Chapter 5

See the Human behind the Law – The Court's Perception of Neoslavery

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Abstract

Forced labour is an economic activity that erodes human dignity. More than 300 cases on the prohibition of forced labour and slavery have so far been heard by the European Court of Human Rights (ECtHR), a number that suggests that fully topical human rights arguments can be made in this area. The relevant guidelines and legal texts of both the Council of Europe (COE) and the International Labour Organization (ILO) have served as a starting point for the present study, which has been supplemented with literature sources. This chapter presents the issue of the prohibition of forced labour in three major units. Firstly, the concept of forced labour is examined, then measures to combat the phenomenon, and finally the case law of the ECHR. The case law has been compiled to provide an overview of recent cases, mainly from the Central European region.

Keywords: forced labour, servitude, slavery, employment, freedom, equality, working conditions

1. Introduction: Forced Labour as Modern Slavery

Forced labour is a relatively broad topic, so it is necessary to narrow it down explicitly by excluding from the discussion possible social problems associated with the topic – the problem with this, however, is that, in practice, forced labour is always

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closely entangled with socio-related aspects. This study aims to detect and analyse the legal consequences which arise from the noted labour market phenomenon, but also to emphasise the person behind the legal protection. Forced labour can be imposed on adults and children, by state authorities, by private enterprises, or by individuals. It is observed in all types of economic activity – such as domestic work, construction, agriculture, manufacturing, sexual exploitation, forced begging, etc. – and in every country. As a result, the existence of the violation itself gives rise to many social problems, which the law is naturally obliged to deal with. At the same time, when examining the prohibition of forced labour, a strict distinction must be made between the persons involved and the legal value to be protected.

Maybe it is not a problem if there are blurred lines between 'legal' and 'social' attempts in analysing a legal area – according to an article about the reconstruction of the notion of social, "political and legal responses to human migration have broken down lines between immigration law, economic regulation, and criminal justice in complex and often troubling ways ... [and that] boundary dissolutions, notions about citizenship, sovereignty, illegality and rights (to name but a few) have all been complicated, challenging a number of long standing assumptions underlying legal scholarship concerned with law's relevance in shaping our global future".[1] And this completely fits here, when talking about the consequences of human trafficking.

Under the European Convention of Human Rights (ECHR, hereinafter referred to as 'the Convention'), forced labour is a condition that is absolutely unacceptable to the international community. In order to protect basic freedoms in this area, the instrument in Article 4 regulates the issue as follows:[2]

1) 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 [i.e. regulation of lawful detention] 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.

According to the 2021 Global Estimates, there are 27.6 million people in situations of forced labour on any given day, 3.5 people for every thousand people in the world. Women and girls make up 11.8 million of this total. More than 3.3 million

1 Nelked, 2013.
2 European Convention on Human Rights 2013.

of all those in forced labour are children. Forced labour has grown in recent years: there was a 2.7 million increase in the number of people in forced labour between 2016 and 2021, which translates to a rise in the prevalence of forced labour from 3.4 to 3.5 per thousand people.[3] These formulations are all associated with humankind. Humans are their starting point and they almost exclusively contain only social considerations. So why is it necessary to treat the issue of the prohibition of forced labour as a priority in international legal sources? Global profits made from forced labourers exploited by private agents or enterprises could reach US$ 44.2 billion every year, of which US$ 31.6 billion is from trafficked victims. The largest profits – more than US$ 15 billion – are made from people trafficked and forced to work in industrial countries.[4] And these are statistics from 20 years ago.

All in all, when analysing forced labour, those legally protectable values must be highlighted which are the focus of the different international legal sources: there are many basic – first and second generation – human rights involved in this case, and all of them point in the same direction. When it comes to work-related issues, it is necessary to be transparent both in terms of inter-human connections and state operations. There are legitimate interests both for the individuals and the state: on the side of the individuals (the workers) there is the right to life and liberty, freedom from slavery and torture, freedom of expression, the right to work in just and favourable conditions, and the rights to social protection, to an adequate standard of living and to the highest attainable standards of physical and mental well-being, and the right to equal treatment. On the side of the state, the rule of law must be maintained: the rule of law is a normative ideal that should be viewed in terms of its ends. The goal of the rule of law is to oppose the arbitrary exercise of power by setting boundaries on, and channelling the exercise of power through known legal rules and institutions that apply to all. The goal is to create restraints on government, as well as private power, together with channels for cooperative and coordinative activities, which provide security and predictability so that people can plan and organise their pursuits and do so without fear. As an ideal, the rule of law will never be fully attained given human failings, but that does not make the principle any less important.[5] In my opinion, it is not possible to maintain the rule of law if private individuals, legal entities, or the state itself can create exploitative working conditions without legal consequences. That is why it is important to discuss the concept.

