3. ARTICLE 4 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

"No one shall be held in slavery or servitude.

2. *No one shall be required to perform forced or compulsory labour.*
3. *For the purpose of this Article the term "forced or compulsory labour" shall not include:*

(a) *any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this 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."[72]

After discussing the definition of trafficking in human beings and the state obligations found in the international legal framework on human trafficking, this chapter addresses the European human rights law perspective on the matter, as revealed in article 4 of the ECHR and the ECtHR's adjudications. The aim of this chapter is to answer two main

72 Article 4 European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September 1953).

research questions of this thesis: First, what conduct relating to the issue of trafficking in human beings is prohibited under the ECHR? Second, what concrete protection does the ECHR offer to victims of human trafficking?

To begin, a short introduction to the system of the ECHR and ECtHR is given in order to clarify its relevance to the issue of trafficking in human beings. Then, an overview of the relevant interpretative methods that have been developed by the Court is given to clarify the reasoning of the Court in its adjudication. Next, the scope of article 4 of the ECHR and the Court's view of the definition and relevance of the concepts contained therein are discussed. Finally, the positive state obligations regarding human trafficking that flow from article 4 of the ECHR are examined in order to establish the extent of protection provided to victims of human trafficking.

3.1. Introduction to the system of the European Convention on Human Rights and the European Court of Human Rights

The ECHR currently has 46 state parties.[73] The convention emerged as a response to the blatant disregard for human rights by the Nazi regime and is closely connected to the formation of the international organisation, the Council of Europe.[74] Although, it started as a typical multilateral treaty, it has evolved into an international treaty that is interconnected with national constitutions and European law.[75] Thus, it forms a crucial pillar of the human rights protection framework in Europe.[76] Yet, there is no general primacy of the ECHR over national law. In fact, its formal status and its incorporation into national law depend on the legal system of the particular state party as well as the

73 The Russian Federation ceased to be a Party in September 2022.
74 Christoph Grabenwarter and Katharina Pabel, *Europäische Menschenrechtskonvention: Ein Studienbuch* (7th edn, C.H. Beck; HLV; Manz 2021), 1 f.
75 Ibid, 6.
76 Ibid.

status that the state gives to the ECHR.[77] Nonetheless, all state parties have chosen to incorporate the ECHR into their national laws, and the attention given to the ECHR in national rulings has clearly increased over the years.[78]

In the case of Austria, the ECHR has constitutional status and is thus directly applicable law.[79] Consequently, the judicial and executive bodies of Austria are directly bound by the ECHR when applying and executing national law.[80] In addition, constitutional complaints relying on the rights guaranteed by the ECHR can be filed with the Austrian Constitutional Court.[81] There had been an initial reluctance among the judiciary to give space to the ECHR and its interpretation through the ECtHR, but doing so ultimately led to the transformation of Austrian human rights adjudication.[82]

All in all, the system of the ECHR has aspired to set a minimum standard for human rights law across national legal systems without

77 Ibid, 16 ff.
Note: Article 1 of the ECHR only states the obligation to "*secure to everyone* (…) *the rights and freedoms defined*" but stays silent on form and status. Formal incorporation may be characterised by the monist or dualist approach in the particular national legal system. The actual status of the ECHR within a national legal system varies from constitutional status to simple statutory law. Ibid, 16 ff. See also: David J Harris, Michael O'Boyle and Colin Warbrick, *Law of the European Convention on Human Rights* (4th edn, Oxford University Press 2018), 29 ff.

78 Helen Keller, *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (Oxford University Press Incorporated 2008), 683, 695–701. Cited by: David J Harris, Michael O'Boyle and Colin Warbrick, *Law of the European Convention on Human Rights* (4th edn, Oxford University Press 2018), 29, 31.

79 Bundesverfassungsgesetz: Abänderung und Ergänzung von Bestimmungen des Bundes-Verfassungsgesetzes in der Fassung von 1929 über Staatsverträge BGBl Nr. 59/1964.

80 Theo Öhlinger and Harald Eberhard, *Verfassungsrecht* (Facultas 2019), 86 f, 298; Hannes Tretter, 'The implementation of judgements of the European Court of Human Rights in Austria' in M. L van Emmerik, P. H P M C van Kempen and Tom Barkhuysen (eds), *The Execution of Strasbourg and Geneva Human Rights Decisions in the National Legal Order* (International Studies in Human Rights Ser. Brill 1999), 169.

81 Theo Öhlinger and Harald Eberhard, *Verfassungsrecht* (Facultas 2019), 86 f, 298.

82 Walter Berka, *Verfassungsrecht: Grundzüge des österreichischen Verfassungsrechts für das juristische Studium* (8th edn, Verlag Österreich 2021), 409; Theo Öhlinger and Harald Eberhard, *Verfassungsrecht* (Facultas 2019), 298.

harmonizing national approaches in a strict sense.[83] This becomes evident when one considers, on the one hand, the 'minimum standard rule' set out in article 53 of the ECHR, and on the other hand, the application of the 'margin of appreciation'[84] principle developed by the ECtHR in its adjudications over the last decades.

3.1.1. Interpretative principles for the European Convention on Human Rights

Due to the limited space of this thesis, only the principles relevant to article 4 of the ECHR are discussed. Consequently, this does not constitute a comprehensive overview of the interpretative principles applied by the Court.[85]

As mentioned, since the ECHR is an international treaty, the interpretative principles set out in the VCLT 1969 are to be applied as a starting point.[86] However, in its adjudications the ECtHR has developed specific interpretative methods whereby it gives substantial importance to the principle of teleological interpretation.[87] According to article 31(1) of the VCLT 1969, a treaty shall be read "*with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*". The object and purpose of the ECHR are similar to those of national human rights laws and are the

83 Philipp Leach, 'The European Court of Human Rights: Achievements and Prospects' in Gerd Oberleitner (ed), *International Human Rights Institutions, Tribunals, and Courts* (Springer 2018), 426.

84 The margin of appreciation doctrine allows for the state to have a certain degree of discretion concerning measures that interfere with the rights set out in the ECHR. David J Harris, Michael O'Boyle and Colin Warbrick, *Law of the European Convention on Human Rights* (4th edn, Oxford University Press 2018), 15.

85 Hence, the principal of proportionality and doctrine of margin of appreciation are not discussed.

86 David J Harris, Michael O'Boyle and Colin Warbrick, *Law of the European Convention on Human Rights* (4th edn, Oxford University Press 2018), 6.

87 Ibid, 6 ff.

"protection of individual human beings"[88] as well as the maintenance and promotion of *"the ideals and values of a democratic society"*[89].[90]

Based on this, the ECtHR developed the 'principle of dynamic interpretation'. The Court calls the ECHR a *"living instrument* [that is] *to be interpreted in present-day conditions"*[91]. These present-day conditions are determined by considering whether a particular change in the legal and societal context has occurred in enough member states for it to influence the meaning of the convention ('European consensus').[92] The Court identifies the existence of a common European consensus by considering national laws, state practices, international treaties, and soft law.[93] The ECtHR relied heavily on this dynamic and common consensus approach when it deemed trafficking in human beings to be within the scope of article 4 of the ECHR for the first time.[94]

The ECtHR has also established the so-called 'autonomous interpretation' principle: Since the convention was written for various legal systems that have multiple differing legal definitions for terms used in the convention, the Court has developed its own legal definitions in many cases.[95] Nonetheless, national law offers a starting point for the Court's considerations and a comparative law analysis is a further part of the process.[96] The purpose of autonomous interpretation is

88 *Soering v United Kingdom* App no 14038/88 (ECtHR, 7 July 1989), para 87.
89 *Kjeldsen, Busk Madsen and Pedersen v Denmark* App no 5095/71 (ECtHR, 7 December 1976), para 53.
90 Christoph Grabenwarter and Katharina Pabel, *Europäische Menschenrechtskonvention: Ein Studienbuch* (7th edn, C.H. Beck; HLV; Manz 2021), 39.
91 *Siliadin v France* App no 73316/01 (ECtHR, 26 October 2005), para 121. See also: *X. and Others v Austria* App no 19010/07 (ECtHR, 10 February 2013), para 139.
92 David J Harris, Michael O'Boyle and Colin Warbrick, *Law of the European Convention on Human Rights* (4th edn, Oxford University Press 2018), 9.
93 Janneke Gerards, *General Principles of the European Convention on Human Rights* (Cambridge University Press 2019), 53.
94 *Rantsev v Cyprus and Russia* App no 25965/04 (ECtHR, 7 January 2010), 277 f; Janneke Gerards, *General Principles of the European Convention on Human Rights* (Cambridge University Press 2019), 52.
95 Christoph Grabenwarter and Katharina Pabel, *Europäische Menschenrechtskonvention: Ein Studienbuch* (7th edn, C.H. Beck; HLV; Manz 2021), 35 ff.
96 Ibid.

to prevent state parties from using their own national definitions to undercut the protection standard provided by the ECHR.[97]

3.1.2. European Court of Human Rights

As a human rights treaty the ECHR governs relations between states and individuals. What distinguishes it from other human rights treaties and stands out as its most significant features, are the independent judicial oversight by the ECtHR and the system for filing an individual complaint with the Court.[98] However, the Court's actions are only meant to be subsidiary (under the 'principle of subsidiarity') since state parties are primarily tasked with safeguarding the implementation of rights under the ECHR.[99] Hence, one of the admissibility criteria is the 'exhaustion of national remedies'.[100]

In the interest of legal certainty, the Court tends to follow its previous case law.[101] Accordingly, in most judgements, one can find citations of previous ECtHR judgements.[102] Yet, it only follows precedents as long as doing so does not interfere with the principle of dynamic interpreta-

97 Janneke Gerards, *General Principles of the European Convention on Human Rights* (Cambridge University Press 2019), 69.

98 Christian Tomuschat, *Human Rights: Between Idealism and Realism* (2nd edn, Oxford University Press 2008), 198 cited by; Christoph Grabenwarter and Katharina Pabel, *Europäische Menschenrechtskonvention: Ein Studienbuch* (7th edn, C.H. Beck; HLV; Manz 2021), 4 f.

99 Preamble of the ECHR; Janneke Gerards, *General Principles of the European Convention on Human Rights* (Cambridge University Press 2019), 46.

100 Article 35 (1) ECHR; Christoph Grabenwarter and Katharina Pabel, *Europäische Menschenrechtskonvention: Ein Studienbuch* (7th edn, C.H. Beck; HLV; Manz 2021), 72.

101 *Cossey v United Kingdom* App no 10843/84 (ECtHR, 27 September 1990), para 35; William Schabas, *The European Convention on Human Rights: A Commentary* (Oxford scholarly authorities on international law, Oxford University Press 2015), 46 f.

102 William Schabas, *The European Convention on Human Rights: A Commentary* (Oxford scholarly authorities on international law, Oxford University Press 2015), 46 f.

tion.[103] Also, it may deviate from precedents in cases where it considers it necessary to clarify its adjudication on a matter.[104]

The effect of ECtHR judgments can be divided into two categories. First, according to article 46(1) of the ECHR, the respondent state is obligated to abide by the judgement of the Court (*"res iudicata"* effect).[105] The judgement does not have direct legal effect in the particular domestic law, but it does put the state under the obligation to stop the breach and to provide reparation.[106] Second, *"precedent*[-ial] *value"* is established, which makes the judgment relevant and effectual for all other state parties.[107] Since the Court is tasked with supervising compliance with the ECHR and interpreting it, its interpretations given in a judgement are a guide for states on how to avoid condemnation by the Court and to ensure compliance with the ECHR.[108]

3.1.3. Relevance of the European Convention on Human Rights and the European Court of Human Rights in the context of human trafficking

The significance of the ECHR and the effect that ECtHR adjudication has had on the human rights situation in Europe and beyond are un-

103 *Demir and Baykara v Turkey* App no 34503/97 (ECtHR, 12 November 2008); William Schabas, *The European Convention on Human Rights: A Commentary* (Oxford scholarly authorities on international law, Oxford University Press 2015), 46 f.

104 *Schatschaschwili v Germany* App no 9154/10 (ECtHR, 15 December 2015).

105 Jörg Polakiewicz, 'Between 'Res Judicata' and 'Orientierungswirkung' – ECHR Judgments Before National Courts' (Brno, 21 June 2017) <https://www.coe.int/en/web/dlapil/-/between-res-judicata-and-orientierungswirkung-#_edn23> accessed 11 March 2023.

106 Ibid.

107 Ibid.

108 Christoph Grabenwarter and Katharina Pabel, *Europäische Menschenrechtskonvention: Ein Studienbuch* (7th edn, C.H. Beck; HLV; Manz 2021), 15 f; Jörg Polakiewicz, 'Between 'Res Judicata' and 'Orientierungswirkung' – ECHR Judgments Before National Courts' (Brno, 21 June 2017) <https://www.coe.int/en/web/dlapil/-/between-res-judicata-and-orientierungswirkung-#_edn23> accessed 11 March 2023.

paralleled.[109] In light of this, article 4 of the ECHR, in conjunction with the system of the ECtHR, forms a crucial element in the international human trafficking victim's protection framework. Significantly, it is the only international treaty on the issue that provides for effective judicial oversight. Further, the ECHR has the potential to effectively raise the protection level in Europe in the future if acceptable standards are demanded by law and society, thanks to the dynamic interpretation of the convention.

