

Uncovering labour exploitation: lights and shadows of the latest European Court of Human Rights' case law on human trafficking

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Abstract: For the first time, the European Court of Human Rights (ECtHR) qualified two labour exploitation cases as human trafficking. In examining these two latest judgments in the light of the Court's earlier trafficking case law, this study highlights that, despite some positive contributions, a regressive trend prevails. The Court fails to establish a clear distinction between the concepts of human trafficking and forced labour - the very existence of the latter being threatened by its conflation with trafficking - and substantially lowers standards with respect to states' positive obligations, mainly in relation to the establishment of an adequate normative framework and to judicial cooperation in cross-border trafficking cases. Worryingly, while confusion persists around the understanding of the international definition of trafficking and its relevance under Article 4 ECHR, the holistic approach to positive obligations initially taken by the Court in *Rantsev* is progressively being eroded, in full contradiction with its positive obligations doctrine and European anti-trafficking law.

Keywords: human trafficking - forced labour - irregular migrants - positive obligations - human rights-based approach - slavery

(A) INTRODUCTION

While the ECtHR's two first human trafficking rulings related to sexual exploitation,¹ the Court recently issued two judgments on a more hidden but not less prominent form of trafficking: trafficking for labour exploitation. *J. and Others v Austria*² and *Chowdury and Others v Greece*³, which relate to trafficking into domestic and agricultural work respectively, bring to light the plight of some of the million victims coerced or deceived into labour exploitation around the globe. They also reveal the extent to which European states still fail in their endeavour to address this phenomenon. The Council of Europe (CoE)'s Group of Experts on Action against Trafficking in Human Beings (GRETA) alerted that trafficking for labour exploitation is on the rise: despite being already the predominant form of trafficking in several European countries,⁴ the number of identified victims may still be artificially low since "trafficking for labour exploitation is not recognized and addressed by policy and practice in most parties".⁵

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¹ *Rantsev v Cyprus and Russia*, Application no. 25965/04, Merits and Just Satisfaction, 7 January 2010 (*Rantsev*); and *L.E. v. Greece*, Application no. 71545/12, Merits and Just Satisfaction, 21 January 2016 (*L.E.*) (only available in French).

² *J. and Others v Austria*, Application no. 58216/12, Merits and Just Satisfaction, 17 January 2017 (*J. and Others*).

³ *Chowdury and Others v Greece*, Application no. 21884/15, Merits and Just Satisfaction, 30 March 2017 (*Chowdury*) (only available in French).

⁴ Belgium, Georgia, Ukraine (in *GRETA, Fourth Annual Report* (2015), at 35) and the United Kingdom (in *GRETA Report on the United Kingdom* (2016), *GRETA*(2016)21, at 17).

⁵ GRETA, Fourth ..., *supra* n. 4, at 35.

After briefly describing the two cases (Part B), this article undertakes a comparative analysis of the reasoning developed by the Court in these rulings. It will first examine how the Court's findings contribute to the understanding of the international definition of trafficking and its relevance under Article 4 ECHR, in particular with regard to the relationship between trafficking and forced labour, servitude and slavery respectively (Part C). It will then turn to examine to what extent these judgments contribute to clarifying the scope of states' positive obligations under the human trafficking prohibition in terms of prevention, protection and prosecution (Part D). In that context, the author will point to a number of weaknesses in the Court's reasoning and findings, highlighting the need for the Court to engage with a clearer and at the same time more comprehensive approach to human trafficking (Parts C, D and Conclusion). Indeed, this study highlights how the ECtHR is still far from providing a clear picture of how the concurrent application of both European and international human trafficking and human rights law is to be achieved under the umbrella of a human rights-based approach to trafficking.⁶

(B) BRIEF DESCRIPTION OF THE CASES

J. and Others v Austria concerns the human trafficking allegations brought by three Filipino women who went to work as maids in a household in the United Arab Emirates (UAE). Two of them were recruited by an employment agency in Manila, and the third one travelled at the suggestion of the first one. They alleged that their employers took their passports and mobiles away from them and exploited them. Abuses in the UAE included working for nine months without any day off, extremely long hours (from 5.00 a.m. to midnight), not being allowed to leave the house without supervision, punishment such as being forced to sleep on the cold floor, being slapped and hit and prevented from taking medicines when ill. They claimed that this type of treatment continued during a three days' stay in Vienna where their employers took them, continuing to withhold their passports. After an incident where they were subjected to extreme verbal abuse and threats to their physical integrity, they managed to escape with the help of a Filipino hotel employee. A few months later they filed a criminal complaint in Austria, but the authorities found that they did not have jurisdiction over the alleged offences committed abroad and discontinued the investigation concerning the events in Austria, establishing that they did not amount to trafficking. In their complaint before the ECtHR, the applicants argued that the treatment they were subjected to in Austria amounted to trafficking since those events could not be viewed in isolation, and that the Austrian authorities had failed to adequately investigate and prosecute their trafficking. The ECtHR found that Austria had complied with its positive obligations under Article 4 ECHR.

The second case, *Chowdury and Others*, concerned 42 Bangladeshi nationals who were recruited without having work permits between October 2012 and February 2013 to pick strawberries on the

⁶ On the extent to which the two regimes are mutually reinforcing, see V. Milano, "The International Law of Human Trafficking: At the Forefront of the Convergence between Transnational Criminal Law and International Human Rights Law?", in P. De Hert, S. Smis and M. Holvoet, *Convergences and Divergences between International Human Rights Law, International Criminal Law and International Humanitarian Law* (Intersentia, 2018, in press).

Manolada farm in Greece. They had been promised a wage of 22 euros for seven hours' work and three euros for each hour of overtime. They worked every day from 7 a.m. to 7 p.m. under the supervision of armed guards, and did not receive any pay. When asking for their wages, their employers warned them that they would only receive them if they continued to work. The applicants lived in makeshift huts without toilets or running water. In February, March and April 2013, the workers went on strike demanding payment of their wages, without success. On 17 April 2013, they learned that other Bangladeshi migrants had been recruited. Fearing that they would not be paid, 100 to 150 workers went to the two employers to demand their wages, when one of the armed guards opened fire, seriously injuring 30 workers, including 21 of the applicants. The wounded were taken to hospital and questioned by police. The two employers, together with the guard and an armed overseer, were arrested and tried for attempted murder - subsequently reclassified as grievous bodily harm - and for trafficking in human beings. In July 2014, the assize court acquitted them of the trafficking charges. It convicted the armed guard and one employers of grievous bodily harm, but their prison sentences were commuted to a financial penalty. They were also ordered to pay 43 euros each to the 35 workers who had been recognised as victims. The workers asked the public prosecutor at the Court of Cassation to appeal against the judgment because the human trafficking had not been properly examined, but their request was summarily dismissed. The ECtHR found that Greece has failed to comply with its positive obligations under Article 4 ECHR to protect the victims, prosecute the traffickers and compensate the victims.

At the outset, a number of common and distinctive features between the two cases can be identified. In both cases the applicants are victims of labour exploitation and migrants, coming from poor Asian countries. On the other hand, there are important distinctive points that relate to the type of exploitative work, the gender dimension, and the country where they were exploited. In *Chowdury*, exploitation took place in agricultural work, a professional field that is particularly exploitative but that tends to be recognized as work in the formal economy (although not subjected to adequate controls). On the contrary, Ms. J., G. and C. were exploited into domestic work, an activity that has largely been confined to the informal economy and does thus not benefit from the same standards of protection under labour laws.⁷ Moreover, domestic work is almost exclusively carried out by women, which brings us to the second element.