1.1. The Notion of Forced or Compulsory Labour

As we have seen, Article 4 § 2 of the Convention prohibits forced or compulsory labour (see *Stummer v. Austria [GC], § 117*[6]). However, Article 4 does not define

3 ILO 2022.
4 Belser, 2005.
5 Shaffer & Sandholtz, 2024, pp. 393–438.
6 European Court of Human Rights 2011.

what is meant by "forced or compulsory labour" and no guidance on this point is to be found in the various Council of Europe documents relating to the preparatory work of the European Convention (see *Van der Mussele v. Belgium, § 32*[7]). Consequently, case law has recourse to ILO Convention No. 29 concerning forced or compulsory labour. The persistence of slavery and slavery-like practices has received renewed official attention, including from the UN Commission on Human Rights[8] and its Working Group on Contemporary Forms of Slavery. Most notable among the UN agencies, however, is the International Labour Organization (ILO),[9] which has launched a campaign against forced labour and, as part of that campaign, has ventured to estimate the extent of forced labour worldwide.[10] For governments and the public in the developed world, the focus on illegal immigration and transnational human trafficking has also led to a renewed interest in forced labour in the context of human trafficking.[11]

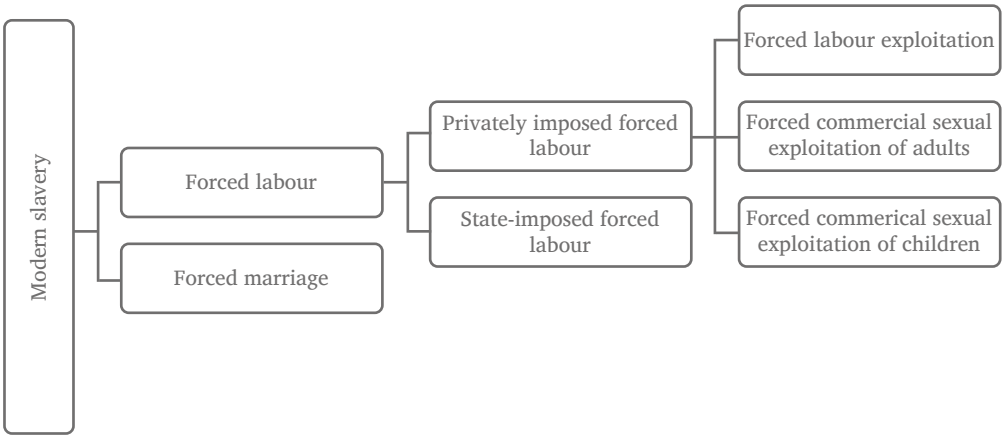

Figure 1. The system of modern slavery according to the ILO[12]

Privately-imposed forced labour refers to forced labour in the private economy imposed by private individuals, groups, or companies in any branch of economic of activity. 86 per cent of all forced labour is imposed by private agents – 63 per cent in forced labour exploitation and 23 per cent in forced commercial sexual exploitation.

7 European Court of Human Rights 1983.
8 See United Nations Human Rights Office of the High Commissioner.
9 See International Labour Organization. The ILO is the UN agency responsible for international labour standards and is the only international organisation that addresses labour rights issues at the international level. It has a tripartite constituency of governments, employers and workers, which helps to create overarching policies.
10 For detailed statistics see ILO 2022.
11 Lerche, 2007, pp. 425–452.
12 ILO 2022.

State-imposed forced labour accounts for the remaining 14 per cent of people in forced labour.[13] State-imposed forced labour refers to forced labour imposed by State authorities, regardless of the branch of economic activity in which it takes place. It includes labour exacted by the State as a means of political coercion or education or as a punishment for expressing political views; as a punishment for participating in strikes; as a method of mobilising labour for the purpose of economic development; as a means of labour discipline; and as a means of racial, social, national, or religious discrimination.[14]

While it is recognised that States have the power to impose compulsory work on citizens, the scope of these prerogatives is limited to specific circumstances, for example, compulsory military service for work of purely military character; normal civic obligations of citizens of a fully self-governing country and assimilated minor communal services; work or service under supervision and control of public authorities as a consequence of a conviction in a court of law; work or service in cases of emergency such as war, fire, flood, famine, earthquake, etc.

Patrick Belser emphasises in his earlier cited work that it is the type of engagement that links a person to an employer which determines forced labour, not the type of activity that a worker is actually performing. A woman trafficked and forced into prostitution is in forced labour because of the menace under which she is working, not because of the sexual duties that her job demands or the legality or illegality of that particular occupation. In some cases, the activity itself may not be an economic activity in the sense of national accounts. It is also worth noting that not all child labour is defined as forced labour. Child labour amounts to forced labour only when coercion is applied by a third party to the children or to the parents of the children, or when a child's work is the direct result of the parents being in forced labour. When forced labour is imposed on children, it represents – in ILO terminology – an 'unconditional worst form' of child labour.[15]

1.2. Distinctions

Louis Waite writes that the problem of human exploitation is as old as work itself. Yet despite development through the ages, and more recent industrial and technological advances in the modern era, extreme exploitation and resulting unfreedoms

13 Ibid. p. 25.

14 It is worth mentioning the use of child soldiers in armed conflicts, which is done mostly by armed groups but also sometimes by government forces. This is a persistent problem in approximately twenty countries and several conflict zones. In addition to taking direct part in fighting, children can also be forced into other roles in armed conflict situations that involve abhorrent abuses of their human rights. Reports from a variety of war contexts document children being used as human shields, in intelligence gathering, in mine clearance, as bodyguards, in planting improvised explosive devices, and as perpetrators of acts of terror. Girls may be forced into sexual slavery or forced marriages. Many children are abducted. In addition, they may be forced to perform extremely hazardous child labour in the production of conflict minerals.

15 Belser, 2005, p. 4.

remain doggedly persistent in contemporary global economies and societies. The author emphasises that the term exploitation is commonly heard in discussions of social injustices and human rights abuses, yet it remains semantically slippery and challenging to define in legal instrument.[16] I completely agree with the expert, but for the record I add: Although in our daily lives we unfortunately often encounter working conditions that do not meet the requirements of the law, in my view it is important to note that most of these cases do not fall within the scope of the prohibition of forced labour or slavery. In short, forced labour is different from sub-standard or exploitative working conditions.