3.2. Scope of article 4 of the European Convention on Human Rights

The practical relevance of article 4 of the ECHR and its application by the Court has only appeared within the past 20 years, after the main pillars of the international legal framework on human trafficking, namely the Palermo Protocol and the CoE Trafficking Convention, were adopted. Therefore, the number of trafficking related cases reviewed under article 4 of the ECHR remains relatively limited. Nevertheless, an increase in cases, especially in the last 5 years, is evident.

Regarding the personal scope of article 4 of the ECHR, it has not yet been clarified whether the article also applies to legal persons such as corporations.[110] In *Four Companies v Austria*, the Court had to rule on the admissibility of an application of corporations under article 4 of the ECHR, which claimed to be subjected to forced labour. The Court avoided the question of personal scope and instead dismissed the case by declaring the application to be manifestly ill-founded.[111] However, considering the approach taken in articles 2 and 3, it is unlikely that the personal scope extends to legal persons. Further, in light of the material

109 David J Harris, Michael O'Boyle and Colin Warbrick, *Law of the European Convention on Human Rights* (4th edn, Oxford University Press 2018), 35 f.

110 Vanessa Wilcox, *A Company's Right to Damages for Non-Pecuniary Loss* (Cambridge University Press 2016), 3/23.

111 *Four Companies v Austria* App no 7427/76 (ECtHR, 27 September 1976), para 1; Vanessa Wilcox, *A Company's Right to Damages for Non-Pecuniary Loss* (Cambridge University Press 2016), 3/23.

scope of article 4 of the ECHR, it seems more reasonable to limit the personal scope to natural persons. The issues of slavery, servitude, and trafficking in human beings are all closely connected to exploitative personal circumstances involving an individual and therefore should not be applied to legal persons, which due to their very nature, always require natural persons to act on their behalf.

As for the territorial scope of the convention, article 1 states that state parties *"shall secure to everyone within their jurisdiction the rights and freedoms defined* (…)." Hence, state parties are held accountable not only for acts committed on their territory but also for those occurring aboard a ship or plane that is registered in the respective state.[112] Moreover, in cases of extradition of a person, state responsibility can, in certain circumstances, be extended to acts that are subsequently committed in another country.[113] States are also responsible for actions on foreign territory if they are under their effective control, as well as for actions of their diplomats and other state agents abroad.[114]

"The Court considers that, together with Articles 2 and 3, Article 4 of the Convention enshrines one of the basic values of the democratic societies making up the Council of Europe."[115] Accordingly, article 4 of the ECHR does not include an exception clause, meaning that there are no limits to the right and any interference is automatically a violation of article 4 of the ECHR.[116] Exemptions found in article 4(4) of the ECHR are to be regarded as a specifying the material scope and are thus

112 Koen Lemmens, 'General Survey of the Convention' in Pieter van Dijk and others (eds), *Theory and Practice of the European Convention on Human Rights* (5th edn. Intersentia 2018), 16 f.

113 *C. v United Kingdom* App no 10427/83 (ECtHR, 12 May 1986), para 95 f; Koen Lemmens, 'General Survey of the Convention' in Pieter van Dijk and others (eds), *Theory and Practice of the European Convention on Human Rights* (5th edn. Intersentia 2018), 12.

114 *Al-Skeini and Others v United Kingdom* App no 55721/07 (ECtHR, 7 July 2011), para 130–141; Koen Lemmens, 'General Survey of the Convention' in Pieter van Dijk and others (eds), *Theory and Practice of the European Convention on Human Rights* (5th edn. Intersentia 2018), 16 f.

115 *Siliadin v France* App no 73316/01 (ECtHR, 26 October 2005), para 82.

116 *Rantsev v Cyprus and Russia* App no 25965/04 (ECtHR, 7 January 2010), para 283; *Siliadin v France* App no 73316/01 (ECtHR, 26 October 2005), para 112.

not to be viewed as exceptions.[117] Further, the rights under article 4(1) of the ECHR are among the very few non-derogable rights listed in article 15(2) of the ECHR, meaning that even in times of emergency, states are required to fulfil their obligations with regard to slavery and servitude.

Overall, the interpretative challenge for article 4 of the ECHR lies not so much in determining the legitimacy of encroachments on the right but rather in determining the material scope of the concepts found within the article and deriving positive obligations.

3.2.1. Material scope of article 4 of the European Convention on Human Rights

Much confusion surrounds the three concepts mentioned explicitly in article 4 of the ECHR – slavery, servitude and forced labour – and how they relate to the fourth relevant concept of human trafficking. Thus, this chapter first focuses on establishing the scope and definition of human trafficking by analysing the existing ECHR case law and relevant literature. Subsequently, the other three concepts are examined in the context of the exploitation element of the human trafficking definition.

3.2.1.1. Human trafficking

In *Rantsev v Cyprus and Russia*, the Court determined for the first time that article 4 of the ECHR also prohibits trafficking in human beings. It determined that the ECHR was influenced by the Universal Declaration of Human Rights, which also only mentions *"slavery and the slave*

117 *C.N. v United Kingdom* App no 4239/08 (ECtHR, 13 November 2012), para 65.

trade in all their forms"[118].[119] But the Court reasoned that trafficking in human beings had become more prevalent recently and has also been recognized by the international community as a matter of concern that needs to be addressed.[120] Thus, the Court declared it necessary to evaluate the scope of article 4 regarding the issue of trafficking in human beings.[121] However, it only looked to establish whether human trafficking falls within the scope of article 4 and refrained from classifying the specific conduct at issue in the case under one of the three concepts mentioned therein.[122] The Court concluded that the issue of human trafficking, as defined in the Palermo Protocol and CoE Trafficking Convention, falls within the material scope of article 4 of the ECHR.[123]

In the same judgement, the Court seemingly introduced another approach for defining human trafficking.[124] Specifically, it did not focus on the three constituent elements of the international definition but rather on the characteristics of the phenomenon ('ECtHR characteristics approach'[125]), which are the treatment of human beings as commodities involving little payment, surveillance of victims, and violence and threats against victims, as well as poor living conditions.[126] This approach was also applied in the case *J and Others v Austria*.[127] However, in the more recent Grand Chamber judgement, *S.M. v Croatia,* the Court clarified that it is the international definition with its three

118 Article 4 of the Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III).

119 *Rantsev v Cyprus and Russia* App no 25965/04 (ECtHR, 7 January 2010), para 277 ff.

120 Ibid.

121 Ibid.

122 Ibid, para 279.

123 Ibid, para 282.

124 Kristy Hughes, 'Human Trafficking, SM v Croatia and the Conceptual Evolution of Article 4 ECHR' (2022) 85 Modern Law Review 1044, 1048.

125 Ibid.

126 *Rantsev v Cyprus and Russia* App no 25965/04 (ECtHR, 7 January 2010), para 281.

127 *J. and Others v Austria* App no 58216/12 (ECtHR, 17 January 2017), para 104; Kristy Hughes, 'Human Trafficking, SM v Croatia and the Conceptual Evolution of Article 4 ECHR' (2022) 85 Modern Law Review 1044, 1048.

constituent elements, that must be applied when determining whether a situation involves human trafficking.[128]

Therefore, it is necessary to carefully examine the aforementioned definition when considering the scope of article 4 of the ECHR, which read as follows:

> *"Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of 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* (…)."[129]

The definition consists of three constituent elements: an action, describing what was done; a description of how it was done ('means'); and the element of exploitation, which describes why it was done.[130] It is necessary that these elements are all present cumulatively for a situation to be recognized as a case of human trafficking within the meaning of article 4 of the ECHR.[131]

128 *S.M. v Croatia* App no 60561/14 (ECtHR, 25 June 2020), para 290; Kristy Hughes, 'Human Trafficking, SM v Croatia and the Conceptual Evolution of Article 4 ECHR' (2022) 85 Modern Law Review 1044, 1056.

129 Article 3 (a) of the Palermo Protocol and article 4 (a) of the CoE Trafficking Convention.

130 *S.M. v Croatia* App no 60561/14 (ECtHR, 25 June 2020), para 114.

131 *S.M. v Croatia* App no 60561/14 (ECtHR, 25 June 2020), para 156; *C.N. and V. v France* App no 67724/09 (ECtHR, 11 October 2012), para 75. See also: Council of Europe, 'Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings' (2005) CETS 197, para 76.

3.2.1.1.1. Transnationality and organised crime?

Some have interpreted the definition of human trafficking to include the elements of transnationality and organised crime. As has already been discussed in chapter 2.3, this view has been based on the fact that those aspects are mentioned in article 4 of the Palermo Protocol, concerning its application. An examination of article 2 of the CoE Trafficking Convention, which explicitly excludes transnationality and organised crime as constitutive elements, rightly raises some questions concerning the scope of the definition.[132] Leaving out the element of transnationality could suggest that any type of movement that happens in the context of exploitation and abuse should be interpreted as human trafficking.[133] Consequently, it would also include inconsequential and even unrelated movements, such as from one village to the next.[134] This would further erase the distinctiveness of human trafficking from other concepts such as forced labour or slavery. Ultimately, it would challenge *"the integrity and distinctive value of the definition of trafficking."*[135] However, as a solution, *Stoyanova* argues that human trafficking should be understood as being not so much about a victim crossing borders but rather about removing the victim from familiar surroundings.[136] This context would allow for the element of transnationality to be left out without erasing the distinctiveness, and thus the relevance of the human trafficking definition.

In *S.M v Croatia* the Court considered an internal case of human trafficking for the first time and clarified that transnationality and organised crime are not constituent elements of the definition.[137] This

132 Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European Law* (Cambridge University Press 2017), 41.
133 Ibid.
134 Ibid.
135 Ibid, 42.
136 Ibid.
137 *S.M. v Croatia* App no 60561/14 (ECtHR, 25 June 2020), para 296.

view was reiterated in *V.C.L. and A.N v United Kingdom* and *Zoletic and others v Azerbaijan*.[138]

3.2.1.1.2. Action

The element of action encompasses removing victims from their familiar surroundings and putting them into a situation that leaves them vulnerable – this is central to instances of human trafficking.[139] Because the stipulated actions are not problematic on their own, it is therefore crucial to always consider the context in which an action occurs.[140]

In general, the actions in question are to be understood in such a way as to encompass all activities that ultimately lead to victims' exploitation,[141] including *"the movement, the preparation for the movement and the receipt of persons after the movement."*[142] Consequently, the term 'recruitment', for example, is not limited to certain approaches but also covers, for instance, the use of new information technology.[143] The terms 'harbouring' and 'receipt of persons' suggests that the definition may also cover activities that are not directly related to a preceding trafficking matter.[144] In such a case, the definition would encompass the activities of *"not just recruiters, brokers and transporters but also owners and managers, supervisors, and controllers of any place*

138 *Zoletic and Others v Azerbaijan* App no 20116/12 (ECtHR, 7 October 2021), para 155; *V.C.L. and A.N. v United Kingdom* App no 77587/12 and 74603/12 (ECtHR, 16 February 2021), para 148.

139 Helmut Sax, 'Article 4 Definitions' in Helmut Sax and Julia Planitzer (eds), *A Commentary on the Council of Europe Convention on Action against Trafficking in Human Beings* (Edward Elgar Publishing 2020), 4.38.

140 Ibid.

141 Council of Europe, 'Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings' (2005) CETS 197, para 78.

142 Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European Law* (Cambridge University Press 2017) 33.

143 Council of Europe, 'Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings' (2005) CETS 197, para 79.

144 Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010), 30.

of exploitation such as a brothel, farm, boat, factory, medical facility, or household."[145] Although this interpretation is suggested by *Brewer,* it is rejected by others, such as *Gallagher* in the context of the Palermo Protocol and *Sax* with regard to the CoE Trafficking Convention.[146] Such an interpretation would ultimately erase the difference between the action element and the action in the exploitation situation itself.[147] However, the fact that a more sophisticated three-part definition was developed suggests that there was no intention to include all situations of exploitation of an individual.[148] In addition, there are already other instruments of international law dealing with situations of exploitation without the context of a preceding instance of human trafficking.[149]

The Court also seems to apply this distinction between the action element and action in an exploitation situation itself. In *C.N and V. v France*, two applicants had been taken in by relatives residing in France after their parents died during a civil war in Burundi. In a family council meeting in Burundi, it was agreed to make these relatives their guardians. Subsequently, under their custody, the applicants were forced to essentially run the household and were threatened with being sent back to Burundi on the basis of their supposedly illegal immigration status. The applicants argued that the situation was one of

145 Ibid.

146 Helmut Sax, 'Article 4 Definitions' in Helmut Sax and Julia Planitzer (eds), *A Commentary on the Council of Europe Convention on Action against Trafficking in Human Beings* (Edward Elgar Publishing 2020), 4.38; Michelle Brewer, 'Definitions, policy and legal frameworks' in Philippa Southwell, Michelle Brewer and Ben Douglas-Jones KC (eds), *Human Trafficking and Modern Slavery Law and Practice* (2nd ed. Bloomsbury Publishing Plc 2020), 1.8; Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010), 30 f.

147 Helmut Sax, 'Article 4 Definitions' in Helmut Sax and Julia Planitzer (eds), *A Commentary on the Council of Europe Convention on Action against Trafficking in Human Beings* (Edward Elgar Publishing 2020), 4.38. See also: Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010), 30.