In *Chowdury* the victims were exclusively men and in *J. and Others* they were all women, which highlights a clear gender dimension, where each of these activities disproportionately affect men and women respectively. Therefore, an assessment must be made of the extent to which the gender element has been taken into consideration by national authorities. While exploring in detail the gender dimensions of this case law does not fall under the scope of this study, attention should be drawn to the fact that the Court avoided again, as in its previous trafficking decisions, referring to the

⁷ See [ILO, Domestic workers across the world: global and regional statistics and the extent of legal protection \(2013\)](#); see also [UN Committee on Migrants Workers, General comment n° 1 on migrants domestic workers](#), CMW/C/GC/1 (2010). On the lack of legal protection for women migrant domestic workers in the UAE, see [A. Gallagher, "Exploitation in Migration: Unacceptable but Inevitable", 68 Journal of International Affairs \(2015\) 55-74](#), at 62.

gender element,⁸ even though the European Trafficking Convention (ETC),⁹ the instrument it refers to in order to interpret Article 4 ECHR, requires states to adopt a strong gender perspective in all anti-trafficking interventions.¹⁰ This is regrettable, considering that the CoE is concerned that “persisting inequalities between women and men, gender bias and stereotypes result in unequal access of women and men to justice”.¹¹

Finally, contrary to *Chowdury* where the exploitation took entirely place in Europe, which made the investigation much easier, in *J. and Others* most of the exploitation took place in the UAE, and a small part only in Austria. This circumstance provides an opportunity to explore the scope of CoE states’ obligations with regard to investigation and judicial cooperation in cases of cross-border trafficking with non-European states.

(C) ENGAGEMENT WITH THE DEFINITION OF TRAFFICKING UNDER ARTICLE 4 ECHR

(I) The confusion around how trafficking falls under the definitional scope of Article 4

In *Rantsev*, the Court first found that trafficking was prohibited under Article 4 ECHR.¹² However, it found it unnecessary to identify whether the trafficking situation constituted slavery, servitude or forced labour, finding that trafficking itself, as defined in the Palermo Protocol¹³ and the ETC, fell within the scope of Article 4.¹⁴ While the finding that human trafficking is prohibited under the ECHR has generally been welcomed, the Court’s failure to explain how trafficking falls within the realm of Article 4 and how it relates to the conducts established therein has been widely criticized.¹⁵ In *L.E.*, the Court avoided the issue again and entirely relied on the reasoning made in *Rantsev*.¹⁶ *J. v Others* and *Chowdury* also rely on that reasoning¹⁷, but they bring in some additional elements. While *J. and Others* only adds some elements of confusion, in *Chowdury* the Court develops its reasoning a step further.

⁸ See A. Timmer, “Toward an Anti-Stereotyping Approach for the European Court of Human Rights”, 11 *Human Rights Law Review* (2011) 707-739.

⁹ CoE Convention on Action against Trafficking in Human Beings 2005, CETS n. 197.

¹⁰ See Articles 1(1)(a) and (b), 5(3), 6(d) and 17 of the Convention. The [Explanatory Report to the ETC](#) clarifies that: “[e]quality must be promoted by supporting specific policies for women ...”, para 54 and 211. See also [European Commission, Study on the gender dimensions of trafficking in human beings \(2016\)](#).

¹¹ [CoE Gender Equality Strategy 2014-2017](#). See also [CoE, Equal access to justice in the case-law on violence against women before the European Court of Human Rights \(2015\)](#), which concludes that in the ECtHR’s case law “overall there is little examination under Article 14 of the question of equality between the sexes in the context of access to justice”, at 35.

¹² *Rantsev*, at 277 and 282.

¹³ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime 2000, 2237 UNTS 319.

¹⁴ *Rantsev*, at 279 and 282.

¹⁵ [R. Piotrowicz, “States’s Obligations under Human Rights Law towards Victims of Trafficking in Human Beings: Positive Developments in Positive Obligations”, 26\(2\) *International Journal of Refugee Law* \(2012\) 181-201, at 196; J. Allain, “Rantsev v Cyprus and Russia: The European Court of Human Rights and Trafficking as Slavery”, 10\(3\) *Human Rights Law Review* \(2010\) 546-557, at 554; and V. Stoyanova, *Human Trafficking and Slavery Reconsidered, Conceptual Limits and States’ Positive Obligations In European Law* \(CUP, 2017\), at 298-299.](#)

¹⁶ *L.E.*, at 58.

¹⁷ *J. and Others*, at 104; and *Chowdury*, at 93.

As far as *J. and Others* is concerned, it is quite surprising that the Court reiterates the assertion made in *Rantsev* that trafficking “is based on the exercise of powers attaching to the right of ownership”.¹⁸ Indeed, since this is the central part of the definition of slavery, this is tantamount to saying that trafficking is a form of slavery, which is intrinsically wrong considering that slavery is only one of the numerous forms of exploitation included in the definition of trafficking.¹⁹

Moreover, the Court makes a statement that may add more confusion to the matter. When referring to the supposed “identified elements of trafficking” —the ones it identified in *Rantsev* in order to demonstrate that trafficking is based on the exercise of powers attaching to the right of ownership—, i.e. “the treatment of human beings as commodities, close surveillance, the circumscription of movement, the use of violence and threats, poor living and working conditions, and little or no payment”, the Court declares that these elements “cut across these three categories”, referring to the conduct prohibited under Article 4.²⁰ Such a statement can be misleading. If it is true that these elements might be present to different degrees in forced labour, servitude and slavery, the Court fails to mention that the difference between these three conducts lies in the degree to which these elements are present and, as a consequence, control is exerted over the victim(s).²¹ If this is not added to the assertion that these elements “cut across all three categories”, it sends the message that these three conducts are very similar and that there is no real need to distinguish between them.

This is a dangerous path to take. The inability to distinguish between these conducts is generating serious impunity at the national level, as will be discussed in the next section. It is therefore essential that the distinct features and corresponding gravity of these three conducts be clarified and preserved when addressing human trafficking cases, to avoid, inter alia, the trafficking definition “to swallow up [these] other prohibited practices”.²² However, *J and Others* does not bring any clarity on the distinctive features of these conducts and their relationship with trafficking. Regrettably, in this case the Court lost an opportunity to develop its reasoning any further on this point by avoiding reviewing the adequacy of the Austrian legal framework and - too easily - agreeing with Austrian authorities’ view that it was appropriate to stop their investigation at an early stage.²³

Two months later, the Court finally establishes that link in *Chowdury*. It found that the facts under scrutiny constitute trafficking, that they amount to forced labour and thus constitute a violation of Article 4(2). For the first time, the Court qualifies a trafficking situation as amounting to one of the three conducts proscribed under Article 4. Later, we will reflect on why this has not happened before. But we should first have a closer look at the reasoning developed by the Court in *Chowdury* in relation to trafficking and forced labour, essentially under two angles. First, to what extent it contributes to clarifying the concept of forced labour and how it relates to human trafficking

¹⁸ *J. and Others*, at 104.

¹⁹ See Allain, *supra* n. 15, at 554; and Stoyanova, *supra* n. 15, at 298-299.

²⁰ *J. and Others*, at 104.

²¹ On the gradational model based on the level of control exercised over a person, see J. Allain, *Slavery in International Law: of Human Exploitation and Trafficking* (Martinus Nijhoff Publishers, 2013), at, inter alia, 127-129 and 310-312; and Stoyanova, *supra* n. 15, at 285-287.

²² A. Gallagher, *The International Law of Human Trafficking* (CUP, 2010), at 50.

²³ See *infra* Part D(4)(b).

and differs from servitude. And secondly, how it creates some confusion between the concepts of trafficking for forced labour and forced labour per se.

(2) Clarifying the concept of forced labour and how it relates to human trafficking and differs from servitude

In *Chowdury*, the Court clarifies at the outset that, as opposed to *Rantsev*, this case is not about sexual exploitation but about labour exploitation, a form of exploitation included in the definition of trafficking,²⁴ which “highlights the intrinsic relationship between forced and compulsory labor and trafficking in human beings”²⁵. The Court eventually acknowledges an intrinsic relationship that was quite obvious.