Various indicators can be used to ascertain when a situation amounts to forced labour, such as restrictions on workers' freedom of movement, withholding of wages or identity documents, physical or sexual violence, threats and intimidation or fraudulent debt from which workers cannot escape.[17] Sub-standard working conditions or exploitative working conditions are sooner present in everyday practice – for example when the employer does not meet the ergonomical expectations,[18] does not pay overtime, or commits any form of abuse of rights. It is crucial that in addition to being a serious violation of fundamental human rights and labour rights, the exaction of forced labour is a criminal offence, while it may occur that sub-standard or exploitative working conditions result only in private liability.

It is also worth mentioning that forced labour and exploitative working conditions should also be interpreted in the context of situations where the parties do not subordinate dependent labour to an employment relationship (at the instigation of the employer), but use some other contract (e.g. independent contractor agreement) that may fulfil the characteristics of forced labour. This is also true in the event that an actual written contract between the parties is otherwise not in force, and the quality of the legal relationship can only be inferred from the nature and content of the relationship existing between them.

There are many fields which are well described and investigated in scientific articles dealing with the different forms of forced labour, but I believe that the focus should be on areas that have not yet been explored. For example, as a result of the digital transformation of the labour market, it is possible to discuss completely new phenomena, for example, the issues of agency employment, home working, and working through digital labour platforms. It is self-evident that in many cases these possibilities are not given due to the existing legal system: for example, it is not

16 Waite 2024.

17 ILO 2013.

18 The main factors of interest for ergonomics, as well as for occupational safety, include hygienic, anthropometric, physiological, psychophysiological and psychological factors that cause deterioration in the physical and mental health of employees. A significant number of them, due to limited financial and material resources in the organisations, require the introduction of a process for managing occupational and ergonomic risks, the purpose of which, inseparable from occupational safety, is not only to reduce injuries and occupational morbidity, but also the creation and protection of values, the main of which are the life and health of an employee. See more: Bazaluk et al. 2023.

possible to organise forced labour through a legally operating labour agency, but at the same time it is possible to cover up such activities. For this reason, it is worthwhile to deal in detail with similar forms of operation. When working at home, the exploitative or sub-standard working conditions tend to arise when the employer, for example, does not take into account the work schedule and assigns tasks that need to be completed urgently without extra compensation, or does not provide the appropriate technical or infrastructural background for the work.

2. Elimination of Forced Labour as a Human Right

As an international treaty, the Convention must be interpreted in the light of the rules of interpretation set out in the Vienna Convention of 23 May 1969 on the Law of Treaties, under which the Court is required to ascertain the ordinary meaning to be given to the words in their context and in the light of the object and purpose of the provision from which they are drawn. Article 4 of the Convention, together with Articles 2 and 3 of the Convention, enshrines one of the fundamental values of democratic societies (*Siliadin v. France, § 112*[19]; *Stummer v. Austria [GC], § 116*[20]). Article 4 § 1 of the Convention requires that "no one shall be held in slavery or servitude". Unlike most of the substantive clauses of the Convention, Article 4 § 1 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2, even in the event of a public emergency threatening the life of the nation (*C.N. v. the United Kingdom, § 65*;[21] *Stummer v. Austria [GC], § 116*[22]).

In interpreting the concepts under Article 4 of the Convention, the Court relies on international instruments such:

- 1926 Slavery Convention (*Siliadin v. France, § 122*[23]),
- Supplementary Convention on the Abolition of Slavery,
- Slave Trade and Institutions and Practices Similar to Slavery (*C.N. and V. v. France, § 90*[24]),
- ILO Convention No. 29 (Forced Labour Convention) (*Van der Mussele v. Belgium, § 32*[25]),
- Council of Europe Convention on Action against Trafficking in Human Beings ('Anti-Trafficking Convention'), and

19 European Court of Human Rights 2005.
20 European Court of Human Rights 2011.
21 European Court of Human Rights 2013b.
22 European Court of Human Rights 2011.
23 European Court of Human Rights 2005.
24 European Court of Human Rights 2013a.
25 European Court of Human Rights 1983.

– Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children supplementing the United Nations Convention against Transnational Organised Crime ('Palermo Protocol'), 2000 (*Rantsev v. Cyprus and Russia, § 282*[26]).

However, as the Court's jurisdiction is limited to the Convention, it has no competence to interpret provisions of international instruments, such as the Anti-Trafficking Convention, or to assess the compliance of respondent States with the standards contained therein *(V.C.L. and A.N. v. the United Kingdom, § 113*[27]). Taking this circumstance into account, I also note that although the court formally only deals with the Convention, it is not suitable in itself to serve as a full-fledged legal instrument. Human rights – and thus also the prohibition of forced labour – have such wide-ranging connections that the relevant international legal sources need to be taken into account by the decision-making body as a whole.