148 Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010), 31.

149 Helmut Sax, 'Article 4 Definitions' in Helmut Sax and Julia Planitzer (eds), *A Commentary on the Council of Europe Convention on Action against Trafficking in Human Beings* (Edward Elgar Publishing 2020), 4.38.

human trafficking.[150] However, the Court decided that these facts did not amount to human trafficking but rather considered the situation solely in the context of forced labour and servitude.[151] The Court offers no reasoning for this approach, but the missing of the action element may be the basis. The facts of the case suggest exploitation did take place, which occurred in the context of forced labour and servitude.[152] Hence, this was a situation of exploitation but without a preceding activity where the victim was trafficked into the exploitative situation.

3.2.1.1.3. Means

The element of means essentially *"(…) concerns the deliberate manipulation of the will of the victim of trafficking."*[153] This manipulation can either happen in a direct manner (coercion) or in a more indirect manner (deception or fraud).[154] In addition, it can also occur through the abuse of power or with the victim being in a position of vulnerability. Finally, a fourth approach is manipulation by obtaining control over a person through exchange of benefits.[155] Coercion is generally connected with other criminal offences, and abuse of authority relates to more formal authority, such as guardianship over children.[156] Abuse of a position of vulnerability is a very broad concept that captures *"any*

150 *C.N. and V. v France* App no 67724/09 (ECtHR, 11 October 2012), para 83.

151 Ibid, para 88.

152 Here the element of means would not have been necessary for it to be considered human trafficking, as the applicants were minors at the time.

153 Helmut Sax, 'Article 4 Definitions' in Helmut Sax and Julia Planitzer (eds), *A Commentary on the Council of Europe Convention on Action against Trafficking in Human Beings* (Edward Elgar Publishing 2020), 4.41.

154 Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010), 31.

155 Helmut Sax, 'Article 4 Definitions' in Helmut Sax and Julia Planitzer (eds), *A Commentary on the Council of Europe Convention on Action against Trafficking in Human Beings* (Edward Elgar Publishing 2020), 4.41.

156 Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010), 32; Helmut Sax, 'Article 4 Definitions' in Helmut Sax and Julia Planitzer (eds), *A Commentary on the Council of Europe Convention on Action against Trafficking in Human Beings* (Edward Elgar Publishing 2020), 4.41.

situation in which the person involved has no real and acceptable alternative to submitting to the abuse."[157] A position of vulnerability can be based on physical, psychological, social or, economic factors and naturally necessitates that the abuser knows about these circumstances.[158] Accordingly, the consent of a victim always has to be considered in light of the circumstances present, as consent obtained through deception or where the victim had no real alternative is void.[159] Notably, the element of means is only required in cases of adult trafficking. Child trafficking occurs as soon as stipulated actions for the purpose of exploitation have taken place.[160]

There are two essential questions that relate to the requirement of means. First, at what point in time does the element of means have to be present in order to be relevant for the trafficking definition?[161] Second, what level of intensity of deception or coercion is necessary to reach the threshold of the element of means?[162]

To answer the first question, *Stoyanova* presents two options: It can either be required during the recruitment or transportation process, specifically, in the context of the preparation of the movement or during the movement.[163] Or, it can be required to occur closer in temporal proximity to the actual exploitation itself.[164] The first alternative is harder to prove, but it does agree more with the wording of the human

157 Council of Europe, 'Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings' (2005) CETS 197, para 83.
158 Ibid.
159 Article 4 (b) of the CoE Trafficking Convention; article 3(b) of the Palermo Protocol. See also: *S.M. v Croatia* App no 60561/14 (ECtHR, 25 June 2020), para 115.
160 Article 4 (c) of the CoE Trafficking Convention; Council of Europe, 'Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings' (2005) CETS 197, para 76.
161 Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European Law* (Cambridge University Press 2017), 50.
162 Ibid.
163 Ibid, 50 f.
164 Ibid, 52.

trafficking definition.[165] *Sax* agrees with this view and adds that this approach also ensures that the distinction between the concepts of human trafficking and exploitation itself is preserved.[166]

As to the second question, criminal legislation can serve as a guide for the interpretation of some of the concepts, such as threat, use of force, abduction, and fraud.[167] Nonetheless, for other concepts, such as deception and abuse of power or of a position of vulnerability, the threshold remains unclear.[168]

3.2.1.1.4. 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* (…)."[169]

The third element 'for the purpose of exploitation' requires the aforementioned actions to be taken with the intention or knowledge that it would result in exploitation of an individual ('dolus specialis').[170] Therefore, it is not required for actual exploitation to have already taken place and the trafficker does not necessarily have to be the

165 Ibid, 51 f.

166 Helmut Sax, 'Article 4 Definitions' in Helmut Sax and Julia Planitzer (eds), *A Commentary on the Council of Europe Convention on Action against Trafficking in Human Beings* (Edward Elgar Publishing 2020), 4.42.

167 Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European Law* (Cambridge University Press 2017), 54.

168 Ibid, 54 ff. See also: Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010), 32 f.

169 Article 3 (a) of the Palermo Protocol; article 4(a) of the CoE Trafficking Convention.

170 Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010), 34; United Nations Office on Drugs and Crime, 'Legislative Guide: for the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime' (2020), para 118.

exploiter.[171] As there is no abstract all-encompassing international definition for the concept of 'exploitation', each form has to be assessed independently.[172] The list of types of exploitation, explicitly mentioned in the human trafficking definition, is not exhaustive and is only intended to set a minimum standard.[173] Nowadays, there are various other forms of exploitation that come up in the context of human trafficking: For instance, the European Commission proposes for the amendment of the EU Trafficking Directive to include illegal adoption and forced marriage as meeting the minimum standard of the purpose element.[174] Overall, the actual threshold of severity, for a situation to be considered exploitative within the context of human trafficking, mostly remains to be determined.[175]

The case law of the ECtHR has so far touched upon exploitation for the purposes of slavery, servitude, forced labour, criminal activities, and sexual exploitation. Concerning the issue of prostitution of others

171 Council of Europe, 'Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings' (2005) CETS 197, para 87; United Nations Office on Drugs and Crime, 'Legislative Guide: for the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime' (2020), para 118.

172 Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European Law* (Cambridge University Press 2017), 68; Helmut Sax, 'Article 4 Definitions' in Helmut Sax and Julia Planitzer (eds), *A Commentary on the Council of Europe Convention on Action against Trafficking in Human Beings* (Edward Elgar Publishing 2020), 4.45.

173 Council of Europe, 'Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings' (2005) CETS 197, para 85; United Nations Office on Drugs and Crime, 'Legislative Guide: for the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime' (2020), para 115.

174 European Commission, 'Proposal for a Directive of the European Parliament and of the Council amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims' COM (2022) 732 final, article 1(1).

175 Helmut Sax, 'Article 4 Definitions' in Helmut Sax and Julia Planitzer (eds), *A Commentary on the Council of Europe Convention on Action against Trafficking in Human Beings* (Edward Elgar Publishing 2020), 4.45.

or sexual exploitation, the CoE Trafficking Convention deliberately left it to the state parties to decide what situations exactly qualify as such.[176] This is because there is no international consensus on whether prostitution is *per se* exploitative or if it is only forced prostitution that is covered by the human trafficking definition.[177] In *S.M v Croatia,* the Court interpreted article 4 of the ECHR in such a way as to only include forced prostitution.[178] That said, it emphasized that the meaning of 'forced' also encompasses subtle forms of coercion.[179] Due to the ambiguous reasoning of the Court in *S.M v Croatia*, it has become unclear whether the Court considers forced prostitution as a separate category of article 4 of the ECHR or whether it qualifies as a form of forced labour.[180]

Regarding the exploitation for the removal of organs, the question arises whether this exploitation type only covers trafficking of victims for the purpose of unlawful organ removal or also trafficking of organs themselves. According to article 2(2) of the Council of Europe Convention against Trafficking in Human Organs, organ trafficking encompasses "*any illicit activity in respect of human organs*", such as the unlawful removal of organs from living or deceased donors, as well as unlawful exchange and trade of organs.[181] So far, no ECtHR case

176 Council of Europe, 'Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings' (2005) CETS 197, para 88; United Nations Office on Drugs and Crime, 'Travaux Preparatoires: of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto' (2006), 347.

177 Vladislava Stoyanova, 'United Nations against Slavery: Unravelling Concepts, Institutions and Obligations' [2017] Michigan Journal of International Law, 57 ff, 63; United Nations Office on Drugs and Crime, 'Legislative Guide: for the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime' (2020), para 121.

178 *S.M. v Croatia* App no 60561/14 (ECtHR, 25 June 2020), para 299 ff.

179 Ibid, para 301.

180 Kristy Hughes, 'Human Trafficking, SM v Croatia and the Conceptual Evolution of Article 4 ECHR' (2022) 85 Modern Law Review 1044, 1054 ff; *S.M. v Croatia* App no 60561/14 (ECtHR, 25 June 2020), para 302.

181 See article 4(1) of the Convention against Trafficking in Human Organs (adopted 25 March 2015, entered into force 1 March 2018) CETS No. 216.

has dealt with the matter, and thus, this issue remains to be clarified. However, considering the wording 'for the removal of organs' as well as the Legislative Guide for the Palermo Protocol, it can be argued that article 4 of the ECHR does not cover organ trafficking.[182] The UN Inter-Agency Coordination Group against Trafficking in Persons also differentiates between the two concepts, arguing that both the Palermo Protocol as well as the CoE Trafficking Convention only apply to victims who have been trafficked in order to exploit them for their organs.[183] However, in practice, cases of human trafficking for the removal of organs and organ trafficking are often intertwined.[184]

While exploitation for the purpose of criminal activities is not explicitly mentioned in either the Palermo Protocol or the CoE Trafficking Convention, it is included in article 2(3) of the EU Trafficking Directive. Moreover, in the recent case *V.C.L and A.N v United Kingdom*, the Court dealt with this type of exploitation for the first time. The case concerned two presumed child trafficking victims who were prosecuted after they had been found working at illegal cannabis production facilities. The ECtHR primarily took issue with the fact that the prosecuting authorities did not consider the applicants' situations as human trafficking.[185] The Court did not elaborate on the question of whether exploitation for the purpose of criminal activity is covered by the trafficking definition. However, it appears to have presupposed that to be the case, insofar as it also listed article 2 of the EU Trafficking Directive as relevant international law.

The exploitation types of forced labour, servitude and slavery are examined in the following chapters. They are independent concepts

182 United Nations Office on Drugs and Crime, 'Legislative Guide: for the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime' (2020), para 142.

183 Inter-Agency Coordination Group against Trafficking in Persons, 'Issue Brief 11: Trafficking in Persons for the Purpose of Organ Removal' (2021), 3 f.

184 Ibid, 5 f.

185 *V.C.L. and A.N. v United Kingdom* App no 77587/12 and 74603/12 (ECtHR, 16 February 2021), para 113.

found in article 4 of the ECHR, and therefore, they are integral and also separate parts of the material scope of article 4 of the ECHR.

3.2.1.2. Forced labour

The notion of forced labour requires that work was performed against the will of the worker *"under the menace of any penalty"*[186]. Before considering the exact definition of these elements, it is necessary to point out that not all work reaches the threshold needed to be considered under the framework of forced labour. The Court requires the type and amount of work in question to produce a *"disproportionate burden"* on the worker.[187] With this in mind, the Court opined in *C.N v France*, that it is within reason to task a minor who is part of one's household with chores, provided these are not excessive.[188]

The Court has consistently taken a broad view of the notion of penalty, affirming this stance in the Grand Chamber judgement of *S.M v Croatia*:[189] In *Siliadin v France*, the employers of a minor fed into her fear of being arrested by the police because of her illegal immigration status and simultaneously indicated that they would help her obtain a residence document. The Court considered that these facts amounted to a situation comparable to a threat of penalty.[190] In *C.N and V. v France*, the Court cited an ILO report that determined 'penalty' includes not only physical violence but also psychological violence, such as threats to expose illegal workers to the authorities.[191] With regard to the element of involuntariness, the Court considers whether the person

186 Article 2 (1) of the Forced Labour Convention, 1930 (No. 29).
187 *Van der Mussele v Belgium* App no 8919/80 (ECtHR, 23 November 1983), para 39.
188 *C.N. and V. v France* App no 67724/09 (ECtHR, 11 October 2012), para 75.
189 *S.M. v Croatia* App no 60561/14 (ECtHR, 25 June 2020), para 281 ff.
190 *Siliadin v France* App no 73316/01 (ECtHR, 26 October 2005), para 118.
191 *C.N. and V. v France* App no 67724/09 (ECtHR, 11 October 2012), para 77; International Labour Conference 98th Session 2009, 'The Cost of Coercion: Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work' (Washington, 2009), 5 f.

concerned had any choice in the matter.[192] In addition, any consent given has to be viewed in light of all circumstances.[193] Consequently, situations where an employer exploits the vulnerabilities of his workers are not to be considered voluntary.[194]

3.2.1.3. Servitude

The Court defined the concept of *servitude as "an obligation to provide one's services that is imposed by the use of coercion, and is to be linked with the concept of "slavery"*[195] and which comes with *"a serious form of denial of freedom"*[196]. It is, therefore, typical in such situations of servitude for the victim to live on the property of the abuser.[197] Additionally, there is a serious loss of freedom concerning aspects outside of work.[198] Also, the circumstances make it seem impossible to escape the situation.[199] The Court has deemed the victim's impression that their situation is permanent to be the distinguishing feature of servitude, differentiating it from the concept of forced labour.[200] Overall, the Court has called servitude an "*aggravated form of forced labour"*[201] that has not amounted to slavery.

