

5. Conclusion

The international legal framework that deals with the issue of exploitation has been developed in the past 100 years. The various international documents cover different types of exploitation and their level of protection for victims differ from mere recommendations to more detailed obligatory measures with monitoring mechanisms in place. The oldest relevant document is the Slavery Convention 1926, which defined slavery as ‘legal and de facto ownership’ over a person and abolished such institution. The Forced Labour Convention, 1930 and its follow-up documents, prohibited forced labour and define it as work or service which is offered not voluntarily and exacted under the menace of any penalty. The Palermo Protocol, 2000 provides the internationally accepted and established definition of human trafficking, prescribes the criminalisation thereof, and suggests a number of measures to protect victims. However, this definition includes many terms that are ambiguous, which prevents a uniform understanding and interpretation of human trafficking. The CoE Trafficking Convention, 2005 builds upon the standard set in the Palermo Protocol and further includes obligatory measures to protect victims. Finally, the EU Trafficking Directive, 2011 adapts the definition of human trafficking to include new types of exploitation and means, and it also includes protective measures specifically applicable to child victims. When considering international

treaties, all such international treaties lack subjective, enforceable rights for individuals.⁴⁴²

The ECHR is a particularly effective regional human rights treaty due to its independent judicial oversight by the ECtHR. It forms an integral part of the European human rights framework and proved to have a significant influence on human rights protection in Austria. The dynamic interpretation of the ECHR, that is guided by the European consensus, enabled the inclusion of human trafficking under the scope of article 4 of the ECHR. It further provides the option of an even greater standard of human rights in the future.

In *Rantsev v Cyprus and Russia*, the Court considered human trafficking, as defined in the Palermo Protocol and CoE Trafficking Convention, to be within the scope of article 4 of the ECHR for the first time. However, in that judgement it failed to clarify how human trafficking relates to the other concepts found in article 4 of the ECHR – namely slavery, servitude and forced labour – and it seemingly simultaneously introduced another definition of human trafficking. The Court only resolved these issues in the recent Grand Chamber judgement *S.M. v Croatia*.

It clarified that the international definition with its three constitutional elements, action, means, and purpose of exploitation, is applicable. The Court rejected the opinion of some, that aforementioned definition would also include the elements of transnationality and organised crime. The element of action includes activities that lead to the subsequent exploitation of a victim, but arguably, it does not encompass actions of the exploitation situation itself. The element of means – which does not need to be present in case of child trafficking – stipulates that manipulation of the victim's will must have taken place. The Court has not yet clarified, at what point in time the manipulation must take place and what threshold it must reach for it to become relevant for the trafficking definition. The element of exploitation serves as a 'dolus specialis', which only requires that the actions are taken

442 With the exception of the EU Trafficking Directive, which could become directly applicable law under certain circumstances that is enforceable by an individual.

with the intention or knowledge that they would result in exploitation. Thus, actual exploitation must not yet have taken place. The list of exploitation types is only meant to be exemplary, and the Court has so far only dealt with a number of them. Furthermore, the actual threshold of severity of exploitation remains to be determined.

The prohibition of forced labour, servitude and slavery are explicitly mentioned in article 4 of the ECHR and simultaneously serve as exploitation types included by the human trafficking definition. Although, the Court had conflated these concepts and human trafficking in older cases, it has since clarified that they are distinct concepts that are interconnected. Human trafficking covers the process leading up to exploitation, whereas the other concepts concern actual exploitation that encroaches upon human dignity. They differ as to the extent of the exploitative circumstances: forced labour concerns work that is done involuntarily due to a threat, without taking away a person's liberty in other areas of life; servitude already includes a more serious form of denial of freedom that also concerns life outside of work, leaving the impression of the situation being permanent for the victim; finally, slavery amounts to de facto ownership with no freedom left for the victim. Considering that these four concepts of slavery, servitude, forced labour, and human trafficking have slightly different material scopes, their delimitation ensures a complete level of protection, and could therefore lead to different results when evaluating the reasonableness of positive obligations.

Article 4 of the ECHR mandates three different positive obligations that require states to take reasonable measures to protect individuals from harm caused by other individuals. First, states have to ensure an adequate legal framework by criminalising each of the four concepts, considering that each has a different material scope. Further, they must introduce adequate penalties that are not prematurely time barred. However, further clarification by the Court regarding adequate limitation periods is needed. Contrary to the objective and purpose of the ECHR, which is the promotion of a human rights-based approach instead of the prosecution of trafficking, the appropriateness of the wider

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legal framework has not been reviewed by the Court in its newer case law. Instead it only focused on criminalisation. This arguably leaves a gap in the victim protection framework under article 4 of the ECHR, as it tolerates legislative frameworks that unwittingly facilitate trafficking and the exploitation of individuals.

