adequate. However, such an investigation must meet all the investigatory criteria set out in the ECtHR's case law. Human trafficking and forced prostitution, as impossible as they may sometimes seem, must be punished appropriately.

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