192 *Siliadin v France* App no 73316/01 (ECtHR, 26 October 2005), para 119.
193 *Chowdury and Others v Greece* App no 21884/15 (ECtHR, 30 March 2017), para 96; *S.M. v Croatia* App no 60561/14 (ECtHR, 25 June 2020), para 285; *V.C.L. and A.N. v United Kingdom* App no 77587/12 and 74603/12 (ECtHR, 16 February 2021), para 149; *Zoletic and Others v Azerbaijan* App no 20116/12 (ECtHR, 7 October 2021), para 147.
194 Ibid.
195 *Siliadin v France* App no 73316/01 (ECtHR, 26 October 2005), para 124.
196 Ibid, para 123.
197 *Siliadin v France* App no 73316/01 (ECtHR, 26 October 2005), para 124; *C.N. and V. v France* App no 67724/09 (ECtHR, 11 October 2012), para 90.
198 *Chowdury and Others v Greece* App no 21884/15 (ECtHR, 30 March 2017), para 123; *Siliadin v France* App no 73316/01 (ECtHR, 26 October 2005), para 127.
199 *C.N. and V. v France* App no 67724/09 (ECtHR, 11 October 2012), para 91.
200 *C.N. and V. v France* App no 67724/09 (ECtHR, 11 October 2012), para 91; *Chowdury and Others v Greece* App no 21884/15 (ECtHR, 30 March 2017), para 99.
201 *C.N. and V. v France* App no 67724/09 (ECtHR, 11 October 2012), para 91; *S.M. v Croatia* App no 60561/14 (ECtHR, 25 June 2020), para 280.

3.2.1.4. Slavery

In *Siliadin v France*, the Court determined that the international definition of the term found in the Slavery Convention 1926 is to be used for understanding article 4 of the ECHR.[202] The Court applied a very narrow interpretation of said definition requiring a *"a genuine right of legal ownership."*[203] Thus, it limited slavery to 'de jure' ownership situations by ascribing *"the "classic" meaning of slavery as it was practiced for centuries"*[204] to the definition. However, the Court seems to have extended its understanding to include 'de facto' ownership in *M and Others v Italy and Bulgaria*. Here, the Court suggested that situations involving payments in connection with the transfer of a person into the hands of another person could come within the scope of slavery.[205,206] Such an interpretation would also be more appropriate, as it is in line with the predominant understanding and interpretation of the definition found in the Slavery Convention.

3.2.2. Delimitation of the concepts of article 4 of the European Convention on Human Rights

Slavery, servitude and forced labour are all concepts explicitly prohibited by article 4 of the ECHR and are, simultaneously, types of

202 The definition has already been discussed in chapter 2.1. Slavery Convention, 1926: *"Slavery is the status or condition of a person over whom any or all of the powers attaching, to the right of ownership are exercised."*

203 *Siliadin v France* App no 73316/01 (ECtHR, 26 October 2005), para 122.

204 Ibid.

205 *M. and Others v Italy and Bulgaria* App no 40020/03 (ECtHR, 17 December 2012), para 161. See also: Siliva Scarpa, 'The Nebulous Definition of Slavery: Legal Versus Sociological Definitions of Slavery' in Jones Winterdyk and Jackie Jones (eds), *The Palgrave International Handbook of Human Trafficking* (1st edn. Palgrave Macmillan Cham 2020), 137.

206 *Día Mogado* does not share this interpretation but instead argues that the Court continues to interpret slavery as a concept of 'de jure' ownership. See: Celia Díaz Morgado, 'Prohibition of Slavery and Forced Labour (Article 4)' in David Moya and Georgios Milios (eds), *Aliens before the European Court of Human Rights: Ensuring Minimum Standards of Human Rights Protection* (Immigration and asylum law and policy in Europe volume 49. Brill Nijhoff 2021), 78 f.

exploitation that fall within the third element of the human trafficking definition. As a result, much confusion exists regarding the relationship between these concepts and human trafficking.

The Court's adjudications have added to the confusion by conflating these concepts, especially in older cases. In *Rantsev v Cyprus and Russia*, the Court stated for the first time that human trafficking falls within the scope of article 4 of the ECHR. However, it did not deem it necessary to identify the relevant exploitative purpose. Instead, it indicated that all three concepts of article 4 of the ECHR were covered by the trafficking definition.[207] Further, it characterized human trafficking as follows:

> *"The Court considers that trafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership. It treats human beings as commodities to be bought and sold and put to forced labour, often for little or no payment, usually in the sex industry but also elsewhere (…). It implies close surveillance of the activities of victims, whose movements are often circumscribed (…). It involves the use of violence and threats against victims, who live and work under poor conditions (…). It is described by Interights and in the explanatory report accompanying the Anti-Trafficking Convention as the modern form of the old worldwide slave trade (…)."*[208]

This characterization has been repeated in two other cases.[209] Bearing in mind the previous chapters discussing the definitions of forced labour, servitude, slavery, and human trafficking, it appears that the Court merged all these concepts together with its characterization. In particular, it suggested that human trafficking was a form of slavery. However, the Court had also already explicitly distinguished between

207 *Rantsev v Cyprus and Russia* App no 25965/04 (ECtHR, 7 January 2010), para 282.

208 Ibid, para 281.

209 *J. and Others v Austria* App no 58216/12 (ECtHR, 17 January 2017), para 104; *M. and Others v Italy and Bulgaria* App no 40020/03 (ECtHR, 17 December 2012), para 151.

servitude and human trafficking as early as in 2012: In *C.N v United Kingdom*, it found a violation of the criminalisation obligation based on the fact that only trafficking for the purpose of servitude was a criminal offence, but not the act of holding someone in servitude itself.[210] That is why, the authorities considered the facts of the case, which clearly revealed a case of domestic servitude, only in light of the constitutional elements of trafficking. Consequently, there was no conviction of the perpetrator.

Eventually the Court sought to resolve this entanglement in *S.M v Croatia*. It clarified that the aforementioned characterization of human trafficking is only intended to show why and how human trafficking falls within the material scope of article 4 of the ECHR, describing the connection with the other concepts as an "*intrinsic relationship*"[211].[212] In addition, the Court presented the definitions of slavery, servitude, and forced labour.[213] Overall, it is clear that slavery, servitude, forced labour, and human trafficking are separate concepts that share, however, the element of exploitation that concerns human dignity.[214] Slavery, servitude and, forced labour differ regarding the extent of the exploitation.[215] Whereas, human trafficking requires the 'action' element, which positions human trafficking as a *"process preceding the exploitation"*[216]. This differentiation has also been applied by the Court in its most recent case *Zoletic and Others v Azerbaijan*: It first determined that the facts of the case presented a situation of forced labour, and in a second

210 *C.N. v United Kingdom* App no 4239/08 (ECtHR, 13 November 2012), para 80.
211 *S.M. v Croatia* App no 60561/14 (ECtHR, 25 June 2020), para 291. See also: *Chowdury and Others v Greece* App no 21884/15 (ECtHR, 30 March 2017), para 93.
212 *S.M. v Croatia* App no 60561/14 (ECtHR, 25 June 2020), para 291 f.
213 Ibid, para 279 ff.
214 Celia Díaz Morgado, 'Prohibition of Slavery and Forced Labour (Article 4)' in David Moya and Georgios Milios (eds), *Aliens before the European Court of Human Rights: Ensuring Minimum Standards of Human Rights Protection* (Immigration and asylum law and policy in Europe volume 49. Brill Nijhoff 2021), 80.
215 Ibid.
216 Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European Law* (Cambridge University Press 2017), 42.

separate step, determined that the process leading to the situation of forced labour constituted human trafficking.[217]

The preceding discussion begs the question of whether there is a practical relevance for the distinction of these concepts. The Court has affirmed that the same principles with regard to the positive obligations are applicable to all the concepts.[218] However, considering that each concept has a different material scope, proper distinctions are necessary in order to guarantee a complete and consistent level of protection.[219] Otherwise, national authorities may evaluate situations on the basis of the wrong set of characteristics, as happened in *C.N v United Kingdom*.[220] Moreover, these different concepts may trigger varying consequences with regard to victim compensation and criminal penalties.[221] Lastly, the concepts may lead to different evaluations when considering the reasonableness of positive obligations.[222] Thus, proper differentiation of the concepts is necessary for an objective and consistent level of protection for victims of severe exploitation.

3.3. Positive state obligations under article 4 of the European Convention on Human Rights

Earlier chapters discussed and clarified the material scope of article 4 of the ECHR, and this chapter turns to the state obligations that correspond to the right to not be subjected to slavery, servitude, forced

217 *Zoletic and Others v Azerbaijan* App no 20116/12 (ECtHR, 7 October 2021), para 167 f.

218 *S.M. v Croatia* App no 60561/14 (ECtHR, 25 June 2020), para 307; *C.N. v United Kingdom* App no 4239/08 (ECtHR, 13 November 2012), para 65 ff.

219 Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European Law* (Cambridge University Press 2017), 290.

220 *C.N. v United Kingdom* App no 4239/08 (ECtHR, 13 November 2012), para 80.

221 Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European Law* (Cambridge University Press 2017), 290.

222 Ibid. Note: The aspect of reasonableness is discussed in chapter 3.3.1 and concerns the evaluation of potential violations of positive obligations.

labour, or human trafficking. It should be noted that one has to distinguish between obligations stemming from the international legal framework on human trafficking and obligations under the human rights framework.[223] Obligations deriving from the international trafficking legal framework were briefly discussed in chapter 2 of this thesis. Obligations under article 4 of the ECHR belong to the human rights framework; though the article's interpretation is heavily informed by the international trafficking legal framework, as the Court has determined that the CoE Trafficking Convention and Palermo Protocol in particular are the authoritative sources in this regard.

There are three positive state obligations deriving from article 4 of the ECHR. They were fully identified by the Court for the first time in *Rantsev v Cyprus and Russia*: First, states must set up a legislative and administrative framework that provides appropriate protection and prevention of trafficking. Second, states must protect victims or potential victims by taking certain operational measures. Third, states have to effectively investigate any situation that suggests trafficking has taken place. While the first two obligations are substantive obligations, the third one is a procedural obligation, mandating a process instead of a certain result.[224] These principles are not explicitly found in the convention itself but were developed by the Court in its case law. Consequently, in the following chapters, an introduction is given to the theory of state obligations. Then, the scope and details of each positive obligation are examined by carefully analysing the relevant case law and discussing the relevant literature.[225]

223 See in detail: Vladislava Stoyanova, *Huma Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European Law* (Cambridge University Press 2017).

224 *S.M. v Croatia* App no 60561/14 (ECtHR, 25 June 2020), para 306.

225 Due to the limited scope of this thesis, the focus is on the positive obligations regarding situations of human trafficking.

3.3.1. Theory of positive and negative state obligations

Article 1 of the ECHR requires state parties to *"secure to everyone within their jurisdiction the rights and freedoms"* of the convention. Based on this article, two categories of obligations have been identified:[226] On the one hand, there are negative obligations that mandate states to refrain from infringing upon the rights guaranteed under the convention.[227] Thus, they prohibit certain state actions. With regards to article 4 of the ECHR, this means that states shall refrain from enslaving people, forcing them to labour, making them servants, or trafficking them. By contrast, positive obligations require states to actively take measures to safeguard the guaranteed rights.[228] In this respect, they often oblige states to take actions in situations where a private individual's actions violate the rights of another individual.[229] This is the usual case for violations of article 4 of the ECHR. However, positive obligations are not to be understood as absolute but, to determine the extent of necessary measures, are rather to be considered in connection with the specific situation at hand.[230] The Court has held in its case law that positive obligations do not dictate absolute prevention of all horizontal human rights violations.[231] They neither require measures that prevent literally any risk of violation.[232] Instead, they oblige a state to have protective measures in place that are actually effective while still reasonable, without *"impos*[ing] *an excessive burden on the authorities"*.[233] Generally, there are two key factors that when determining what would be reason-

226 David J Harris, Michael O'Boyle and Colin Warbrick, *Law of the European Convention on Human Rights* (4th edn, Oxford University Press 2018), 24.
227 Ibid.
228 Ibid.
229 Ibid, 26.
230 Ibid, 24.
231 *O'Keeffe v Ireland* App no 35810/09 (ECtHR, 28 January 2014), para 144. See also: Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European Law* (Cambridge University Press 2017), 324.
232 Ibid.
233 *O'Keeffe v Ireland* App no 35810/09 (ECtHR, 28 January 2014), para 144; Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits*

able steps for a state to take in a specific case:[234] First, the state must have knowledge of the threat or violation.[235] This only concerns threats and violations the state ought to know or have known about; this could already be the case if appropriate funding and research would have revealed an unknown threat.[236] Second, the specific harm needs to be connected to the state failure to act or react appropriately in a situation.[237] This connection exists as soon as reasonable measures would have had a chance to influence the outcome or at least alleviate the harm.[238] Hence, this condition of correlation is not to be confused with the notion of causality, which would render the state's omission a *conditio sine qua non* with respect to the harm.[239] To conclude, extensive and diverse case law becomes vital due to the interrelation of all these factors. Furthermore, it provides a thorough and comprehensive understanding of the scope of each positive obligation. While there is still comparably little case law to be found on article 4 of the ECHR,

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and States' Positive Obligations in European Law (Cambridge University Press 2017), 324 f.