2.1. Elimination of Forced labour as a Human Right According to the ILO

The ILO has two forced labour conventions which enjoy nearly universal ratification, meaning that almost all countries are legally obliged to respect their provisions and regularly report on them to the ILO's standards supervisory bodies. Not being subject to forced labour is a fundamental human right: all ILO member States have to respect the principle of the elimination of forced labour, regardless of ratification.[28]

The ILO resources are the Forced Labour Convention, 1930 (No. 29)[29], the Abolition of Forced Labour Convention No. 105 (1957)[30], the Protocol of 2014 to the Forced Labour Convention, 1930[31], the Forced Labour (Supplementary Measures) Recommendation, 2014 (No. 203), which supplement the Forced Labour Convention, 1930 (No. 29)[32]. According to the Forced Labour Convention, 1930 (No. 29) forced or compulsory labour is all work or service which is exacted from any person under the threat of a penalty and for which the person has not offered himself or herself voluntarily. Therefore, forced or compulsory labour can be understood as *work that is performed involuntarily and under the menace of any penalty.*[33]

The definition refers to situations in which persons are coerced to work through the use of violence or intimidation, or by more subtle means such as manipulated debt, retention of identity papers, or threats of denunciation to immigration

26 European Court of Human Rights 2010.
27 European Court of Human Rights 2021.
28 ILO 1930.
29 ILO 1930.
30 ILO 1957.
31 ILO 1930.
32 ILO 2014.
33 See among other sources: ILO n.d.

authorities. The work or service itself means all types of work occurring in any activity, industry, or sector including in the informal economy. 'Menace of any penalty' refers to a wide range of penalties used to compel someone to work – this can include physical and psychological harm or threats. It should be noted that the punishment is not an objective category: it includes everything that causes a disadvantage for a given 'employee', of which they bend to the 'employer's' will because of their fear. The voluntariness refers to the free and informed consent of a worker to take a job and their freedom to leave at any time. This is not the case, for example, when an employer or recruiter makes false promises so that a worker takes a job they would not otherwise have accepted – in this case the work is done involuntarily.

The Abolition of Forced Labour Convention No. 105 adopted by the ILO in 1957 primarily concerns forced labour imposed by state authorities. It prohibits, specifically, the use of forced labour: as punishment for the expression of political views; for the purposes of economic development; as a means of labour discipline; as a punishment for participation in strikes; or as a means of racial, religious, or other discrimination.

2.2. Elimination of Forced Labour as a Human Right – Comparison

Types of exceptions	**ECHR**	**ILO**
Compulsory or replacing military service	✓	✓
Normal civic obligations	✓	✓
Prison labour (under certain conditions)	✓	✓
Work in emergency, situations (such as war, calamity, or threatened calamity e.g. fire, flood, famine, earthquake)		✓
Minor communal services (within the community)		✓

Table 1. Elimination of forced labour in different perspectives[34]

Based on the table, it seems that the bodies use the same concepts, with minor differences in emphasis, at most. That is why it is important for the Court to handle

34 The Author's own work.

the relevant international legal sources during the cases and, at the same time, this is why the simultaneous use of legal sources generally ensures a consistent result.

2.3. Slavery and Servitude

In considering the scope of 'slavery' under Article 4, the Court refers to the classic definition of slavery contained in the 1926 Slavery Convention,[35] which defines slavery as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised" *(Siliadin v. France, § 122*[36]). According to the ILO, modern slavery or neoslavery is the "very antithesis of social justice and sustainable development." The *2021 Global Estimates* indicate there are 50 million people in situations of modern slavery on any given day, either forced to work against their will or in a marriage that they were forced into. This number translates to nearly one of every 150 people in the world. The estimates also indicate that situations of modern slavery are by no means transient – entrapment in forced labour can last years, while in most cases forced marriage is a life sentence.[37]

For Convention purposes 'servitude' means an obligation to provide services that is imposed by the use of coercion, and is to be linked with the concept of slavery *(Seguin v. France*;[38] *Siliadin v. France, § 124*[39]). With regard to the concept of 'servitude', what is prohibited is a "particularly serious form of denial of freedom". It includes "in addition to the obligation to perform certain services for others ... the obligation for the 'serf' to live on another person's property and the impossibility of altering his condition" (*Siliadin v. France, § 123*[40]).

3. Related Case Law of the European Court of Human Rights

There is an existing piece of research that suggests that countries that are more open to trade provide better economic rights to women and have a lower incidence of forced labour. This effect holds in a global sample as well as in a developing country sub-sample, and holds also when potential feedback effects are controlled via instrumental variable regression.[41] This is because being more open toward trade is likely to promote rather than hinder the realisation of two labour rights considered as core

35 SeeUnited Nations Human Rights Office of the High Commission 1926.
36 European Court of Human Rights 2005.
37 ILO 2022, p. 77.
38 European Court of Human Rights 2002.
39 European Court of Human Rights 2005.
40 European Court of Human Rights 2005
41 Neumayer & De Soysa, 2007, pp. 1510–1535.

or fundamental by the ILO, namely the elimination of economic discrimination and of forced labour.[42]

This is debatable: the breakdown of forced labour by national income grouping (of the country where the forced labour occurs) makes clear that forced labour is as much of a problem in rich countries as it is in poor ones. Indeed, more than half of all forced labour occurs in either upper-middle income or high-income countries.