Before qualifying the form of exploitation endured by the applicants as forced labour, the Court describes the general principles that surround the concept of forced labour. In that context, it relies on its findings in *Van der Mussele*²⁶ where it pointed to the need to rely on the definition included in Article 2(1) of the ILO Forced Labour Convention in order to define forced labour. It recalls that this definition includes two fundamental elements. First, the fact that the work has been extracted “under the menace of any penalty”. And second, that it lacks voluntariness: it is a work for which the person “has not offered himself [or herself] voluntarily”.²⁷ In that framework, it recalls two principles established in *Van der Mussele* that relate to these elements. First, in relation to voluntariness, prior consent to perform the work is not the key element to look at and is only to be given relative weight: lack of voluntariness is to be assessed against all the circumstances of the case since these, taken globally, may invalidate the consent initially given.²⁸ Second, the Court considers that not all work performed under the menace of a penalty necessarily constitute forced labour and that it should be found that a “disproportionate burden” has been imposed on the person, in light of the nature and volume of the work performed.²⁹

One of the mayor contributions of this case is that the Court sheds light on how these principles apply to the exploitation of migrants in an irregular situation. It is particularly welcome that the Court addresses this phenomenon, establishing that, in light of a number of factors, undocumented migrants may be considered as finding themselves in a situation of vulnerability that, if abused by the employer, may invalidate a possible initial consent to their work.³⁰ According to the mentioned

²⁴ Reference is made to the definition as per Article 4(a) of the ETC, which reflects the one included in the Palermo Protocol.

²⁵ *Chowdury*, at 93 (translation by the author).

²⁶ *Van der Mussele v Belgium*, Application no. 8919/80, Merits and Just Satisfaction, 23 November 1983 (*Van der Mussele*).

²⁷ *Chowdury*, at 90.

²⁸ *Ibid.*, at 90, referring to *Van der Mussele* at 37.

²⁹ *Ibid.*, at 91, referring to *Van der Mussele* at 39.

³⁰ Irregular status had already been considered as a vulnerability factor in the context of forced labour by the International Labour Organization (ILO), see [ILO, Hard to See, Harder to Count: Survey Guidelines to Estimate Forced Labour of Adults and Children](#) (2012), at 16; and [ILO, Forced Labour and Human Trafficking: A Handbook for Labour Inspectors](#) (2008), at 10. See also Gallagher, *supra* n. 22, at 36. For a consideration of migrant’s irregular status as a position of vulnerability in the context of the trafficking definition, see [UNODC, Abuse of a position of vulnerability and other “means”](#)

general principles, the Court assesses the voluntariness of the work performed against all the circumstances of the case, considering the following as relevant: - the applicants worked without perceiving their salary; - their living and working conditions were particularly harsh, as they worked every day from 7 to 19 hours under the control of armed men, lived in makeshift huts, and their employers threatened not to pay them if they stopped working; - since their irregular situation put them at risk of being arrested, detained and deported, leaving their work would have meant increasing the prospect of deportation and losing their salaries; - without any salary, they could not move to another place.³¹

The Court finds that the applicants were in a situation of vulnerability when they started working since they were in an irregular situation, had no resources and knew that if they stopped working they would never get their due wages.³² Therefore, even if they had initially consented to that work, the conduct of the employers had changed the nature of the situation, as follows: “[W]hen an employer abuses his power or takes advantage of the vulnerability of his workers in order to exploit them, they do not offer their work voluntarily”.³³ In a European and world context where the exploitation of irregular migrants is widespread and perceived as “inevitable”,³⁴ this is a significant contribution by the Court.

On the menace of a penalty, the Court’s reasoning is not as clear. A number of circumstances are referred to by the Court, but without stating which element they actually contribute to substantiate. The Court notes that the applicants worked in extreme physical conditions and were subject to constant humiliation, and that the accused imposed themselves without scruple through the use of weapons and threats. The day of the shootings, the employer threatened to kill them if they did not continue to work for him. When they refused, he told them to leave and threatened to burn their huts if they stayed.³⁵ These elements clearly constitute a menace of a penalty. However, when mentioning these elements, the Court fails to state that they constitute a menace of a penalty. Moreover, while these elements refer to the duress of the working conditions, the Court fails to examine whether they amount to an “excessive or disproportionate burden”, according to the requirement it had established a few paragraphs earlier.

There is another important issue on which the Court conveys a clear message: the distinction between forced labour and servitude. This is a vital point: failure to understand the distinctive thresholds required under these two notions may end up generating impunity for forced labour situations, as happened in this case.³⁶ Indeed, the Patras Court applied a too high threshold to the

[within the definition of trafficking in persons](#) (2013), at, inter alia, 3, 15, 16, 34, 45 and 46.

³¹ Chowdury, at 94-95.

³² *Ibid*, at 97.

³³ *Ibid*, at 96 (translation by the author).

³⁴ See [European Union Agency for Fundamental Rights \(FRA\), Severe labour exploitation: workers moving within or into the European Union. States’ obligations and victims’ rights \(2015\)](#), which refers to EU states “accepting systemic labour exploitation” of migrants, at 3.

³⁵ *Ibid*, at 98.

³⁶ For a reflection on how conflating trafficking for forced labour with slavery equally risks “raising the threshold for what counts as trafficking”, undermining prosecutorial efforts and access to redress for victims, see [J. Chuang, “The Challenges and Perils of Reframing Trafficking as ‘Modern-Day Slavery’”, 5 Anti-Trafficking Review \(2015\) 146-149](#), at 147.

situation experienced by the applicants: conflating forced labour with servitude, and finding that the constituent elements of servitude were not satisfied, it ruled that forced labour allegations had not been substantiated and acquitted the accused.

In *Chowdury*, the Court recalls that the fundamental feature that distinguishes servitude from forced labour “lies in the victims’ feeling that their condition is permanent and that the situation is unlikely to change”.³⁷ This feeling is closely linked to the fact that the person is excluded from the outside world through the deprivation of his or her freedom of movement, and can thus not alter his or her situation because it has no possibility to abandon it. In that sense, servitude is an “aggravated” form of forced labour, as the Court had already established.³⁸ The Court found that the fact that the applicants could not have felt that feeling—since they were not in a situation of exclusion from the outside world nor in the impossibility of abandoning their employment—is not relevant for the purposes of qualifying the situation as forced labour, since “restriction to freedom of movement is not a *sine qua non* condition in order to qualify a situation as forced labour”.³⁹ Restriction to freedom of movement is an element that relates to aspects of the life of the victims—and not so much their work—that infringe Article 4 under another angle: the prohibition of servitude. On that basis, the Court concludes that the applicants were put into forced labour,⁴⁰ and that Article 4(2) had been violated.

The reasoning developed by the Court on what constitutes forced labour and how it is different from servitude is to be praised, in particular in relation to the situation of vulnerability of irregular migrants. However, more clarity in terms of identifying which facts contribute to fulfil each of the elements required under the forced labour definition and when the “excessive or disproportionate burden” condition is fulfilled would have contributed to enhance its quality. Also, no explanation is provided on how the Court jumps from finding that the facts constitute forced labour to finding that they constitute trafficking into forced labour, a point that will be addressed hereunder.