234 Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European Law* (Cambridge University Press 2017), 325. See also: Laurens Lavrysen, 'Human Rights in a Positive State: Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights' (Dissertation, Ghent University 2016), 131 ff.

235 Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European Law* (Cambridge University Press 2017), 325.

236 *O'Keeffe v Ireland* App no 35810/09 (ECtHR, 28 January 2014), para 144; Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European Law* (Cambridge University Press 2017), 328.

237 Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European Law* (Cambridge University Press 2017), 325.

238 *O'Keeffe v Ireland* App no 35810/09 (ECtHR, 28 January 2014), para 149; Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European Law* (Cambridge University Press 2017), 328.

239 *O'Keeffe v Ireland* App no 35810/09 (ECtHR, 28 January 2014), para 149. See also: Vladislava Stoyanova, 'United Nations against Slavery: Unravelling Concepts, Institutions and Obligations' [2017] Michigan Journal of International Law, 327 f.

the relevant cases, especially of recent years, already allow for a better understanding of the Court's view on the matter.

3.3.2. Obligation for legislative and administrative framework

In its case law on article 4 of the ECHR, the Court has assessed the adequacy of national legal frameworks from three different perspectives: First and foremost, is the assessment of the appropriate criminalisation and punishment of actions that violate article 4 ECHR. Second, the Court has evaluated whether there is trafficking legislation in place that ensures the protection of victims or potential victims of human trafficking. Third, it has also examined the wider legal framework relevant to a particular case with regard to proper safeguarding measures, that aim to reduce known risks and thus prevent human trafficking in the first place.

The second perspective is closely connected to the second positive obligation of protective operational measures. Naturally, operational measures presuppose a legislative framework being in place that empowers the responsible authorities to take the necessary actions. Accordingly, when the Court mandates different types of operational measures, it simultaneously and implicitly postulates the existence of corresponding trafficking protection legislation. For this reason, victim protection legislation is not to be discussed separately but is included in the chapter covering the obligation to provide protective operational measures.

3.3.2.1. Criminalisation

In *Siliadin v France*, the Court formulated – for the first time, with regard to article 4 of the ECHR – a positive obligation to appropriately punish and effectively prosecute any private individual who intends to

keep others in a situation prohibited by article 4 of the ECHR.[240] In this case, the French legislative framework was found lacking by the Court, which pointed out that there were no provisions that explicitly mentioned slavery and servitude as offences.[241] Moreover, the offences that had been applicable concerned compulsory labour in the context of poor living or working conditions and inadequate payments.[242] The Court opined that these offences would not fully cover the actions prohibited under article 4 of the ECHR.[243] Furthermore, it remarked that the wording of the French offences was too ambiguous, resulting in differing judicial interpretations.[244] Finally, the perpetrators were only prosecuted under civil law. The French government defended this by arguing that having civil remedies in place was sufficient due to the state's margin of appreciation, which the ECtHR had recognized in its previous case law on ill-treatment.[245] However, the Court asserted that adequate protection of the rights of article 4 of the ECHR as fundamental values requires criminal penalisation for violations thereof.[246] It reiterated the requirement of criminalisation in the subsequent cases of *Rantsev v Cyprus and Russia* and *C.N and V v France*.

The Court expanded on the issue of specific penalisation in *C.N v United Kingdom*, which concerned a situation of domestic servitude. At the time of the case, there was no separate specific offence for servitude enshrined in the UK penal code. Accordingly, situations of servitude were subsumed under other offences that penalised overlapping aspects. In the case at hand, the matter of servitude was therefore investigated from a human trafficking perspective. Ultimately, the Court held that there was a violation of the criminalisation obligation due to the fact that treatment contrary to article 4 of the ECHR was

240 *Siliadin v France* App no 73316/01 (ECtHR, 26 October 2005), para 112.
241 Ibid, para 141.
242 Ibid, para 46.
243 Ibid, para 142.
244 Ibid, para 147.
245 Ibid, para 73 ff.
246 Ibid, para 144.

not criminalised in the penal code.[247] However, in its reasoning it did not specifically take issue with the lack of an offence titled 'servitude'. It rather considered that the penal code as a whole did not cover all situations that constitute servitude, which ultimately resulted in the finding of incomplete and ineffective protection.[248] Moreover, the Court presumed the lack of a specific offence to be the reason why authorities had not investigated all relevant circumstances of the case.[249] In fact, it drew a connection between the need for specific criminalisation and effective investigations by stating that

> "(…) *domestic servitude is a specific offence* (…) *which involves a complex set of dynamics* (…). *A thorough investigation into complaints of such conduct therefore requires an understanding of the many subtle ways an individual can fall under the control of another.*"[250]

This reasoning of the Court suggests that even if the obligation of criminalisation *per se* does not necessitate specific offences for slavery, servitude, forced labour, and human trafficking, it may become a requirement when considered in conjunction with the positive obligation of effective investigations and the authorities' lacking thereof.

The judgement in *Chowdury and Others v Greece* seemingly relativises the importance of having specific criminal offences for each concept in place as an obligation under article 4 of the ECHR. The facts of the case presented a situation of trafficking that resulted in forced labour. Greece had a criminal provision in place, that punished human trafficking for the purpose of labour exploitation. Yet, it did not have a separate offence specifically dealing with forced labour. The Court acknowledged this, but nonetheless, it found no violation of the criminalisation obligation.[251] It came to this conclusion, by first, conflating the two concepts of human trafficking and forced labour;

247 *C.N. v United Kingdom* App no 4239/08 (ECtHR, 13 November 2012), para 81.
248 Ibid, para 76 ff.
249 Ibid, para 78 ff.
250 Ibid, para 80.
251 *Chowdury and Others v Greece* App no 21884/15 (ECtHR, 30 March 2017), 107 ff.

and second, finding that the human trafficking offence was adequate; thus, the offence provided the required level of protection in the particular case.[252] So, while there was an offence that offered effective protection in that particular situation, there was no offence to cover situations of forced labour unrelated to human trafficking. In light of the Court's departure from the notion of conflating the concepts of article 4 of the ECHR, it can therefore be argued that the Greek penal code at the time was not completely and effectively protecting the rights guaranteed under article 4 of the ECHR with regard to situations of forced labour. Accordingly, criminalisation of human trafficking would not automatically eliminate the necessity for specific criminalisation of the other concepts and vice versa.

In *T.I and Others v Greece*, the Court elaborated on the issue of adequate protection: In this judgement, the Court found that the Greek legislative framework at the time paid no regard to the aggravating circumstances of trafficking for the purpose of sexual exploitation.[253] As a consequence, the traffickers could not be prosecuted due to time-barring of the lesser offence of human trafficking – which was only a misdemeanour at the time.[254] For this reason, the Court held that the criminal provision was ineffective and insufficient.[255] It is unclear from the Court's reasoning, whether the Court took issue with the fact that the offence included a limitation period at all or if it solely deemed the time-barring period as too short. Therefore, further clarification by the Court is needed.

Taking the preceding discussion into account, it can be summarized that the Court only allows a very restricted margin of appreciation for state parties with regard to adequate penalisation.[256] Accordingly, article 4 of the ECHR necessitates criminal penalties that are severe and give due regard to aggravating factors. Furthermore, even if separate

252 Ibid.
253 *T.I. and Others v Greece* App no 40311/10 (ECtHR, 18 July 2019), para 143.
254 Ibid.
255 Ibid, para 144.
256 Tenia Kyriazi, 'Trafficking and Slavery' (2015) 4 International Human Rights Law Review 33, 47.

and explicit offences for forced labour, servitude, slavery, and human trafficking are not *per se* mandatory, they are at least recommended, as they preclude any legislative gap and ensure complete criminalisation of any conduct that contradicts article 4 of the ECHR. *Stoyanova* goes a step further arguing that "(…) *implicitly there is such a requirement.*"[257] She reasons that labelling is needed to ensure that any progress made in human rights law concerning the interpretation of these concepts would be followed by national criminal law.[258] Moreover, explicit offences provide efficient deterrence, capture the seriousness of the misconduct, and align with the principle of 'fair labelling'.[259] In this regard, the question comes up, whether a simple replication of the international human trafficking definition in national criminal law would fulfil the obligation of penalisation of human trafficking. *Stoyanova* has criticised such approach, emphasising that offences must not only satisfy the standard of an effective remedy required under the human rights framework of article 4 of the ECHR, but also comply with basic principles of criminal law.[260] Consequently, with a view to the principle of legality, national law that criminalises human trafficking should be precise and clear in its wording.[261] However, the international human trafficking definition consists of several ambiguous terms that would require further clarification in national law.[262]

257 Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European Law* (Cambridge University Press 2017), 340.

258 Ibid, 340 f.

259 Ibid, 341 f.

260 Vladislava Stoyanova, 'Article 4 of the ECHR and the Obligation of Criminalising Slavery, Servitude, Forced Labour and Human Trafficking' (2014) 3(2) Cambridge Journal of International and Comparative Law 407, 415 ff, 434.

261 Article 7 of the ECHR; Vladislava Stoyanova, 'Article 18: Criminalization of Trafficking in Human Beings' in Helmut Sax and Julia Planitzer (eds), *A Commentary on the Council of Europe Convention on Action against Trafficking in Human Beings* (Edward Elgar Publishing 2020), 18.17; Vladislava Stoyanova, 'Article 4 of the ECHR and the Obligation of Criminalising Slavery, Servitude, Forced Labour and Human Trafficking' (2014) 3(2) Cambridge Journal of International and Comparative Law 407, 433 f.

262 Vladislava Stoyanova, 'Article 18: Criminalization of Trafficking in Human Beings' in Helmut Sax and Julia Planitzer (eds), *A Commentary on the Council of Euro-*

3.3.2.2. Requirements for wider legal and administrative framework

In *Rantsev v Cyprus and Russia*, the Court stated that the positive obligation of an appropriate legal framework not only required the criminalisation of trafficking but also adequate prevention and protection provisions in the general legal framework.[263] It specifically pointed to the need for appropriate regulations governing businesses often involved in trafficking and immigration regimes that unwittingly facilitate trafficking.[264] In the particular case, the victim had been recruited to work in a cabaret and entered Cyprus on an artiste visa. Due to various reports, Cyprus had been aware that in the absence of adequate preventative measures this artiste visa was frequently used to recruit victims of sex trafficking; and that subsequently, many victims of trafficking were sexually exploited in cabaret businesses.[265] Consequently, the Court found the relevant visa regulations did not fulfil the requirements of article 4 of the ECHR for an adequate legal framework.[266] The Court evidently applied the concept of knowledge and its correlation with harm suffered by the victim when assessing whether Cyprus fulfilled its obligation to have an appropriate legislative framework in place. Furthermore, it expected the state to have amended its visa regulations in response to the well-known risk of trafficking that was linked to the cabaret-visa regime.

Though, the Court has reiterated this general principle of an adequate wider legal framework and the need for appropriate preventative legislation in subsequent case law, it has not undertaken such

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pe Convention on Action against Trafficking in Human Beings (Edward Elgar Publishing 2020), 18.19 ff; Vladislava Stoyanova, 'Article 4 of the ECHR and the Obligation of Criminalising Slavery, Servitude, Forced Labour and Human Trafficking' (2014) 3(2) Cambridge Journal of International and Comparative Law 407, 433 f.

263 *Rantsev v Cyprus and Russia* App no 25965/04 (ECtHR, 7 January 2010), para 284 f.

264 Ibid, para 284.

265 Ibid, para 91 ff.

266 Ibid, para 293.

a thorough examination of the wider legal framework since.[267] In a case analysis of *L.E v Greece*, which was the first trafficking case after *Rantsev*, where the Court found a violation of article 4 of the ECHR – *Milano* asserts that, contrary to the approach taken in *Rantsev*, there was no detailed examination of the wider legal framework nor a review of relevant reports on the issue.[268] Yet, existing reports would have exposed that human trafficking was a highly prevalent issue in Greece and that the state had trouble mitigating the issue of human trafficking and preventing its occurrence.[269] *Milano* criticises these omissions as indefensible stating that *"as for any other criminal activity, the State has the preventative duty to create a climate where trafficking cannot flourish peacefully."*[270] Furthermore, she points out that such a sole focus on the criminalisation and prosecution of trafficking reinforces the widespread criminal law approach instead of promoting a human rights-based approach that focuses more on the prevention and protection aspect.[271] Bearing in mind the holistic approach regarding prevention and protection of the CoE Trafficking Convention, which the Court has repeatedly cited as an authoritative source for the interpretation of article 4 of the ECHR, as well as the fact that the ECHR itself is a human rights treaty, such an approach then indeed seems to be questionable. Finally, *Milano* contends that systemic failures leading to inadequate protective measures in the particular case have been mistaken by the Court as isolated incidents that were consequently subsumed under the obligation to take operational measures instead of

267 *Chowdury and Others v Greece* App no 21884/15 (ECtHR, 30 March 2017), para 87; *S.M. v Croatia* App no 60561/14 (ECtHR, 25 June 2020), para 305; *L.E. v Greece* App no 71545/12 (ECtHR, 21 January 2016), para 65; Valentina Milano, 'The European Court of Human Rights' Case Law on Human Trafficking in Light of L.E. v Greece: A Disturbing Setback?' (2017) 17(4) Human Rights Law Review 701, 711.