The results showing a significant presence of forced labour in higher-income countries are supported by a range of other reports documenting the presence of forced labour in these countries in sectors including agriculture, domestic work, construction, fishing, and the commercial sexual exploitation industry, with many cases involving migrants in situations of vulnerability. Taking only the sexual exploitation element, in industrial countries, the victims are overwhelmingly foreign women who have been trafficked. While some are sold by their parents or kidnapped, the data shows that most victims are recruited by traffickers under false pretences. Traffickers often approach women in their countries of origin, promising jobs as waitresses, cleaners, or maids. Other women know that they are recruited to work in the sex industry but only find out upon arrival that they are forced to work off fraudulent debts. Some women even find out that they have several 'debts' – fees of travel agents, smugglers, labour contractors, and so on. Forced prostitution also exists in transition and developing countries. The modalities are similar to those in industrial countries. There are some distinctions, however. Firstly, more cases relate to intraregional trafficking rather than to inter-regional trafficking. This means that victims in Latin America, Asia or Sub-Saharan Africa are usually from within these same regions. They are often trafficked internally (i.e. within the same country). Secondly, forced child prostitution is more frequently reported in developing countries than in industrial countries.[43]

But, all in all, agriculture is probably 'host' to the largest number of forced labourers – regardless of geographical territories.[44] While numbers in industrial countries are a cause for concern, the problem of agricultural forced labour remains largest in developing countries. One particular problem is bonded labour in South Asia. Bonded labourers are people who lose their freedom of movement or their freedom of employment as a result of a debt and the obligation to reimburse this debt through labour. In some regions of Latin America, indigenous people are also held captive through the open use of violence. The *enganche* or *habilitación* labour systems, which are based on wage advances made to workers before the harvest in exchange for a commitment to work, are still used in some Andean countries. They often result in debt bondage and unpaid forced labour. Bonded workers are usually

42 More on geographical distribution: Strauss, 2012, pp. 137–148.
43 Belser, 2005, p. 8.
44 For other areas see e.g. Strating, Rao and Yea, 2024.

males, but often workers' wives and children[45] are also involved and expected to provide free labour.[46]

Additionally, developed countries can be connected to forced labour through global supply chains,[47] even if the actual forced labour occurs elsewhere. Reports suggest that forced labour can occur, in particular, in raw materials production in the lower tiers of supply chains of consumer goods bound for markets in the Global North.[48]

The detailed breakdown of results by region makes clear that no part of the world is spared from the presence of forced labour. Asia and the Pacific is host to by far the largest number of people in forced labour, 15.1 million, which is more than half of the global total and more than three times that of the region with the next highest number, Europe and Central Asia. But these numbers are driven by the size of the population in each region, and the regional rankings change considerably when forced labour is expressed as a proportion of the population. By this measure, forced labour is highest in the Arab States, at 5.3 per thousand people, compared to 4.4 per thousand in Europe and Central Asia, 3.5 per thousand in both the Americas and Asia and the Pacific regions, and 2.9 per thousand in Africa.[49]

3.1. Case Distribution and Some Significant Decisions

To summarise the case law of the Court (judgements/Grand Chamber, Chamber and Committee), the more specific issues in cases relating to the prohibition of forced labour can be divided as follows:[50]

(Art. 4) Prohibition of slavery and forced labour (315 cases)
(Art. 4) Effective investigation (25 cases)
(Art. 4) Positive obligations (63 cases)
(Art. 4-1) Servitude (61 cases)
(Art. 4-1) Slavery (45 cases)
(Art. 4-1) Trafficking in human beings (77 cases)
(Art. 4-2) Compulsory labour (122 cases)
(Art. 4-2) Forced labour (174 cases)

45 Over the years, the multilateral regimes have added specialised instruments to protect children. However, multiple levels of protections, no matter how relevant, run the risks of lack of cohesion. Where laws duplicate, overlap, overreach or under-present penalties, children suffer the brunt of structural ambiguities, and this negatively affects their economic ingenuity. When it comes to children, issues of economic exploitations fall under three legal schedules: Criminal Law, Children's Rights, and Employment Law. See Adegbite& Fatoki, 2024.
46 Belser, 2005, pp. 12–13.
47 For this topic see amongst others Wilhelm, Bhakoo, Soundararajan, Crane, & Kadfak, 2024, pp. 1–20.
48 ILO 2022, p. 28.
49 ILO 2022, p. 23.
50 European Court of Human Rights 2023.

(Art. 4-3-a) Work required of detainees (32 cases)
(Art. 4-3-b) Alternative civil service (6 cases)
(Art. 4-3-b) Service of military character (22 cases)
(Art. 4-3-d) Normal civic obligations (26 cases)

This chapter will present eight different cases which I believe have a significant effect on the practice of prohibition of forced work. There are cases which underline that remunerated work can also count as forced labour, so the *differentia specifica* does not lie in the question of rewards or compensations. It is also important how this aspect should be perceived in the context of the Adequate Minimum Wage Directive (2022/2041/EU):[51] as the instrument itself states, in-work poverty has increased over the past decade and more workers are experiencing poverty. During economic downturns, the role of adequate minimum wages in protecting low-wage workers is particularly important, as they are more vulnerable to the consequences of such downturns, and is essential for the purpose of supporting a sustainable and inclusive economic recovery, which should lead to an increase in quality employment.[52] This is also a social aspect that needs to be reinforced by law and the Court strives towards this in its practice.

The court also stated that prior consent is not enough: if there is any chance of coercion, the consent is not valid – certainly this is completely in line with general legal principles. It can also happen that a person is victim of human trafficking and starts working in relation of this action, but the labour in itself is voluntarily done and the circumstances do not establish forced labour.

This article focuses on Central-Europe-related cases, but regarding forced labour I am sure that one cannot look only at this region. Therefore, Romania, Croatia, and Austria are included in the compilation, but cases of fundamental importance from Belgium, Greece, and the United Kingdom are also presented.