(3) Trafficking for forced labour v. forced labour

What the Court fails to do in *Chowdury* is to make clear how the facts of the case constitute trafficking into forced labour as opposed to simply forced labour. While the Court reviews to some extent the existence of the two elements of forced labour, it fails to assess the existence of the three constituent elements of trafficking. When finding that the facts constitute forced labour, the Court qualifies the situation alternatively as “trafficking in human beings”, “forced labour as a form of exploitation for the purpose of trafficking”, “trafficking in human beings and forced labour”, giving

On the risks of an expansionist vision of slavery and a narrow understanding of trafficking, see [A. Gallagher, “Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway”, *Virginia Journal of International Law*, vol. 49\(4\), 2009.](#)

³⁷ *Chowdury*, at 99, quoting *C.N. and V. v. France*, Application n° 67724/09, Merits and Just Satisfaction, 11 October 2012, at 91 (C.N. and V).

³⁸ *C.N. and V.*, at 91. The distinction between forced labour and servitude was also examined in depth in *Siliadin v. France*, Application No. 73316/01, Merits and Just Satisfaction, 26 July 2005 (*Siliadin*), at 123-129.

³⁹ *Chowdury*, at 123.

⁴⁰ *Ibid.*, at 99-100.

the impression that it is referring to them interchangeably.⁴¹ This creates considerable confusion.

In fact, the Court simply says that “the facts in question fall within the definition of trafficking in human beings of Article 3a of the Palermo Protocol and Article 4 of the European Anti-Trafficking Convention”. I wonder: on what basis? When has this been established? What the Court determined in the previous paragraphs is exclusively that the facts fall within the definition of forced labour. In fact, just after having established that the facts clearly constitute “trafficking in human beings and forced labour”,⁴² instead of explaining why and how, the Court jumps to the assertion that it is for national authorities to interpret national law and that the Court should only verify compatibility with the Convention. It then finds that Greek courts’ interpretation of *trafficking* was too restrictive as it identified it with servitude.⁴³ The confusion between trafficking into forced labour and forced labour per se is plain in this sentence: the elements of forced labour only were identified as having been fulfilled by the ECtHR. But at no time was the existence of the elements of trafficking examined by the ECtHR.

Indeed, in its previous case law the Court has equally failed to establish these elements.⁴⁴ However, since the Court developed its reasoning further in *Chowdury*, linking trafficking with forced labour, it could have been hoped that the Court would have finally examined these elements. One may wonder: could the constitutive elements of trafficking somehow be subsumed? As is well known, the ETC and the Palermo Protocol’s trafficking definition require the existence of three elements: an action, a means and a purpose. It can surely be argued that the purpose has been checked by the Court when finding that the applicants were put into forced labour (an exploitative purpose included in the trafficking definition), and that the means have also been established since the use of threats, of force and the abuse of a position of vulnerability - means included in the trafficking definition - have been ascertained when establishing the existence of forced labour. However, the action element, which emerges as the distinctive feature between forced labour per se and trafficking into forced labour, has not been addressed by the Court.⁴⁵

The Court does not seem to be aware of the confusion it generates by assimilating the two concepts. If the Court finds that the facts constitute trafficking for forced labour, it should identify the elements that make it a trafficking case as opposed to a forced labour one.⁴⁶ The Court seems to simply follow the approach taken by the applicants in their allegations, where that same confusion is

⁴¹ *Ibid.*, at, inter alia, 99-101 and 123.

⁴² *Ibid.*, at 100.

⁴³ *Ibid.*

⁴⁴ For an analysis of that same failure in *Rantsev*, see Stoyanova, *supra* n. 15, at 299-301.

⁴⁵ ILO holds that “While most victims of trafficking end up in forced labour, not all victims of forced labour are in this situation as a result of trafficking. For example, people who are coerced to work in their place of origins have not been considered in ILO’s own estimates of forced labour as trafficking victims”, in [ILO, Fighting Human Trafficking: the Forced Labour Dimensions](#) (2008).

⁴⁶ In its first human trafficking case, the Inter-American Court of Human Rights (IACtHR) made that finding: after establishing that the exploitation endured by the applicants amounted to slavery, it established that the situation also amounted to trafficking since the victims were recruited from the poorest regions of Brazil and moved to the ranch through fraud, deceit and false promises, thereby substantiating the “action” element; IACtHR, *Case of the Hacienda Brasil Verde Workers v. Brazil*, Judgment of 20 October 2016, Series C No. 318 (*Hacienda Brasil Verde*), para 305.

to be found.⁴⁷ Also, the Court failed to highlight that the absence of a specific provision criminalizing forced labour in the Greek Penal Code certainly contributed to that assimilation under Greek law, where servitude does appear in a specific provision, while forced labour does not appear per se but only in the context of human trafficking.⁴⁸ While that confusion should have been highlighted by the Court, the Court actually perpetuates it.

In sum, it is welcome that the Court indicates for the first time for what specific purpose trafficking has taken place and thus establishes a clearer link between trafficking and a conduct proscribed under Article 4. This provides a more solid justification for holding that human trafficking falls within the scope of that Article. However, there is still a lack of clarity around the way trafficking relates to these conducts, under different perspectives. While some more reflections on these grey areas will be developed in the next section, it can be said at the outset that the Court seems to have gone from one extreme to the other: while it had until now refused to establish any link between trafficking and the conducts prohibited under Article 4, now that it eventually decided to do so it does so in excess, by assimilating the two concepts (trafficking and forced labour in this case).⁴⁹ While before *Chowdury* these two concepts were unrelated, now they end up being the same! It appears that the Court has still not reached the point where these two concepts might coexist in a balanced way. Neither separated nor assimilated, but connected, through the interplay of the trafficking definition and Article 4 ECHR, with each of them keeping its distinct identity.

(4) Conclusions on a possible clarification of the links between trafficking and the conducts prohibited under Article 4

While in the two first cases on trafficking into sexual exploitation, the ECtHR had failed to establish a link between trafficking and one of the conducts prohibited under Article 4, it is only in *Chowdury*, a case on trafficking into labour exploitation, that it ends up doing so. Thus, a first question arises: is the Court's definitional problem on how trafficking fits into Article 4 related to the specificity of trafficking for sexual exploitation, because this form of exploitation is not expressly referred to in Article 4?

When considering this hypothesis, we note that its main argument is highly questionable. In *Rantsev*, the Court already established that trafficking “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”.⁵⁰ This statement refers to forced sex work as a sub-category of forced labour. This is indeed an adequate approach. Clearly, “a forced labour situation is determined by the nature of the relationship between a person and an “employer”, and not by the type of activity performed [...] A woman forced into prostitution is in a forced labour situation because of the involuntary nature of

⁴⁷ *Chowdury*, at 58.

⁴⁸ See a more detailed analysis in Part D(2).

⁴⁹ The Court thus contributes to the assimilation of trafficking with other related concepts that has been termed “exploitation creep”, in J. Chuang, “Exploitation creep and the Unmaking of Human Trafficking Law”, 108(4) *The American Journal of International Law* (2014) 609-649.

⁵⁰ *Rantsev* at 281; reiterated in *J. and Others* at 104.

the work and the menace under which she is working”.⁵¹

There is therefore no obstacles for the Court to proceed to qualify trafficking for sexual exploitation as a violation of article 4(2) if the constituent elements of forced labour are present, which appeared to be the case of both Ms Rantseva and Ms L.E. Similarly, the Court should be prepared to find trafficking for sexual exploitation (as well as sexual exploitation per se, for that matter) as potentially falling under the realm of Article 4(1) when the exploitation involved amounts to servitude or, alternatively, to slavery, i.e. if the degree of control over the victim, in particular in relation to the limitation of the victim’s freedom of movement, is found to be higher and thus reaches the threshold of sexual servitude or sexual slavery.

If we work on that basis, we would suggest that the Court takes the view that trafficking is not a separate or additional form of exploitation prohibited under Article 4, but that it falls under Article 4 because of its intrinsic connection with the conducts prohibited under Article 4 under the “purpose” element of its definition. From this perspective, trafficking should be considered as a preliminary conduct or process that leads to the forms of exploitation described in Article 4. Logically, recruiting a person through deceit or transferring a person through coercion in order to exploit that person in any of the possible forms of forced labour, servitude or slavery, would fall under Article 4 in the same way that these same forms of exploitation would fall under that Article if the distinctive element of trafficking - the action to recruit, transfer etc - were to be absent.