268 Valentina Milano, 'The European Court of Human Rights' Case Law on Human Trafficking in Light of L.E. v Greece: A Disturbing Setback?' (2017) 17(4) Human Rights Law Review 701, 713.

269 Ibid.

270 Ibid, 715.

271 Ibid, 725.

being reviewed in the context of a wider legal framework that failed to prevent such incidents due to the lack of preventative legislation.[272]

Nevertheless, in *Chowdury and Others v Greece*, the Court repeated this approach: While the judgement included reports describing systemic failures and inactivity of the state, the Court's reasoning solely focused on the legal regime of criminalisation and prosecution when examining compliance with the obligation for an appropriate legal framework.[273] In the most recent human trafficking case, *Zoletic and Others v Azerbaijan*, the judgement also included various reports that, *inter alia*, identified legislative gaps with regard to prevention legislation.[274] But again, the Court did not elaborate on the issue in detail. However, this time, the omission was due to the fact that the applicant did not complain about the legislative framework but only about the investigation of the authorities.[275]

In summary, the Court's adjudication has tended to mainly focus on the criminalisation and prosecution aspects with regard to the adequacy of national legal frameworks. With the judgement of *Rantsev* in mind, it can be concluded that further clarification in future case law is therefore necessary; especially, since the more recent approach arguably departs from the objective and purpose of both the ECHR and CoE Trafficking Convention.

3.3.3. Obligation for protective operational measures

The second positive obligation of article 4 of the ECHR mandates authorities to take certain actions in order to protect an individual – that is, a victim or at least potential victim of trafficking – from further

272 Ibid, 726.
273 *Chowdury and Others v Greece* App no 21884/15 (ECtHR, 30 March 2017), para 48–57, 105 ff.
274 *Zoletic and Others v Azerbaijan* App no 20116/12 (ECtHR, 7 October 2021), para 101 ff.
275 Ibid, para 192.

harm.[276] Regarding the various types of actions that are mandated, here again, the CoE Trafficking Convention, as interpreted by the expert group GRETA, is of major importance because it serves as the guiding document.[277] It includes preventative and protective measures, such as strengthening the coordination between various stakeholders, implementing trafficking related border control, and adopting victim identification and victim assistance measures.[278] Given the limited scope of this thesis, this chapter solely focuses on those measures that have already been scrutinized and interpreted by the ECtHR in its case law.[279] Before taking a closer look at the various types of protective measures, as a first step, it is necessary to determine what constitutes a situation that obliges authorities to take action and to what extent authorities are required to act. The prerequisites for this obligation were developed by the Court in *Osman v United Kingdom*, which concerned article 2 of the ECHR.[280]

3.3.3.1. Prerequisite of knowledge of real and immediate risk

As already discussed, for a positive obligation to arise, authorities at least ought to have known about the necessity for actions to be

276 *Zoletic and Others v Azerbaijan* App no 20116/12 (ECtHR, 7 October 2021), para 184. See also: *V.C.L. and A.N. v United Kingdom* App no 77587/12 and 74603/12 (ECtHR, 16 February 2021), para 152; *Rantsev v Cyprus and Russia* App no 25965/04 (ECtHR, 7 January 2010), para 286.

277 *V.C.L. and A.N. v United Kingdom* App no 77587/12 and 74603/12 (ECtHR, 16 February 2021), para 150, 153. See also: *Chowdury and Others v Greece* App no 21884/15 (ECtHR, 30 March 2017), para 104.

278 *Chowdury and Others v Greece* App no 21884/15 (ECtHR, 30 March 2017), para 110. See also: *V.C.L. and A.N. v United Kingdom* App no 77587/12 and 74603/12 (ECtHR, 16 February 2021), para 153.

279 For a comprehensive and detailed analysis of all protective measures of the CoE Trafficking Convention see Helmut Sax and Julia Planitzer (eds), *A Commentary on the Council of Europe Convention on Action against Trafficking in Human Beings* (Edward Elgar Publishing 2020).

280 Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European Law* (Cambridge University Press 2017), 400.

taken. With regard to operational measures, there must be *"official awareness"*[281] of a real and concrete situation concerning an actual individual.[282] Therefore, for instance, having abstract knowledge of migrant workers in the labour sector often being trafficked and in need of assistance to escape the situation is not enough.[283] Only if authorities have been made aware of individual circumstances does the obligation to take concrete protection actions arise. There is no requirement for proof though, that the concerned individual is indeed a victim of trafficking.[284] In fact, it suffices if there are *"(…) circumstances giving rise to a credible suspicion that an identified individual had been, or was at real and immediate risk of being, trafficked (…)."*[285]

In regard to what constitutes a credible suspicion, the Court held in *Rantsev v Cyprus and Russia* that abstract knowledge learned through reports in conjunction with learning of individual circumstances that feature some characteristics of a situation highlighted in the reports was sufficient.[286] In the particular case, there were various reports available pointing out the danger of trafficking for migrant women from Russia working as artistes in Cyprus.[287] Given this context, the Court held that the police should have had suspicions when the victim was brought to the police by her employer who was not only in possession of her

281 Ibid, 402.

282 *Zoletic and Others v Azerbaijan* App no 20116/12 (ECtHR, 7 October 2021), para 184. See also: *V.C.L. and A.N. v United Kingdom* App no 77587/12 and 74603/12 (ECtHR, 16 February 2021), para 152; *Rantsev v Cyprus and Russia* App no 25965/04 (ECtHR, 7 January 2010), para 286.

283 Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European Law* (Cambridge University Press 2017), 402 f.

284 Ibid, 401.

285 *V.C.L. and A.N. v United Kingdom* App no 77587/12 and 74603/12 (ECtHR, 16 February 2021), para 152. See also: *Chowdury and Others v Greece* App no 21884/15 (ECtHR, 30 March 2017), para 88; *J. and Others v Austria* App no 58216/12 (ECtHR, 17 January 2017), para 110.

286 Julia Planitzer, *Trafficking in Human Beings and Human Rights: The Role of the Council of Europe Convention on Action against Trafficking in Human Beings* (NWV 2014), 82.

287 *Rantsev v Cyprus and Russia* App no 25965/04 (ECtHR, 7 January 2010), para 294.

passport but also complained that she had already left his employment after having just arrived in Cyprus on an artiste visa.[288] Likewise, in the case of *Chowdury and Others v Greece*, there were also reports available regarding the precarious situation of workers in the strawberry fields.[289] In light of these reports, the Court determined that complaints made to the police by field workers about their employer refusing to pay their wages should have alerted the police.[290] In *V.C.L and A.N v United Kingdom* there were also various reports pointing out that Vietnamese children had a high probability of being trafficked to work at illegal cannabis production facilities. In this case, one of the applicants was such a Vietnamese minor who was found by the police working at an illegal cannabis facility. The Court determined that these circumstances in conjunction with the available reports already gave rise to a credible suspicion of trafficking, and thus required protective measures.[291] Overall, these judgements suggest that while abstract reports are not enough of an indication on their own, they become quite significant when assessed in conjunction with the personal circumstances of an individual. In addition, it can be deduced from these cases that there is no specific requirement for victims themselves to approach authorities and to make them explicitly aware of their circumstances. In fact – also in light of the adjudication discussed in the preceding -arguably, authorities have a duty to examine indications in order to determine whether they are credible.[292]

However, there is one ECtHR judgement that seems to contradict these conclusions: In *L.E v Greece*, the applicant, a young Nigerian woman, had contact with the police several times in the context of

288 Ibid, para 295 ff.

289 *Chowdury and Others v Greece* App no 21884/15 (ECtHR, 30 March 2017), para 48 ff.

290 Ibid, para 111 ff.

291 *V.C.L. and A.N. v United Kingdom* App no 77587/12 and 74603/12 (ECtHR, 16 February 2021), para 163.

292 *Osman v United Kingdom* App no 23452/94 (ECtHR, 28 October 1998); Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European Law* (Cambridge University Press 2017), 403.

an asylum request and arrests involving prostitution. *Milano* asserts in a case analysis that at that time, there were multiple reports from national and international institutions available that disclosed the issue of trafficking of African women, especially from Nigeria, for the purpose of forced prostitution in Greece.[293] Nonetheless, the Court did not include any of those in its judgements and consequently did not consider any of them. Instead, it held that credible suspicions only emerged once the applicant told the police that she was a victim of trafficking. The reasoning of the Court was therefore strongly criticized by *Stoyanova* and *Milano*, due to its stark conflict with the reasoning adopted in *Rantsev v Cyprus and Russia* by seemingly requiring explicit statements from the victim.[294] Ultimately, the question is whether the Court knew about these reports but did not regard them as significant enough to include them in its judgement or whether these reports were not widely known and thus also remained unnoticed by the Court. Regardless, considering that the Court's reasoning in this particular adjudication sticks out among the Court's case law, with especially more recent judgements following the reasoning adopted in *Rantsev v Cyprus and Russia*, it can be assumed that the Court requires more active rather than reactive actions from authorities.

As to the second part of the knowledge requirement concerning the type of situation that obligates authorities to act – namely, situations with a 'real and immediate risk' – not much can be stated yet, due to the lack of examination by the Court with regard to article 4 of the ECHR.[295] While the wording of 'real and immediate risk' has also

293 Valentina Milano, 'The European Court of Human Rights' Case Law on Human Trafficking in Light of L.E. v Greece: A Disturbing Setback?' (2017) 17(4) Human Rights Law Review 701, 720.

294 Valentina Milano, 'The European Court of Human Rights' Case Law on Human Trafficking in Light of L.E. v Greece: A Disturbing Setback?' (2017) 17(4) Human Rights Law Review 701, 717; Vladislava Stoyanova, 'L.E. v. Greece: Human Trafficking and the Scope of States' Positive Obligations Under the ECHR' [2016] European Human Rights Law Review 290, 303.

295 Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European Law* (Cambridge University Press 2017), 404.

been applied by the Court in the context of positive obligations of other rights, it has neglected so far to offer a definition or explanation of the terminology.[296] In light of the meaning of the word 'real' and the reasoning of the Court in past case law, it may be argued that this wording relates to the objective existence of a risk and that there is enough evidence to suggest its real existence rather than a certain level of intensity.[297] In this regard, the term 'immediate' then refers to the temporal closeness of such risk manifesting.[298] Ultimately, though, the Court's adjudication on the matter is inconsistent, and thus, the implied standard of the terminology is questionable.[299]

3.3.3.2. Prerequisite of reasonability

Once authorities have a credible suspicion of a relevant risk, they must take all reasonable measures that could possibly avoid the realisation of the risk.[300] The requirement of reasonability is meant to give due regard to the issue of finite amounts of resources and the necessity for prioritizing these, as well as the difficulty of anticipating human conduct.[301] Moreover, it is clearly acknowledged that while there might

296 Frédéric Bouhon, 'The challenge of risk assessment by the ECtHR' (Ninth Cambridge International Law Conference – 2020 Webinar Series, University of Cambridge, 2 May 2020) <https://orbi.uliege.be/handle/2268/247027> accessed 23 June 2023; Vladislava Stoyanova, 'Fault, knowledge and risk within the framework of positive obligations under the European Convention on Human Rights' (2020) 33 Leiden Journal of International Law 601, 612.

297 Ibid.

298 Ibid.

299 Frédéric Bouhon, 'The challenge of risk assessment by the ECtHR' (Ninth Cambridge International Law Conference – 2020 Webinar Series, University of Cambridge, 2 May 2020) <https://orbi.uliege.be/handle/2268/247027> accessed 23 June 2023; Vladislava Stoyanova, 'Fault, knowledge and risk within the framework of positive obligations under the European Convention on Human Rights' (2020) 33 Leiden Journal of International Law 601, 613.

300 *Osman v United Kingdom* App no 23452/94 (ECtHR, 28 October 1998), para 116. See also: *Zoletic and Others v Azerbaijan* App no 20116/12 (ECtHR, 7 October 2021), para 184.

301 Ibid.

sometimes be measures available to alleviate or remove a risk, authorities cannot be expected to take measures if they would be disproportionate.[302] Ultimately, to determine what are reasonable measures in a specific situation, all relevant circumstances have to be evaluated on a case-by-case basis.[303] In this regard, the Court has mentioned as relevant factors the scope of the authorities' powers, the physical safety of victims, and the fundamental rights of others involved.[304] *Stoyanova* names, in addition, personal, financial, and social costs.[305]

3.3.3.3. Victim identification

"*Victim identification is the formal identification procedure that leads to conferral of the status of a presumed victim (…).*"[306] It is one of the most important protective measures because it presents an indispensable foundation for any other operational protective measure and the alleviation or prevention of further harm.[307] There are no provisions in the CoE Trafficking Convention that mandate specific procedures with regards to the identification process and neither has the ECtHR established a procedure. Nevertheless, there are a number of aspects to

302 Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European Law* (Cambridge University Press 2017), 405.