Van der Mussele v. Belgium[53]

In Van der Mussele v. Belgium the Court accepted that the applicant, a pupil-advocate, had suffered some prejudice by reason of the lack of remuneration and of

51 See: European Union 2022.

52 See 2022/2041/EU Directive; Preamble paragraph (9). According to this directive Minimum wages are considered to be adequate if they are fair in relation to the wage distribution in the relevant Member State and if they provide a decent standard of living for workers based on a full-time employment relationship. The assessment might be based on reference values commonly used at international level such as the ratio of the gross minimum wage to 60 % of the gross median wage and the ratio of the gross minimum wage to 50 % of the gross average wage, which are currently not met by all Member States, or the ratio of the net minimum wage to 50 % or 60 % of the net average wage. The assessment might also be based on reference values associated to indicators used at national level, such as the comparison of the net minimum wage with the poverty threshold and the purchasing power of minimum wages. (Preamble paragraph 28 and Art. 5).

53 European Court of Human Rights 1983.

reimbursement of expenses, but that prejudice went hand in hand with the advantages the applicant enjoyed and had not been shown to be excessive.

It held that while remunerated work may also qualify as forced or compulsory labour, the lack of remuneration and of reimbursement of expenses constitutes a relevant factor when considering what is proportionate or in the normal course of business. Noting that the applicant had not had a disproportionate burden of work imposed on him and that the amount of expenses directly occasioned by the legal work he performed in question had been relatively small, the Court concluded that he had not been a victim of compulsory labour for the purposes of Article 4 § 2 of the Convention (§§ 34-41).

Chowdury and Others v. Greece[54]

The question of whether an individual offers themself for work voluntarily is a factual one which must be examined in the light of all the relevant circumstances.

The Court has made it clear that where an employer abuses their power or takes advantage of the vulnerability of their workers in order to exploit them, the workers do not offer themselves for work voluntarily. In this regard, the prior consent of the victim is not sufficient to exclude the characterisation of work as forced labour.

The term 'forced labour' brings to mind the idea of physical or mental coercion. As for the term 'compulsory labour', it cannot refer to just any form of legal compulsion or obligation. For example, work to be carried out in pursuance of a freely negotiated contract cannot be regarded as falling within the scope of Article 4 of the Convention on the sole ground that one of the parties has undertaken with the other to do that work and will be subject to sanctions if the former not honour their promise.

What there has to be is work "exacted ... under the menace of any penalty" and also performed against the will of the person concerned, i.e. work for which the person "has not offered themself voluntarily" (see *Van der Mussele v. Belgium*, 23 November 1983; Series A no. 70, and *Siliadin*).

In the *Van der Mussele* judgment, the Court found that 'relative weight' was to be attached to the argument regarding the applicant's 'prior consent' and thus opted for an approach which took account of all the circumstances of the case. In particular, it observed that, in certain cases or circumstances, a given "service could not be treated as having been voluntarily accepted beforehand" by an individual. Accordingly, the validity of the consent had to be assessed in the light of all the circumstances of the case.

In order to clarify the concept of 'labour' within the meaning of Article 4 § 2 of the Convention, the Court would point out that any work demanded from an individual under the threat of a 'punishment' does not necessarily constitute 'forced or compulsory labour' prohibited by that provision. It is necessary to take into account,

54 European Court of Human Rights 2017a.

in particular, the nature and volume of the activity in question. (see *Mihal v. Slovakia, 28/06/2011*).

These circumstances make it possible to distinguish 'forced labour' from work which can reasonably be required on the basis of family assistance or cohabitation. In this regard, the Court in *Van der Mussele* (cited above, § 39) relied in particular on the concept of 'disproportionate burden' in determining whether a trainee lawyer had been subject to compulsory labour when required to act, free of charge, to defend clients as assigned counsel (see *C.N. and V. v. France*, no. 67724/09, §74, 11 October 2012).

Dănoiu v. Romania[55]

The applicants were three Romanian nationals. The case concerns a reduction in the applicants' fees ordered by the domestic courts, when they were acting as officially appointed lawyers on behalf of several thousand civil parties in criminal proceedings.

The Bucharest Court of Appeal capped the amount of the fees payable to each of the applicants at approximately 5,700 euros.

Relying on Article 1 of Protocol No. 1 (protection of property) to the European Convention on Human Rights, the applicants complained about the substantial reduction of their fees.

On the merits of the complaint, the Romanian Government stated that the allegedly discriminatory situation complained of by the applicants cannot be characterised as forced labour within the meaning of Article 4 of the Convention, since the persons concerned had registered of their own free will on the list of court-appointed lawyers and had carried out the legal activities without the threat of any penalty (see for the issue of consent in *Van der Mussele v. Belgium*).

The Court found that the applicants had provided no evidence capable of corroborating their assertions regarding discrimination. It did not have any information that would have enabled it to assess the level of remuneration of the various court-appointed lawyers who defended the accused in the criminal proceedings in question in order to ascertain whether any difference in treatment really took place in the species.

The same conclusion must be drawn with regard to the argument put forward by the applicants, namely the remuneration without reduction in salary of the judicial staff who took part in the same procedure (system of remuneration which is not, in any event, comparable to that court-appointed lawyers in this case). In summary, the Court did not see in this case any appearance of discrimination prohibited by Article 14 and 4 of the Convention.

55 European Court of Human Rights 2022.

V.C.L. and A.N. v. The United Kingdom[56]

According to the Palermo Protocol and the Anti-Trafficking Convention, in order to be considered a victim of human trafficking three constituent elements usually had to be present:

- the person had to be subject to the act of recruitment, transportation, transfer, harbouring or receipt (action);
- by means of threat of force or other form of coercion (means);
- for the purpose of exploitation, including, *inter alia*, forced labour or services (purpose).