To say it differently, both forced labour and trafficking into forced labour would fall under the prohibition of Article 4(2) ECHR, both servitude and trafficking into servitude would fall under the prohibition of Article 4(1) ECHR, and both slavery and trafficking into slavery would fall under the prohibition of Article 4(1) ECHR. Each of these six offences is still different from the criminal law perspective and must be criminalized as a distinct offence under domestic law. But under international human rights law, which is not aimed at determining the gravity of a punishment against an individual but at promoting adequately protective policies by the state for the community at large, it appears reasonable that trafficking should fall under the prohibition of the exploitative conduct it aims to fulfil, as a preparatory process that leads or intends to lead to it. This should be so at least until human trafficking is not provided for as a separate human rights violation, as was done, for example, in the EU Charter of Fundamental Rights.⁵²

This line of reasoning raises another important question. Are all forms of trafficking susceptible of falling under one of the conducts prohibited under Article 4? In addition to the forms of exploitation we already referred to, trafficking is mostly taking place for the purpose of organ removal, forced begging, forced marriage, criminal activity and the use of children as soldiers.⁵³ The difficulty seems to arise with regard to trafficking for the removal of organs. All other forms of trafficking entail a form of subjugation of the victim to another person’s influence or control in order to provide a work or service, and would therefore fall under one of the conducts prohibited under Article 4. In cases of organ removal, the person is not forced to provide a work or service, but is taken away a bodily part.

⁵¹ [ILO, The Cost of Coercion \(2009\)](#), at 26.

⁵² Article 5(3).

⁵³ [UNODC, Global Report on Trafficking in Persons \(2016\)](#), at 8.

The nature of the exploitation is indeed different, and it appears to be difficult to make it fit under the prohibition of forced labour, servitude or slavery. It may be wise to reflect on whether trafficking for organ removal could fall under a separate prohibition under the Convention. For instance, under Article 3 ECHR.

In conclusion, I consider that it was unwarranted for the Court to avoid assessing which of the three types of conduct prohibited under Article 4 ECHR are engaged in a trafficking case. With the exception of trafficking for organ removal, which is believed to constitute less than 5% of trafficking cases,⁵⁴ there is no particular difficulty for making the other forms of trafficking exploitative purposes fit into one of the conducts proscribed by Article 4. This would provide a more solid legal basis for the fight against human trafficking under international human rights law. Indeed, this same connection has already been established at the universal level, without any particular difficulty. The Human Rights Committee (HRC) has stated that under Article 8 of the International Covenant on Civil and Political Rights⁵⁵, which prohibits slavery, servitude and forced labour, states should report on their efforts to eliminate trafficking,⁵⁶ thus recognizing that the prohibition of trafficking falls under the scope of these prohibitions.

However, caution is required in ensuring that this connection does not negatively affect the possibility of finding violations of Article 4 solely based on slavery, servitude and forced labour, where trafficking elements are absent or difficult to prove. Although this may seem obvious, it is regrettably not. The greater visibility achieved by trafficking has had a negative repercussion on these three conducts where judicial bodies at the national – and possibly international – level are readier to establish violations of the prohibition of trafficking than of the prohibition of slavery, servitude and forced labour.

As far as trafficking for sexual exploitation is concerned, this line of reasoning would also be beneficial. The perception that sexual exploitation is something separate from slavery, servitude and forced labour has not well served the cause of protecting its victims. Similarly to the late recognition under international criminal law that rape and other forms of sexual violence against women fell under the definition of well-established international crimes, it might now be required to state in much clearer terms that under international human rights law trafficking for sexual exploitation is a human rights violation that amounts to either slavery, servitude or forced labour and clearly falls under the realm of these prohibitions. An additional advantage of ascribing this form of trafficking to these three conducts is that it would allow to graduate the gravity of trafficking for sexual exploitation in relation to the degree of exploitation and control exerted: that has not been the case until now.

⁵⁴ *Ibid.*

⁵⁵ International Covenant on civil and political rights (1966), 999 UNTS 13971.

⁵⁶ [Human Rights Committee, General Comment n. 28 \(2000\), CCPR/C/21/Rev.1/Add.10](#), at 12.

(D) SCOPE OF STATES' POSITIVE OBLIGATIONS

(1) What is the object of the Court's scrutiny? *J. and Others* and a sudden change in the scope of the obligations under review

In *Chowdury*, the Court reiterates the scope of states' positive obligations under Article 4 and the general principles that guide their implementation as identified in *Rantsev* and *L.E.* It recalls that "States party's positive obligations under Article 4 of the Convention must be interpreted in the light of the aforementioned CoE [Trafficking] Convention and require, in addition to the adoption of measures related to prevention, victim's protection and investigation, the criminalization and effective punishment of any act aimed at keeping a person in such situations".⁵⁷ It adds, for the first time, that it draws its inspiration from the manner the ETC is interpreted by GRETA,⁵⁸ which is particularly positive since the adjudication of such complex cases requires relying on specialized expertise. Finally, it follows the same analytical framework used in *Rantsev* and *L.E.*, reviewing compliance with three categories of duties: (1) to put in place an appropriate legal and administrative framework; (2) to take protective operational measures; and (3) to effectively investigate and prosecute.

J. v Others, however, appears as a worrying discordant note. In this case, the Court modifies the three broad categories of obligations around which it had structured its assessment since *Rantsev*. It does so in two ways. On the one hand, the first category disappears: the obligation to put in place an appropriate legal and administrative framework is not at all considered. Secondly, the scope of the second category of obligations is considerably modified.

Concerning the first point, it is hardly justifiable that the Court suddenly avoids reviewing states' compliance with the obligation to put in place an appropriate legal and administrative framework, a central obligation under its case law,⁵⁹ including with respect to the right to life⁶⁰ and to freedom from torture and the right to family life in the context of sexual or domestic violence.⁶¹ It is also the obligation that was first identified by the Court in its positive obligations' case law under Article 4.⁶² Once the Court admits a case and starts reviewing whether Article 4 has been complied with, it is difficult to see how the particular circumstances of any given case would allow the Court to assess compliance with that Article without reviewing the adequacy of that state's legal framework, without reviewing whether the conducts proscribed under that Article are adequately criminalized under

⁵⁷ *Chowdury*, at 104 (translation by the author).

⁵⁸ *Ibid.*

⁵⁹ See [L. Lavrysen, "Protection by the Law: The Positive Obligation to Develop a Legal Framework to Adequately Protect ECHR Rights"](#), in E. Brems and Y. Haack, *Human Rights and Civil Liberties in the 21st Century* (Springer, 2014), 69-129; and [R. Pisillo Mazzeschi, "Responsabilité de l'Etat pour violation des obligations positives relatives aux droits de l'homme"](#), 333 *Collected Courses of the Hague Academy of International Law* (2008) 175-506, at 311-344 and 390-414.

⁶⁰ See, for example, *Osman v. the United Kingdom*, Application n. 23452/94, Merits and just Satisfaction, 28 October 1998, at 115. For relevant ECtHR, IACtHR and HRC case law, see Pisillo Mazzeschi, *supra* n. 59, at 311-344.

⁶¹ See, for example, *M.C. v. Bulgaria*, Application n. 39272/98, Merits and just Satisfaction, 4 December 2003, where it established that "effective deterrence against grave acts such as rape [...] requires efficient criminal-law provisions", concluding that "States have a positive obligation inherent in Articles 3 and 8 of the Convention to enact criminal-law provisions effectively punishing rape", at 150 and 153.