303 *Osman v United Kingdom* App no 23452/94 (ECtHR, 28 October 1998), para 116.

304 *Chowdury and Others v Greece* App no 21884/15 (ECtHR, 30 March 2017), para 88; *Rantsev v Cyprus and Russia* App no 25965/04 (ECtHR, 7 January 2010), para 287; *Osman v United Kingdom* App no 23452/94 (ECtHR, 28 October 1998), para 116.

305 Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European Law* (Cambridge University Press 2017), 405.

306 Vladislava Stoyanova, 'Article 10: Identification of the Victims' in Helmut Sax and Julia Planitzer (eds), *A Commentary on the Council of Europe Convention on Action against Trafficking in Human Beings* (Edward Elgar Publishing 2020), 10.01.

307 *V.C.L. and A.N. v United Kingdom* App no 77587/12 and 74603/12 (ECtHR, 16 February 2021), para 160; Council of Europe, 'Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings' (2005) CETS 197, para 127.

consider that can be deduced from the Court's reasoning in its relevant case law.

First, the identification of a potential victim must happen promptly. In *L.E v Greece*, it took the authorities 9 months to confer official victim status on the applicant.[308] Despite the fact that authorities took other protective measures, the Court held that this delayed official identification constituted a violation of the positive obligation for protective measures.[309] In *V.C.L and A.N v United Kingdom*, the Court further stressed, with regard to the decision on prosecuting a potential victim of trafficking, that *"early identification is of paramount importance."*[310] Consequently, victim identification should happen first, before any decisions are taken that may be affected by the outcome of the identification assessment. Moreover, the Court highlighted that any claims made by a person should be taken very seriously by authorities.[311] In this regard, it should further be noted that law-enforcement should be trained to identify potential victims, and specifically trained personnel ought to make the assessment.[312] Finally, the identification of a person as a potential victim is separate from any criminal procedure concerning the trafficking offence.[313] Hence, conferral of victim status upon a person does not automatically mean that the criminal offence of human trafficking has been proven in the case.[314]

308 *L.E. v Greece* App no 71545/12 (ECtHR, 21 January 2016), para 77.
309 Ibid, para 77 f.
310 *V.C.L. and A.N. v United Kingdom* App no 77587/12 and 74603/12 (ECtHR, 16 February 2021), para 160.
311 *J. and Others v Austria* App no 58216/12 (ECtHR, 17 January 2017), para 111.
312 Article 10 (1) CoE Trafficking Convention; *V.C.L. and A.N. v United Kingdom* App no 77587/12 and 74603/12 (ECtHR, 16 February 2021), para 160. See also: *J. and Others v Austria* App no 58216/12 (ECtHR, 17 January 2017), para 110; *Rantsev v Cyprus and Russia* App no 25965/04 (ECtHR, 7 January 2010), para 296.
313 Council of Europe, 'Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings' (2005) CETS 197, para 134; *J. and Others v Austria* App no 58216/12 (ECtHR, 17 January 2017), para 115.
314 *J. and Others v Austria* App no 58216/12 (ECtHR, 17 January 2017), para 115.

3.3.3.4. Victim assistance measures

The Court has pointed out that states must assist identified victims of human trafficking *"in their physical, psychological and social recovery."*[315] In this regard, it has already explicitly acknowledged various measures legislated or taken by states when it examined whether those states had fulfilled their duties under the second positive obligation. In *Rantsev v Cyprus and Russia*, it criticised the authorities for not implementing existing laws that provided for accommodations, medical care, and psychological support for victims of trafficking.[316] Furthermore, it mentioned the following assistance actions when it decided that Austrian authorities had employed all reasonable protective measures available: personal data disclosure ban, support by specialised NGO staff throughout proceedings, legal representation and guidance for victims, integration assistance, work and residence permits.[317] The fact that the applicant subsequently obtained a residence permit was highlighted by the Court in *L.E v Greece* too.[318]

It is difficult to deduce minimum requirements for assistance measures from this adjudication. While the CoE Trafficking Convention could offer further clarification, the Court has not yet scrutinized measures in such detail as to suggest that the minimum threshold defined in the CoE Trafficking Convention for each assistance measure also automatically presents a separate part of the protective measures' obligation under article 4 of the ECHR. The Court has rather considered assistance measures holistically with regard to the criteria of reasonability.[319] Accordingly, the lack of a certain assistance measure does not seem to immediately result in a violation of article 4 of the ECHR – contrary to the lack of official identification, which may be

315 *V.C.L. and A.N. v United Kingdom* App no 77587/12 and 74603/12 (ECtHR, 16 February 2021), para 153; *Chowdury and Others v Greece* App no 21884/15 (ECtHR, 30 March 2017), 110.

316 *Rantsev v Cyprus and Russia* App no 25965/04 (ECtHR, 7 January 2010), para 298, 130.

317 *J. and Others v Austria* App no 58216/12 (ECtHR, 17 January 2017), para 110.

318 *L.E. v Greece* App no 71545/12 (ECtHR, 21 January 2016), para 76.

319 *J. and Others v Austria* App no 58216/12 (ECtHR, 17 January 2017), para 111.

severe enough to already constitute a violation as it is connected to the provision of further assistance and prevention of further harm.

3.3.3.5. Non-punishment of victims

The Court considered the issue of the prosecution and punishment of victims of trafficking for the purpose of criminal activities for the first time in its recent case *V.C.L and A.N v United Kingdom*. As already discussed, it concerned children that were convicted of crimes relating to their work in cannabis production facilities, despite eventually being identified as potential victims of trafficking by the competent authorities.

In its judgement, the Court first pointed to the consensus among international documents, explaining that in principle non-punishment of victims of trafficking is not mandated by default but is an option for state authorities.[320] Furthermore, the option of non-punishment depends on the offence being committed by the trafficking victim under compulsion – this is also the case with child victims.[321] Consequently, there must be a *"relevant nexus"*[322] between the alleged crime and the trafficking circumstances of the victim. However, simultaneously, the Court observed that a prosecution clearly runs counter to the principle of recovery and thus the objective of protective measures.[323] Therefore, in order to reconcile those conflicting principles, it defined some aspects that must be considered to give due regard to the objective of recovery: Next to prompt and adequate victim identification, it is necessary to evaluate whether there is a public interest to prosecute,

320 Article 26 of the CoE Trafficking Convention. see also: article 8 of the EU Trafficking Directive; article 4(2) of the Protocol of 2014 to the Forced Labour Convention, 1930 (P29); *V.C.L. and A.N. v United Kingdom* App no 77587/12 and 74603/12 (ECtHR, 16 February 2021), para 158.

321 *V.C.L. and A.N. v United Kingdom* App no 77587/12 and 74603/12 (ECtHR, 16 February 2021), para 158.

322 Ibid, para 170.

323 Ibid, para 159.

if possible, only after the official identification process.[324] In addition, while the decision to prosecute ultimately remains at the discretion of the prosecutor, any disagreement with the official identification assessment must be grounded in clear arguments that accord with the trafficking definition.[325] In the particular case, the ECtHR did not take issue with the fact that the national courts had decided to uphold the criminal convictions, but rather with fact that they followed the prosecution's assumptions that the applicants were not trafficking victims without giving appropriate reasons for their view that conflicted with the official identification assessment.[326]

Overall, this judgement suggests that – contrary to the exact wording found in relevant international documents[327] – the application of the non-punishment principle is not completely left to the discretion of state authorities. In fact, responsible authorities have to consider the application of the principle with the objective of recovery in mind. With regard to article 26 of the CoE Trafficking Convention, *Piotrowicz* argues that the wording must be considered in view of the human rights-based approach of the CoE Trafficking Convention.[328] Thus, it must be understood in such a manner as to require states to apply the principle in *"appropriate cases*", where the way of implementation is, however, left to the discretion of the state.[329]

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324 Ibid, para 160 f.

325 Ibid, para 162.

326 Ibid, para 170, 172, 178.

327 The wording in the EU Trafficking Directive and in the 2014 Protocol to the Forced Labour Convention is the following: "[E]*nsure that competent authorities are entitled not to prosecute*"; and the CoE Trafficking Directive says, *"provide for the possibility of not imposing penalties"*.

328 Ryszard Piotrowicz, 'Article 26: Non-Punishment Provision' in Helmut Sax and Julia Planitzer (eds), *A Commentary on the Council of Europe Convention on Action against Trafficking in Human Beings* (Edward Elgar Publishing 2020), 26.26.

329 Ibid.

3.3.4. Obligation for effective investigation and prosecution

The third obligation is connected to the first one concerning the criminalisation of trafficking, as it obligates states to actually enforce the relevant criminal law and therefore, investigate any situation that suggests that the offence of trafficking has been committed within the territory of the respective state.[330] This means that the responsible state authorities have to gather all available evidence and clarify the circumstances of situations of potential trafficking.[331] Here too, the factor of 'reasonableness' has to be considered given that the duty to investigate is not meant to impose an impossible or excessive burden on the authorities.[332] Since this is a procedural obligation, it does not mandate a certain result, and thus does not constitute an absolute right of the victim to have an alleged perpetrator prosecuted, but only a duty to conduct an investigation that fulfils certain criteria that relate to the effectiveness of such.[333] Nevertheless, the objective of the investigation should be the implementation of criminal law and thus, the identification and punishment of actual traffickers.[334]

In principle, there are two relevant questions to consider when evaluating compliance with the obligation of an effective investigation.[335] First, when does the obligation to investigate arise?[336] Second, what criteria must be met in order for an investigation to be deemed effect-

330 *S.M. v Croatia* App no 60561/14 (ECtHR, 25 June 2020), para 308.
331 *Zoletic and Others v Azerbaijan* App no 20116/12 (ECtHR, 7 October 2021), para 188; *S.M. v Croatia* App no 60561/14 (ECtHR, 25 June 2020), para 316.
332 *Zoletic and Others v Azerbaijan* App no 20116/12 (ECtHR, 7 October 2021), para 188; *S.M. v Croatia* App no 60561/14 (ECtHR, 25 June 2020), para 315.
333 Ibid.
334 *C.N. and V. v France* App no 67724/09 (ECtHR, 11 October 2012), para 109; *Rantsev v Cyprus and Russia* App no 25965/04 (ECtHR, 7 January 2010), para 232.
335 Krešimir Kamber, *Prosecuting Human Rights Offences: Rethinking the Sword Function of Human Rights Law* (International criminal law series vol 11, Brill 2017), 217; Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European Law* (Cambridge University Press 2017), 351.
336 Ibid.

ive?[337] These aspects have already extensively been covered in case law concerning articles 2 and 3 of the ECHR, and the Court has explicitly referred to this case law when considering the investigation obligation under article 4 of ECHR.[338]

3.3.4.1. Triggering investigation obligation

To date, the Court has used different phrases in its adjudications of article 4 of the ECHR to define the threshold at which authorities must open an investigation.

In the first case, *Rantsev v Cyprus and Russia,* the Court stated as a general rule that "*once the matter has come to the attention of the authorities they must act* (…)."[339] When the Court applied the principle to the facts of the case, it seemed to suggest the same threshold that triggers the obligation for victim protective measures. In light of the general trafficking issues present in Cyprus, the Court opined that there were enough clues to give rise to a *"credible suspicion*" which would trigger the obligation for an investigation.[340] Thus, aspects of personal circumstances that overlap with a general trafficking problem known by the authorities would trigger the obligation for an investigation. In *C.N v United Kingdom*, the Court had already used the term 'credible suspicion' as a general principle.[341] However, this time, when it applied it to the facts of the case, it stated that an investigation was already necessary if the applicant's claims were not "*inherently implausible*"[342], thereby arguably lowering the threshold.

337 Ibid.
338 *Zoletic and Others v Azerbaijan* App no 20116/12 (ECtHR, 7 October 2021), para 185. see also: *S.M. v Croatia* App no 60561/14 (ECtHR, 25 June 2020), para 311.
339 *Rantsev v Cyprus and Russia* App no 25965/04 (ECtHR, 7 January 2010), para 288.
340 Ibid, para 296.
341 *C.N. v United Kingdom* App no 4239/08 (ECtHR, 13 November 2012), para 69.
342 Ibid, para 72.

In its more recent Grand Chamber judgement, *S.M v Croatia*, the Court reiterated the wording used in *Rantsev v Cyprus and Russia* when citing the general principle. However, when it applied the facts to the case, it used a different definition altogether, requiring "*the applicant* [to have] *made an arguable claim or* [that] (....) *there was prima facie evidence* (...)."[343] This definition originates from the investigation obligation under article 3 of the ECHR, and the Court stated that the same approach applies to article 4 of the ECHR.[344] Simultaneously, it also referred back to the definition applied in *C.N v United Kingdom*.[345] Finally, in *Zoletic and Others v Azerbaijan*, on the one hand, the Court used the wording of 'credible suspicion' when formulating a general principle.[346] Yet, when applying the facts to the case, it referred to the criteria of 'arguable claim' and, in addition, analysed whether the authorities had abstract knowledge about the general issue at hand before concluding that the obligation for an investigation was triggered.[347]

In light of the preceding discussion and in consideration of comments made by scholars and ECtHR judges on the matter, it seems to be unclear whether the different terms have different meanings and, if so, which definition is actually applicable at present.[348] However, the following aspects should be noted: With regard to the wording 'credible

343 *S.M. v Croatia* App no 60561/14 (ECtHR, 25 June 2020), para 324.