The applicants were both discovered on or near cannabis factories in April/May 2009. "It was accepted that on the balance of probabilities there were grounds to believe that he had been trafficked into the United Kingdom. In its view, the account of the second applicant's recruitment and movement from Vietnam to the United Kingdom satisfied the definition of trafficking under the Anti-Trafficking Convention for the purposes of labour exploitation." However, the material did not support the contention that the applicant was a victim of forced labour. On the contrary, it suggested that *he chose to work* in the cannabis factory.

S.M. v. Croatia[57]

The applicant lodged a criminal complaint against T.M., a former policeman, alleging that he had physically and psychologically forced her into prostitution.

The policeman was subsequently indicted on charges of forcing somebody into prostitution, as an aggravated offence of organising prostitution. In 2013 the criminal court acquitted him on the grounds that, although it had been established that he had organised a prostitution ring in which he had recruited the applicant, it had not been established that he had forced her into prostitution.

He had only been indicted for the aggravated form of the offence in issue and so he could not be convicted for the basic form of organising prostitution. The appeal of the State Attorney's Office against the decision was dismissed and the applicant's constitutional complaint was declared inadmissible.

The notion of 'forced or compulsory labour' under Article 4 aimed to protect against instances of serious exploitation, such as forced prostitution, irrespective of whether, in the particular circumstances of a case, they were related to the specific human trafficking context.

Any such conduct might have elements qualifying it as 'slavery' or 'servitude' under Article 4, or might raise an issue under another provision of the Convention. In that context, 'force' might encompass the subtle forms of coercive conduct

56 European Court of Human Rights 2021.
57 European Court of Human Rights 2020.

identified in the Court's case-law on Article 4, as well as by the ILO and in other international materials.

The prosecuting authorities had relied heavily on the applicant's statement and so, in essence, created a situation in the subsequent court proceedings where her allegations simply had to be weighed against the denial of T.M., without much further evidence being presented. In that connection, as noted by international expert bodies, there might be different reasons why victims of human trafficking and different forms of sexual abuse might be reluctant to cooperate with the authorities and to disclose all the details of the case. Moreover, the possible impact of psychological trauma had to be taken into account. There was, therefore, a risk of overreliance on the victim's testimony alone, which led to the necessity to clarify and, if appropriate, support the victim's statement with other evidence.

The multiple shortcomings in the conduct of the case by the prosecuting authorities had fundamentally undermined the ability of the domestic authorities, including the relevant courts, to determine the true nature of the applicant's and T.M.'s relationship and whether the applicant had been exploited by him as she had alleged. In sum, there had been significant flaws in the domestic authorities' procedural response to the arguable claim and prima facie evidence that the applicant had been subjected to treatment contrary to Article 4.

J. and Others v. Austria[58]

The applicants, Filipino nationals recruited from the Philippines, worked as maids and nannies for different families in Dubai. In July 2010 they accompanied their employers to Austria. During their stay there, the applicants left the families and reported to the Austrian police alleging that they had been subject to human trafficking and forced labour.

The public prosecutor later discontinued investigations on the grounds that the offences had been committed abroad by non-nationals. No offence had been committed in Austria. The prosecutor's decision was upheld by the regional criminal court. It is understandable that there is no requirement for the States to provide for universal jurisdiction over trafficking offences committed abroad – including forced labour issues. However, the *United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons* was silent on the matter of jurisdiction, and the *Council of Europe Anti-Trafficking Convention* only required State parties to provide for jurisdiction over any trafficking offence committed on their own territory, or by or against one of their nationals. In this case, there was no obligation incumbent on Austria to investigate the applicants' recruitment in the Philippines or their alleged exploitation in the United Arab Emirates.

58 European Court of Human Rights 2017b.

Stummer v. Austria [GC][59]

The applicant argued that European standards had changed to such an extent that prison work without affiliation to the old-age pension system could no longer be regarded as work required to be done in the ordinary course of detention.

Austrian law reflected the development of European law in that all prisoners were provided with health and accident care and working prisoners were affiliated to the unemployment-insurance scheme but not to the old-age pension system. It appeared, however, that there was no sufficient consensus on the issue of the affiliation of working prisoners to the old-age pension system. While the 2006 European Prison Rules reflected an evolving trend, this could not be translated into an obligation under the Convention.

The Court did not find a basis for the interpretation of Article 4 advocated by the applicant and concluded that the obligatory work he had performed as a prisoner without being affiliated to the old-age pension system had to be regarded as "work required to be done in the ordinary course of detention" within the meaning of Article 4 § 3 (a) of the Convention and did not therefore constitute "forced or compulsory labour".

Floroiu v. Romania[60]

While serving his sentence, the applicant asked for permission to work, and after his request was granted he carried out this work for a total of 114 days. As the work was deemed by the National Prison Service to assist the day-to-day running of the prison, he *did not receive any payment but, by way of compensation, was granted a reduction of thirty-seven days* in the term remaining to be served.

During his previous periods of imprisonment, he had worked for a cumulative total of five years and eleven months. In return, he had either been granted a reduction in the number of days remaining to be served if the work involved assisting the day-to-day running of the prison, or he had received payment in accordance with the Execution of Sentences Act (Law no. 23/1969), in force at the relevant time. He was not affiliated to the old-age pension scheme under the general social-security system.