⁶² *Siliadin*, at 89, 112 and 130-49.

national law⁶³ or whether effective measures for the identification and protection of victims, or for preventing trafficking to flourish, are provided for in domestic law.

In this case, no assessment of the adequacy of the Austrian regulatory framework is made, despite the Court's assertion that "States are also under an obligation to put in place a legislative and administrative framework to prohibit and punish trafficking, as well as to take measures to protect victims".⁶⁴ This omission is highly worrying, as this first category of obligations is the only one that allows looking into structural problems that prevent states to address the trafficking phenomenon *a priori* (as opposed to the other two categories that address states' response to a trafficking situation *a posteriori*, in terms of protecting victims and investigating the case). Moreover, the Court does not provide any explanation for that omission.

Turning to the second point, the heading "positive obligation to take protective and/or operational measures" (with minor variations depending on the judgment) becomes "positive obligation to identify and support the applicants as victims of human trafficking".⁶⁵ Again, this creates some confusion. Looking at the way these concepts have been applied in their respective judgments, it appears that the concept of operational measures is broader than the one used in *J. and Others*, as will be described in the section devoted to this issue.

To conclude, the unexplained and one-off change of structure in *J. and Others* might reveal two things. First, the lack of priority given by the Court to the establishment of a comprehensive legal and administrative framework to combat trafficking. And second, some lack of coherence or coordination within the Court. Where a Court's Chamber decides not to follow the same structure of reasoning followed by the other Chambers in previous cases, this ultimately affects the overall clarity and coherence of the Court's case law in a specific field. Of course, I do not question the fact that the Court might consider that it needs to modify the way it addresses a specific issue. However, if it does so, I would hope that it would, for the sake of clarity, provide some explanation on why it departs from examining potential violations of a specific provision on the basis of an established set of obligations.

(2) Legislative and administrative framework

First of all, the Court points to states' duty to establish a legislative and administrative framework that is "adequate to ensure the practical and effective protection of the rights of victims or potential victims"⁶⁶. Indeed, in *Rantsev* and *L.E.* the Court explains that the regulatory framework should address three areas: it should not only be directed at punishing traffickers but also at preventing

⁶³ In that context, Dearing rightly underlines that "under Article 13 ECHR individuals are entitled to criminal law provisions incriminating grave interferences with essential aspects of their human rights" for three reasons: preventing harm, acknowledging as significant the protected right and the wrong done to victim and, finally, because "criminal law provisions provide the basis for granting victims access to justice in compliance with Article 7 ECHR", in A. Dearing, *Justice for Victims of Crime, Human Dignity as the Foundation of Criminal Justice in Europe* (Springer, 2017), at 41-42.

⁶⁴ *J. and Others*, at 106.

⁶⁵ *Ibid.*, at 110.

⁶⁶ *Rantsev*, at 284; *L.E.* at 65; and *Chowdury*, at 87.

trafficking and at protecting victims.⁶⁷ In *Rantsev*, it reviews whether that threefold requirement has been fulfilled in the concrete case, and finds that it was not, while in *L.E.* it checked it in a very superficial way. In *Chowdury*, the need for the framework to address these three areas is neither reiterated nor applied to the facts at stake. In *J. and Others*, finally, the legislative and administrative framework is not even considered as a set of duties to be reviewed. We will examine this marked regressive trend in more detail.

(a) *The criminal law framework*

What is striking in both *J. and Others* and *Chowdury* is that the Court is satisfied that the national criminal framework around trafficking and labour exploitation is adequate, while in both cases the Court fails to review that framework and to identify important shortcomings.

In *Chowdury*, we have seen that the main reason that lies behind the Greek courts' failure to punish the perpetrators is the confusion between the concepts of forced labour and servitude. But that confusion did not come out of nowhere, it is chiefly due to the inadequacy of the Greek criminal law. A look at the Penal Code reveals that what is sanctioned under Greek criminal law is only servitude (and slavery, since the definition assimilates the two concepts)⁶⁸ and human trafficking.⁶⁹

This criminal framework poses a number of problems. First, the definition of trafficking under Article 323A is not sufficiently comprehensive. As far as the exploitative purposes are concerned, it only refers to trafficking for the extraction of organs and for the exploitation of labour and begging. No reference is made to servitude and slavery, nor to sexual exploitation. While the latter is covered by a separate article (Article 351),⁷⁰ there is a lack of clarity regarding the term "exploitation of labour". It may be argued that exploitation amounting to servitude, slavery or forced labour may all be subsumed under that concept. However, this would not satisfy the principle of legal certainty, which is particularly stringent in criminal law, where the *Nulla poena sine lege* principle applies. In this context, GRETA has stressed that the offence of trafficking in national law should expressly refer to "forced labour, forced services, slavery and practices similar to slavery and servitude", and that "failure to do that may lead to difficulties in complying with the state's positive obligations under Article 4".⁷¹ Indeed, the Court should not that easily have reached the conclusion that the Greek criminal framework is satisfactory and should have urged Greek authorities to bring it in line with international standards.

Secondly, the criminalization of forced labour per se is lacking, contrary to states' obligation as already clearly established in *Siliadin*,⁷² and reiterated in *Chowdury*:

"In order to fulfill the positive obligation to criminalize and effectively punish any act referred to in

⁶⁷ *Rantsev*, at 285; and *L.E.* at 65.

⁶⁸ Article 323.

⁶⁹ Article 323A.

⁷⁰ See the amendments brought by [Law n° 4198/2013](#).

⁷¹ GRETA, Fourth ..., supra n. 4, at 37.

⁷² *Siliadin*, at 89, 112 and 130-49. On this point, see Piotrowicz, *supra* n. 15, at 187-189.

article 4 of the Convention, States must establish a legislative and administrative framework prohibiting and punishing forced or compulsory labor, servitude and slavery”⁷³

The Court itself finds that the Penal Code does not contain specific provisions criminalizing forced labor,⁷⁴ where the applicants also refer to that absence and the Government does not contest it.⁷⁵ Why is it then that the Court establishes a duty and, finding that that duty has not been fulfilled, concludes that the state’s conduct is satisfactory?⁷⁶ This raises serious concerns on the quality of the Court’s reasoning and on the negative impact of these shortcomings, considering the gravity of the human rights abuses involved. It has been rightly highlighted that “law enforcement authorities need clear guidelines on how to apply their own national legislation and how to identify a case of forced labour, trafficking in persons or slavery”, since “[a]ny confusion between the concepts can hamper proper identification, investigation and prosecution of cases”.⁷⁷ A third party submission in *Chowdury* also refers to the lack of separate forced labour offence and the importance that national legal orders contain precise provisions in conformity with the principle of strict interpretation of criminal law.⁷⁸

ILO takes the same approach when providing technical support for Penal Code reforms: it promotes the establishment of standalone forced labour offences, in addition to the trafficking in persons offences, with the aim of ensuring full coverage of labour exploitation cases in terms of investigation and prosecution.⁷⁹ In the case of Greece, the absence of a separate forced labour offense in the Penal Code means that if forced labour practices are not found to be taking place in the context of trafficking, they are not sanctioned. A recent EU study on labour exploitation in EU member states also addresses these concerns, reaching the conclusion that:

“A common denominator emerged from the expert interviews which cut across several professional groups. This is the difficulty in understanding, distinguishing and applying the various concepts of severe labour exploitation, ranging from slavery to particularly exploitative working conditions as per the Employer Sanction Directive. As a result, there is a tendency to apply one label —frequently the category of trafficking— to most forms of severe labour exploitation. This comes with the risk that investigations or prosecutions will fail, because all the elements of the crime of trafficking may not be present or may be difficult to prove.”⁸⁰

The EU study finds that the patchy coverage in criminal law of severe labour exploitation is a risk factor impeding victims’ access to justice.⁸¹ Also, the study includes Greece in the list of countries where, in national legislation, “the protection of workers against the most severe forms of labour exploitation is not as comprehensive and strong as could be expected” and “slavery, servitude and

⁷³ *Chowdury*, at 105 (translation by the author).