344 Ibid.

345 Ibid.

346 *Zoletic and Others v Azerbaijan* App no 20116/12 (ECtHR, 7 October 2021), para 185.

347 Ibid, para 194 f.

348 Judges *O'Leary* and *Ravarani* were of the opinion that in preceding case law, the Court had applied a lower threshold for the third obligation compared to the threshold for the legislative and procedural obligations.
Hughes interprets the different wordings of 'credible suspicion' and 'arguable claim' in such a way as to represent two different levels of scrutiny. In light of the arguments made in *Zoletic and Others v Azerbaijan*, on the one hand, the Court seems to conflate the thresholds of the different obligations, and on the other hand, it seems to equate all of the different terms by using all of them simultaneously when explaining and applying the threshold.
See: concurring opinion in *S.M. v Croatia* App no 60561/14 (ECtHR, 25 June 2020), 99; *Zoletic and Others v Azerbaijan* App no 20116/12 (ECtHR, 7 October 2021), para 185 ff; Kristy Hughes, 'Human Trafficking, SM v Croatia and the

suspicion', *Stoyanova* contends that it is *"illogical and nonsensical"*, as it implies that authorities ought to assess their own suspicions.[349] Furthermore, such wording is also often used in the context of assessing the trustworthiness of migrants, which – considering that victims of trafficking are often migrants – is problematic insofar as it suggests that the question of credibility relates to the trustworthiness of the victim as a person instead of the trustworthiness of the information.[350] Thus, other wording that focuses more on the trustworthiness of the information rather than that of the person would be better suited. Moreover, it cannot be denied that the typical facts of a case concerning article 2 and 3 of the ECHR usually entail some sort of physical evidence that clearly offers *prima facie* evidence or an arguable claim, which is not necessarily the case with regard to article 4 situations.[351] Consequently, even if in theory, the same threshold now applies to all three articles, the fact remains that adjudication under articles 2 and 3 of the ECHR is only helpful to a limited extent due to significantly different circumstances in practice.[352]

However, the following aspects must be considered in any case: When considering whether a situation triggers an obligation for an investigation, a delay between alleged trafficking events and the victim approaching the police cannot be regarded as derogatory to the victim's claims if this delay is still within the 30-day reflection period mandated by article 13 of the CoE Trafficking Convention.[353] Regarding the question of jurisdiction, the Court has held that an investigation is only

Conceptual Evolution of Article 4 ECHR' (2022) 85 Modern Law Review 1044, 1052.

349 Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European Law* (Cambridge University Press 2017), 356.

350 Ibid, 356 f.

351 Concurring opinion of Judges O'Leary and Ravarani in *S.M. v Croatia* App no 60561/14 (ECtHR, 25 June 2020), 99 ff.

352 Ibid.

353 *Chowdury and Others v Greece* App no 21884/15 (ECtHR, 30 March 2017), para 121.

compulsory if any part of the trafficking process has actually taken place in the particular country.[354]

3.3.4.2. Criteria for effective investigation

In its case law concerning articles 2 and 3 of the ECHR, the Court has developed a number of criteria to determine the effectiveness of an investigation and adopted them for the investigation obligation under article 4 of the ECHR. The Court has emphasised, that these criteria are not to be understood as a *"checklist"* for specific actions, but rather as *"parameters"* in light of which the circumstances of a specific case must be assessed to determine whether the investigation was adequate.[355] In this respect, only *"significant shortcomings* (...) *that are capable of undermining the investigation's capability of establishing the circumstances"* amount to an ineffective investigation, and therefore, isolated mistakes are not an issue under article 4 of the ECHR.[356] The following paragraphs give an overview of the relevant parameters and how they have been applied in cases of article 4 of the ECHR.

In accordance with the aforementioned threshold for effectiveness, generally, investigations have to be *"capable of leading to the establishment of the facts and of identifying and – if appropriate – punishing those responsible."*[357] Given that the constitutional elements of the trafficking offence have to be proven to enable criminal conviction – if the facts of a case point to a situation of human trafficking – authorities are thus evidently required to focus their investigation on aspects related

354 *J. and Others v Austria* App no 58216/12 (ECtHR, 17 January 2017), para 112.
355 *S.M. v Croatia* App no 60561/14 (ECtHR, 25 June 2020), para 318 f. See also: *Velikova v Bulgaria* App no 41488/98 (ECtHR, 18 May 2000), para 80.
356 *S.M. v Croatia* App no 60561/14 (ECtHR, 25 June 2020), para 320.
357 *Zoletic and Others v Azerbaijan* App no 20116/12 (ECtHR, 7 October 2021), para 187. See also: *S.M. v Croatia* App no 60561/14 (ECtHR, 25 June 2020), para 313.

to the constitutional elements of the trafficking offence.[358] Accordingly, authorities should not come to rash conclusions nor disproportionately preoccupy themselves with other possibly related issues, such as immigration violations for instance.[359] In fact, authorities have to ensure that the investigation has been thorough and that all reasonable measures have been taken with regard to securing evidence and establishing the facts of the case.[360] In this regard, the Court has stressed that authorities need to follow *"obvious lines of inquiry"*.[361] Hence, all witnesses must be questioned, including specialised NGO aid workers who had been in contact with the potential victim.[362] In the case of conflicting testimonies, authorities ought to take additional steps to try to resolve the contradiction.[363] Further, in the case of obvious irregularities and anomalies, reasonable explanations have to be found.[364] Finally, authorities must avoid an outcome where the case decisively depends on the victim's statement, since victims do not necessarily share all information with authorities and are often traumatised.[365]

The opening of an investigation should neither depend on the victim. Rather, investigations must be opened and conducted *ex officio*:

358 In this regard, in *M.C. v Bulgaria* App no 39272/98 (ECtHR, 4 December 2003), para 180, the Court criticized authorities for not considering circumstances that concerned one of the constitutional elements of the crime.

359 *M. and Others v Italy and Bulgaria* App no 40020/03 (ECtHR, 17 December 2012), 106; Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European Law* (Cambridge University Press 2017), 306 f.

360 *Zoletic and Others v Azerbaijan* App no 20116/12 (ECtHR, 7 October 2021), para 188. See also: *El-Masri v the Former Yugoslav Republic of Macedonia* App no 39630/09 (ECtHR, 13 December 2012), para 183; *M. and Others v Italy and Bulgaria* App no 40020/03 (ECtHR, 17 December 2012), para 106.

361 *S.M. v Croatia* App no 60561/14 (ECtHR, 25 June 2020), para 336.

362 *S.M. v Croatia* App no 60561/14 (ECtHR, 25 June 2020), para 339 ff; *L.E. v Greece* App no 71545/12 (ECtHR, 21 January 2016), para 77, 82.

363 *S.M. v Croatia* App no 60561/14 (ECtHR, 25 June 2020), para 341 f. See also: *Rantsev v Cyprus and Russia* App no 25965/04 (ECtHR, 7 January 2010), para 236; *M.C. v Bulgaria* App no 39272/98 (ECtHR, 4 December 2003), para 176.

364 *Rantsev v Cyprus and Russia* App no 25965/04 (ECtHR, 7 January 2010), para 236 f.

365 *S.M. v Croatia* App no 60561/14 (ECtHR, 25 June 2020), para 343 f.

Consequently, once authorities have learnt of relevant circumstances, they must conduct an adequate and complete official investigation regardless of possible claims from the victim themself or their close relatives.[366] This obligation for 'ex officio' actions concerns law-enforcement and judicial personnel.[367] Consequently, in *L.E v Greece*, the Court took issue with the fact that the prosecutor had not resumed an investigation into trafficking allegations made by the applicant once the evaluation of such allegations changed due to a corroborating witness statement made by a NGO director.[368] Hence, authorities must resume an investigation of their own volition, if they learn of new circumstances that require further investigation. Nevertheless, this obviously does not mean that victims play no role in an investigation. On the contrary, victims or close relatives have to be involved in an investigation to *"safeguard their legitimate interests."*[369] Consequently, they must be informed not only of subsequent legal proceedings so that they can participate but also of available steps to secure their rights and interests.[370]

Furthermore, investigations must be conducted *"promptly"* and without delay.[371] Yet, if they could contribute to the removal of a victim from a harmful situation, the Court even mandates proceeding with *"urgency"*.[372] Moreover, investigations have to be conducted by individ-

366 *Zoletic and Others v Azerbaijan* App no 20116/12 (ECtHR, 7 October 2021), para 187; *Chowdury and Others v Greece* App no 21884/15 (ECtHR, 30 March 2017), para 89. See also: *S.M. v Croatia* App no 60561/14 (ECtHR, 25 June 2020), para 314; *C.N. v United Kingdom* App no 4239/08 (ECtHR, 13 November 2012), para 69.

367 *Chowdury and Others v Greece* App no 21884/15 (ECtHR, 30 March 2017), para 116.

368 *L.E. v Greece* App no 71545/12 (ECtHR, 21 January 2016), para 82.

369 *Zoletic and Others v Azerbaijan* App no 20116/12 (ECtHR, 7 October 2021), para 187. See also: *Rantsev v Cyprus and Russia* App no 25965/04 (ECtHR, 7 January 2010), para 288.

370 *Rantsev v Cyprus and Russia* App no 25965/04 (ECtHR, 7 January 2010), para 239 f.

371 *Zoletic and Others v Azerbaijan* App no 20116/12 (ECtHR, 7 October 2021), para 187. See also: *Chowdury and Others v Greece* App no 21884/15 (ECtHR, 30 March 2017), para 116.

372 Ibid.

uals and institutions that are independent from anyone involved in the circumstances of the case.[373] This relates not only to institutional and hierarchical independence but also to independence in practice.[374] However, the degree of independence necessary in a specific case, must be determined by considering all of the circumstances.[375]

Lastly, if the facts of a case include a transnational element, authorities must request legal assistance from other relevant states and also respond to such legal assistance requests made by other states.[376] This duty applies especially in cases where there is a legal assistance mechanism already in place.[377] However, in *J and Others v Austria*, the Court took no issue with the fact that Austrian authorities had not made a legal assistance request to the United Arab Emirates to gain access to the accused traffickers, given the negative outcome of such requests in the past.[378] Instead, it accepted the Austrian government's argument that such request would have had little chance at success, and thus, it was within the margin of appreciation for the authorities to decide whether to make such a request.[379]

3.4. Conclusion

The importance of article 4 of the ECHR as an aspect of the trafficking victim's protection framework is undeniable. The ECtHR's adjudications and interpretations have not only facilitated the implementation of the victim protection standard set forth in the international traffick-

373 *Zoletic and Others v Azerbaijan* App no 20116/12 (ECtHR, 7 October 2021), para 187. See also: *Bouyid v Belgium* App no 23380/09 (ECtHR, 28 September 2015), para 118.

374 *Rantsev v Cyprus and Russia* App no 25965/04 (ECtHR, 7 January 2010), para 233. See also: *Bouyid v Belgium* App no 23380/09 (ECtHR, 28 September 2015), para 118.

375 *M.B. and Others v Slovakia* App no 45322/17 (ECtHR, 1 April 2021), para 91.

376 *Zoletic and Others v Azerbaijan* App no 20116/12 (ECtHR, 7 October 2021), para 191, 206 f; *Rantsev v Cyprus and Russia* App no 25965/04 (ECtHR, 7 January 2010), para 289.

377 *Rantsev v Cyprus and Russia* App no 25965/04 (ECtHR, 7 January 2010), para 241.

378 *J. and Others v Austria* App no 58216/12 (ECtHR, 17 January 2017), para 117.

379 Ibid.

ing legal framework but have also provided victims with subjective rights that they can enforce through a direct complaint with the ECtHR – provided all national remedies have been exhausted.

The Court has elucidated its view of the material scope of article 4 in its most recent case law, clarifying that while slavery, servitude, forced labour, and human trafficking are different concepts, they share an 'intrinsic relationship' with some overlapping characteristics. Arguably, such delimitation benefits victims, as it ensures proper protection from all types of exploitation encompassed by article 4. However, further explanation regarding the exact meaning of certain words used in the definition of human trafficking is needed. Also, it is not clear what threshold alleged exploitation must meet for it to become relevant in the context of human trafficking.

The positive obligations of article 4 of the ECHR are inspired by the protection standard set out in articles 2 and 3 of the ECHR. The obligation for an adequate legal framework requires criminalisation and appropriate punishment of human trafficking. However, given the vague and ambiguous reasoning in newer case law, it is unclear what level of protection the wider legal framework has to offer. Once authorities have been made aware of a situation of trafficking, all reasonable operational measures must be taken to ensure effective protection of the victim, but without imposing a disproportionate burden on the authorities. To ensure protection of victims and punishment of traffickers, states have to conduct a thorough investigation once their authorities have become aware of a potential situation of trafficking. The Court needs to clarify though, when this obligation is triggered in order to inhibit inactivity and passivity of the authorities.

In principle, the obligations that derive from article 4 of the ECHR offer a comprehensive level of protection that fulfils the protection standard set out in the CoE Trafficking Convention. However, due to ambiguous case law, it is necessary for the ECtHR to confirm its understanding of the adequate level of protection offered by the wider legal framework. Otherwise, there is the danger of national law potentially

facilitating human trafficking, which would strongly undermine other protection efforts.