Second, state authorities must take operational measures to protect an individual once they learn of individual circumstances that give rise to a credible suspicion of an individual being at real and immediate risk of being trafficked. The Court has not yet determined what constitutes such real and immediate risk. Regarding the question of what constitutes a credible suspicion, the Court deemed abstract reports in conjunction with circumstances of an individual, that reflect what has been said in those abstract reports, as sufficient to affirm the existence of a credible suspicion, ascribing authorities an active rather than reactive role. State authorities are then required to take all reasonable measures that at minimum alleviate the risk. Reasonableness of a measure has to be evaluated in light of the particular circumstances of a case. An essential protective measure is the prompt identification of possible victims of trafficking by trained authorities, if possible, before any further decisions that affect the victim are made. Further, assistance with physical, psychological, and social recovery should be provided to the victim. The Court has not defined a minimum threshold for each of them. So arguably they should be evaluated as a whole. Regarding the option of non-punishment of human trafficking victims who have committed a crime, the Court has stressed that such decision must be made, if possible, after and in light of the official victim identification process.

Third, states must conduct an effective investigation into situations that suggest human trafficking. This obligation is a procedural obligation, which therefore does not prescribe a certain result. Due to the conflicting adjudication of the Court, the threshold that triggers the obligation to investigate a particular situation remains unclear. There are a number of criteria that serve as parameters when evaluating the effectiveness of an investigation. Only a severe disregard of them

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amounts to the investigation being ineffective. Investigations have to be conducted *ex officio*. They must focus on establishing the facts concerning the three constituent elements of the trafficking definition. The investigation must be conducted by independent agents, promptly and thoroughly by securing and preserving available evidence and by establishing all the relevant facts, following obvious lines of inquiry and resolving inconsistencies. If possible, it should not wholly depend on the victim's testimony. Finally, the respective authorities must consider the victim's legitimate interests throughout the investigation.

Trafficking cases detected in Austria in the past years almost exclusively concern non-Austrian victims who are mainly from Eastern Europe, the Balkan states, or Nigeria. Trafficking for the purpose of labour exploitation and sexual exploitation are the most prevalent forms, with the former mainly concerning female victims and the latter mainly concerning male victims.

There are various criminal offences covering different aspects of trafficking and exploitation. Yet, there seems to be a legislative gap concerning the criminalisation of trafficking for the purpose of slavery or servitude. Additionally, there is also no offence that criminalises forced labour independently from any preceding trafficking actions. Therefore, Austrian criminal law is not completely adhering to the obligation of criminalisation under article 4 of the ECHR. Penalties vary from 6 months up to 10 years and seem to be dissuasive with aggravating circumstances appropriately being taken into consideration. Considering that even the basic offence of trafficking is a serious crime with a limitation period of 5 years, the limitation period seems to be appropriate, though further clarification on this matter by the Court is needed.

The two state funded NGOs 'LEFÖ' and 'MEN VIA' are primarily responsible for helping victims, offering a wide range of assistance measures. Such assistance is not dependent on an official victim status. The Court found a set of assistance measures that had been provided by LEFÖ in the case of *J. and Others v Austria* to be sufficient, which suggests that the set of measures is comprehensive. While an internal

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decree prescribes a 30-day reflection period for potential victims, such is not always afforded to victims, which could prove problematic in light of the principle of early victim identification under article 4 of the ECHR.

Investigations into suspicions of human trafficking are conducted by specialised investigation units of the police. However, in practice these investigations frequently lack the required thoroughness by fully relying on victims' statements and being aware of inconsistencies without trying to resolve them. Such approach could result in a breach of the obligation for an effective investigation under article 4 of the ECHR.

Overall, Austria seems to fulfil most of the requirements under article 4 of the ECHR. However, it needs to close the legislative gap concerning the criminalisation of trafficking for the purpose of slavery and servitude. Furthermore, victims' rights regarding victims in detention awaiting deportation need to be honoured in all cases. Finally, the standard of investigations into possible trafficking cases need to improve to ensure thoroughness and effectiveness thereof.