⁷⁴ *Ibid.*, at 35 and 107.

⁷⁵ *Ibid.*, at 72.

⁷⁶ *Ibid.*, at 109.

⁷⁷ [M. Paavilainen, “Towards a Cohesive and Contextualised Response: When is it necessary to distinguish between forced labour, trafficking in persons and slavery?”, 5 *Anti-Trafficking Review* \(2015\) 158-161](#), at 159.

⁷⁸ *Chowdury*, at 81.

⁷⁹ Paavilainen, *supra* n. 77, at 160.

⁸⁰ FRA, *supra* n. 34. at 42; see also at 39-40.

⁸¹ *Ibid.*, at 42.

forced labour are criminalized only in specific contexts”.⁸² In a context where governmental and non-governmental organizations raise this concern, the Court does worryingly not point to that failure.

As far as *J. and Others* is concerned, it has already been mentioned that the Court entirely omits reviewing the obligation to put in place an appropriate legal and administrative framework. However, if it had done so, it would have found that even if the Austrian Penal Code covers in a relatively comprehensive manner the offences of trafficking, forced labour, servitude and slavery, some important shortcomings are still to be found. First, criminal law does not punish the exploitation of the forced labour of nationals, but only of foreigners. A discriminatory provision that, despite its laudable intent of focusing attention on the exploitation of migrant’s work, ends up leaving a large part of the population unprotected. And secondly, the definition of trafficking in Austrian criminal law is not fully compliant with international standards. As far as the exploitative purposes are concerned, the definition refers to sexual exploitation, organ transplant, labour exploitation and, following a 2013 reform, begging and exploitation into criminal activities.⁸³ Here again, exploitation into servitude or slavery are not explicitly referred to.

In conclusion, we must point with concern to the Court’s failure to identify the Greek and Austrian criminal law shortcomings in terms of establishing a separate and inclusive forced labour offense and a comprehensive definition of trafficking that covers all the exploitative purposes required as a minimum under the international trafficking definition.

(b) The preventive and protective function of the broader non-criminal normative framework

In *Rantsev*, the Court examined the adequacy of the legislative and regulatory framework on aspects other than criminalization. It examined both the anti-trafficking legal framework and the broader legal and administrative framework – in particular immigration laws – and its impact on human trafficking from the perspective of both prevention and protection. Importantly, it relied heavily on national and international bodies’ assessment, such as the National Ombudsman, the CoE Commissioner for Human Rights and the United States of America’s State Department. Considering that their reports had repetitively urged Cypriot authorities to improve their immigration regulatory framework in order to halt the entry of young women sexually exploited in cabarets through the artiste visa regime, the Court found Cyprus responsible for violating Article 4 for its failure to revise that framework.⁸⁴

The next judgment, *L.E.*, already constituted a strong regression on this point. The Court failed to examine whether the regulatory framework was promoting or tolerating trafficking of foreign women into prostitution in Greece. Prevention is not even mentioned, and concerning protection, the Court is simply satisfied that the law includes provisions on protection and assistance to victims, without pushing its assessment any further. The Court omits any reference to the numerous national and international reports that had urged Greece to address the serious failures of its legal framework in

⁸² *Ibid.*, at 36.

⁸³ *J. and Others*, at 35; and *J. and Others*, Concurring Opinion of Judge Pinto de Albuquerque joined by Judge Tsotsoria (*J. and Others* Concurring Opinion), at 45 and 48.

⁸⁴ *Rantsev*, at 290-293. See Piotrowicz, *supra* n. 15, at 196-198; and V. Milano, “The European Court of Human Rights’s Case Law on Human Trafficking in Light of *L.E. v. Greece*: a Disturbing Setback?”, 17(4) *Human Rights Law Review* (2017), at 712-713.

terms of protection and prevention.⁸⁵ Thus, information that allowed making that finding in *Rantsev* was not even considered in *L.E.*

J. and Others and *Chowdury* confirm this trend: the setback is complete, with the absence of any reference to the regulatory framework in the first one, and the absence of any reference to both preventive and protective aspects under the regulatory framework assessment in the second one. In the latter, authorities' failures in terms of protecting the applicants and preventing their exploitation are only examined under the angle of the duty to take operational measures in that case, as will be examined in the next section, which does not address the structural inadequacies of immigration or labour laws that allow trafficking and labour exploitation of irregular migrants to take place.

In fact, the Court had relevant information in that regard. Under the operational measures section, the Court mentions that following reports on abuses in Manolada, three ministers ordered the preparation of texts aimed at improving the situation of migrants, but that these requests produced no concrete results.⁸⁶ Considering that authorities were put on notice that a modification of the normative framework was required to improve the situation of migrant workers, and that nothing was done about it, the Court should certainly have reviewed the legal framework in question. Similarly to *Rantsev*, this case is about a well-known, structural phenomenon. The exploitation of irregular migrants' labour force in strawberry plantations, described by the prosecutor as a barbaric situation which referred to "images of 'Slaveholders' South' having no place in Greece",⁸⁷ is known to authorities. The real problem behind it is the failure of public authorities to address it, to put in place effective regulations and controls. Such a structural problem requires broad policy responses, not only measures aimed at protecting migrants in a given case.

That preventive focus is required under a human rights-based approach to trafficking, based on the ETC but also on states' human rights due diligence duties to prevent, stop, investigate human trafficking and protect victims. Indeed, the Special Rapporteur on trafficking clarified how "due diligence on preventing trafficking also requires action to address the wider, more systemic processes or root causes that contribute to trafficking in persons, such as inequality, restrictive immigration policies, and unfair labour conditions, particularly for migrant workers."⁸⁸ Shouldn't it be a priority for the Court to look at those aspects that make national authorities all too often passive or even active accomplices of the exploitative situations they are supposed to combat?

Indeed, while criminal law enforcement is necessary, "systemic problems need to be addressed at their root through major social, economic and cultural reforms [...]"⁸⁹: this is what prevention is all about, but the ECtHR increasingly avoids giving to that part of the comprehensive anti-trafficking approach the weight it deserves. An effective approach to the prevention of forced labour and trafficking involves "promoting safe labour migration and improving labour protection in migrant-

⁸⁵ Milano, *ibid.*, at 713-715.

⁸⁶ *Chowdury*, at III.

⁸⁷ *Ibid.*, at 20 (translation by the author).

⁸⁸ [Special Rapporteur on trafficking in persons, especially women and children, Report to the General Assembly, A/70/260 \(2015\)](#), at 20.

⁸⁹ R. Plant, "Forced Labour, Slavery and Human Trafficking: When do Definitions Matter?", *5 Anti-Trafficking Review* (2015) 153-157, p. 156.

dominated economic sectors”, where the Forced Labour Protocol⁹⁰ and the Recommendation supplementing it provide guidance in that regard.⁹¹

GRETA also systematically insists on that aspect, stressing that “efforts to discourage demand for the services of victims of trafficking for the purposes of labour exploitation should include reinforcing labour inspections, in particular in sectors at high risks such as agriculture, construction, textile industry, the hotel/catering sectors and domestic work [...]”.⁹² In fact, in *Chowdury* the Court refers to numerous failures by Greece to establish prevention measures for trafficking for labour exploitation that GRETA had identified.⁹³

Why is the Court so reluctant to look at these fundamental questions? How were these men recruited? Through which supply chain? What should be done to improve labour regulations and labour inspections in order to both prevent and detect these cases? What about the duty to train public officers on how to detect and respond to these situations? The failure of the Court to look at these major issue is of great concern. This is particularly so when considering that the EU report on labour exploitation identifies an inadequate legal and institutional framework as one of the 4 main risk factors for labour exploitation, where two factors stand out very clearly as increasing that risk: impunity - described as the low risk to offenders of being prosecuted and punished - and the lack of institutions that effectively monitor the situation of workers.⁹⁴ Within this second category, labour migration regimes that restrict regular employment for irregular migrants and corruption are singled out as determinant.