1) As to the fact that the applicant was not paid for the work he did, the Court reiterated that this in itself does not prevent work of this kind from being regarded as "work required to be done in the ordinary course of detention" (see *Zhelyazkov v. Bulgaria*, no. 11332/04, § 36, 9 October 2012, and *Stummer*, § 122).
2) The 2006 European Prison Rules refer to the normalisation of prison work as one of the basic principles in this sphere. More specifically, Rule 26.10 of

59 European Court of Human Rights 2011.
60 European Court of Human Rights 2013c.

the 2006 Rules provides that "in all instances there shall be equitable remuneration of the work of prisoners".

3) In the present case, under domestic law, prisoners are able to carry out either paid work or, in the case of tasks assisting the day-to-day running of the prison, work that does not give rise to remuneration but entitles them to a reduction in their sentence. Prisoners are able to choose between the two types of work after being informed of the conditions applicable in each case.
4) In the applicant's case, the Court considered that because of a significant reduction in the time remaining to be served, the work carried out by the applicant was not entirely unpaid, therefore the work performed by the applicant can be regarded as "work required to be done in the ordinary course of detention" within the meaning of Article 4 § 3 (a) of the Convention.

4. Conclusions

The ILO stated that the two elements of modern slavery – forced labour and forced marriage – both reflect a denial of people's freedom and their economic and social agency. Both refer to situations of exploitation that a person cannot refuse or leave because of threats, violence, coercion, and deception. Both involve underlying imbalances and abuses of power. Both are embedded in patterns of discrimination, deprivation, and poverty. Gaps in governance, in law and practice, create the space for both these abuses to occur.[61]

Through the adoption of the 2030 Sustainable Development Goals (SDGs),[62] the international community has committed to ending modern slavery among children by 2025, and universally by 2030 (Target 8.7),[63] and, relatedly, by 2030 to eliminating of all forms of violence against all women and girls in the public and private spheres, including trafficking and sexual and other types of exploitation (Target 5.2),[64] and ending abuse, exploitation, trafficking and all forms of violence and torture against children (Target 16.2).[65]

The findings of this paper can be summarised in nine short points:

1) Forced labour mostly occurs together with human trafficking and discrimination cases.

61 ILO 2022, p. 77.
62 United Nations Department of Economic and Social Affairs / Sustainable Development.
63 United Nations Department of Economic and Social Affairs / Sustainable Development.
64 United Nations Department of Economic and Social Affairs / Sustainable Development.
65 United Nations Department of Economic and Social Affairs / Sustainable Development.

2) The actions of the governments must be judged in the light of case law, the practice of the ILO, and many different international legal norms above the Convention.
3) Prior consent is not sufficient to exclude the characterisation of work as forced labour.
4) The state authorities must take into consideration more types of evidence – even psychological issues regarding traumas caused by the forced labour.
5) The threat of a 'punishment' does not necessarily constitute 'forced or compulsory labour'.
6) 'Forced labour' is physical or mental coercion; 'compulsory labour' cannot refer to just any form of *legal* compulsion or obligation.
7) There is no positive obligation for investigating compulsory or forced labour that happens on the territory of another State or does not involve any nationals.
8) Regarding the working conditions of the prisoners, it can be rightful if the remuneration is given in nature and not in financial form,
9) Also, regarding the cases of prisoners, it can be rightful if they are affiliated to the unemployment-insurance scheme but not to the old-age pension system.

The ILO identifies fourteen areas where, with the right legislative decisions, forced labour can be effectively reduced. These are: the freedoms of workers to associate and to bargain collectively; the extension of social protection; fair and ethical recruitment; strengthening the public labour inspectorates; ensuring protection and access to remedy for those freed from situations of forced labour; ensuring adequate enforcement; addressing migrants' vulnerability to forced labour and trafficking for forced labour; addressing children trapped in forced labour; mitigating the heightened risk of forced labour in crisis; combating forced labour and trafficking

for forced labour in business operations and supply chains; ending state-imposed forced labour; international cooperation and partnership; and research and data collection.

Forced labour occurs in the world of work and is interwoven with denial of the right to bargain collectively and the right to freedom of association. Broader economic and labour market forces can play an important determining role. Ensuring respect for workers' fundamental rights of freedom of association and collective bargaining is a critical precondition for social dialogue, which is in turn vital to building lasting, consensus-based solutions to the challenge of forced labour. Without the respect of freedom of association and collective bargaining in all parts of the economy, there can be no negotiation for a fair share of wealth they have helped to generate, and without that there can be no decent work.[66]

Redressing the lack of effective access to representation in the informal economy, where forced labour abuses are overwhelmingly concentrated, is especially important

66 ILO 2022, pp. 78–79.

to progress against forced labour. It is also a central element in broader efforts towards the formalisation of informal workplaces.

Reaching informal economy workers so they can organise in collective representative structures is difficult but far from impossible. Groups of informal workers, including domestic workers, home-workers, brick-kiln workers, tenant farmers, and artisanal fishers, are developing innovative forms of organisation to represent and defend their interests, often with the support of established trade unions, demonstrating what can be done.

Migrant workers are among the groups particularly affected by restrictions on their rights to freedom of association and collective bargaining, in some contexts because law forbids them to join unions and in others because they are concentrated in sectors in which the freedoms to associate and bargain collectively are not protected under law. This is particularly true for migrants with irregular status. However, most international commitments, as well as the 2030

Agenda's promise of leaving no one behind, means that it is critical that such barriers are removed, including in relevant policy and legislative frameworks.[67]

67 Ibid, p. 80.

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