In that context, the EU study singles out Greece, together with Bulgaria, as a country where corruption —described as state inaction, avoidance or delay in intervening in cases of labour exploitation— is one of the main legal and institutional risk factors for labour exploitation.⁹⁵ Finally, the study considers that one of its most significant findings is that the lack of comprehensive and effective monitoring of working conditions is a fundamental determinant of labour exploitation, where deficiencies in monitoring are ultimately reflected in the exploitative employers’ belief that nothing can happen to them.⁹⁶ Greece is mentioned again —with reference to its tourism industry— as one of the most illustrative examples of that sense of impunity, where the improbability of being inspected is so widely known that it conveys a clear message of impunity.⁹⁷

As the EU study rightly underlines, member states “need to adopt a proactive approach by monitoring the labour conditions of workers who have moved within or into the EU [...]. If member states fail to provide effective monitoring structures, there is a serious risk that the rights of victims will not be upheld and that offenders will not be held to account”.⁹⁸

⁹⁰ [Protocol of 2014 to the Forced Labour Convention of 1930, Po29.](#)

⁹¹ Paavilainen, *supra* n. 77, at 160.

⁹² GRETA, Fourth ..., *supra* n. 4, at 40.

⁹³ *Chowdury*, at 44.

⁹⁴ FRA, *supra* n. 34, at 44.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*, at 63.

⁹⁷ *Ibid.*, at 65.

⁹⁸ *Ibid.*, at 26.

I wonder, why is the Court giving crucial importance to the system of inspections and reporting in relation to other abuses, but not in relation to trafficking, in this context of well-known risk? If in *O’Keeffe* the Court extensively examined the system of inspections and the mechanisms for detection and reporting of child abuses within the private primary school system in order to establish whether the legal framework adequately protected children,⁹⁹ why is the same detailed examination of national inspections, detection and reporting mechanisms not undertaken by the Court under Article 4, in order to establish whether domestic legal frameworks sufficiently protect women, men and children against the risk of trafficking in labour sectors that are particularly at risk?

In conclusion, in accordance with its established positive obligations doctrine, the Court should review both criminal and non-criminal laws and regulations, including their monitoring structures, and assess their effectiveness in providing “practical and effective protection” to individuals from potential abuses prohibited under Article 4. And it should do so even in the absence of a causational link between the framework’s shortcomings and the abuse suffered by the applicant. Indeed, as established in *Opuz v. Turkey*,¹⁰⁰ “a failure to take reasonable measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State”¹⁰¹ where the main shortcoming identified by the Court in that case was that “the legislative framework then in force [...] fell short of the requirements inherent in the State’s positive obligations to establish and apply effectively a system punishing all forms of domestic violence and providing sufficient safeguards for the victims”.¹⁰² Similarly, in *Rantsev* the Court found that the Cypriot immigration law encouraged trafficking and failed to protect migrant women from the risk of trafficking without requiring the establishment of a causational link between these shortcomings and the trafficking of Ms. Rantseva.¹⁰³

(3) Operational measures for the protection of victims

(a) Proactive victim protection duties

Slightly adapting its well-established *Osman* test to the specificities of human trafficking cases, the Court established that in order for a positive obligation to take operational measures to arise in the circumstances of a particular case, it must be established that

“State authorities were aware, or ought to have been aware, of circumstances giving rise to a credible suspicion that an identified individual had been, or was at real and immediate risk of being trafficked [...]”.¹⁰⁴

⁹⁹ *O’Keeffe v. Ireland*, Application n. 35810/09, Merits and Just Satisfaction, 28 January 2014 (*O’Keeffe*), at 162-169.

¹⁰⁰ *Opuz v. Turkey*, Application n. 33401/02, Merits and Just Satisfaction, 9 June 2009 (*Opuz*).

¹⁰¹ *Ibid.*, at 136. Also *E. and Others v. the United Kingdom*, Application n. 33218/96, Merits and Just Satisfaction, 26 November 2002, at 99; and *O’Keeffe*, at 149.

¹⁰² *Ibid.*, at 145. See also *O’Keeffe*, where the Court focused on “whether the State’s framework of laws, and notably its mechanisms of detection and reporting, provided effective protection for children [...]”, at 152.

¹⁰³ *Rantsev*, at 291-293.

¹⁰⁴ *Rantsev*, at 286, reproduced literally in L.E. at 66 and in *Chowdury* at 88. On the *Osman* test in general, see *F.C. Ebert and R.L. Sijniensky*, “Preventing Violations of the Right to Life in the European and Inter-American Systems: From the

If the answer is affirmative, the Court will find a violation of Article 4 where the authorities failed to take appropriate measures within the scope of their powers to remove the individual from that situation or risk, to the extent that these do not impose an impossible or disproportionate burden on authorities.¹⁰⁵ Under the concept of “operational measures”, the Court has referred to measures to prevent trafficking to take place or to last, as well as to measures to identify, protect and, to a much lesser extent, support victims. It should be welcomed that the Court conceived this duty as a broad one.

Some of these measures require proactive action that leads to identification —as opposed to those that follow identification and are thus reactive (see next heading). Regarding the former, in *Rantsev* the Court found that there were sufficient elements for competent authorities to be put on notice of the trafficking situation of the victim and the risks she was exposed to, for two reasons. First, they were aware - or should have been aware - of the general situation of trafficking for sexual exploitation in the context where the victim was “working” (it was known that sexual exploitation of foreign women was taking place in cabarets).¹⁰⁶ And secondly, authorities became aware of elements that should have raised a suspicion about Ms Rantseva’s possible trafficking (when she was at the police station, they became aware that she was young, had recently arrived from the ex-USSR and worked as a cabaret artiste).¹⁰⁷ Recalling that officers in relevant fields should receive appropriate training for them to be able to identify victims, the Court found that authorities failed to take appropriate measures to protect her, in violation of Article 4.¹⁰⁸

In *Chowdury*, the Court equally focused on prevention and protection under this heading, adopting a broad approach. It followed a reasoning based on the same two aspects used in *Rantsev*. First, awareness of the general situation of trafficking for labour exploitation in Manolada’s strawberry fields: the Court notes that the state was aware of the situation of abuse well before the shooting, since it had been denounced by the press, the Ombudsman and three Ministers who had requested the government to take appropriate measures.¹⁰⁹ Secondly, awareness of the particular situation of exploitation of the applicants: as foreign undocumented migrants, a couple of days before the shooting they had alerted the police that they were working without being paid, which should have triggered appropriate action.¹¹⁰

On that basis, the Court concludes that “the operational measures taken by the authorities were not sufficient to prevent trafficking in human beings and to protect the applicants from the treatment they were subjected to”.¹¹¹ From this perspective, *Chowdury* is a good judgment, which recovers the

[Osman test to a Coherent Doctrine on Risk Prevention?](#), 15 *Human Rights Law Review* (2015) 343. On how the ECtHR applied it to trafficking cases, see Milano, *supra* n. 84, at 716-720; and Stoyanova, *supra* n. 15, at 400-407.

¹⁰⁵ *Rantsev*, at 287.

¹⁰⁶ *Ibid.*, at 294.

¹⁰⁷ *Ibid.*, at 295.

¹⁰⁸ *Ibid.*, at 296-298.

¹⁰⁹ *Ibid.*, at 111-112.

¹¹⁰ *Ibid.*, at 114.

¹¹¹ *Ibid.*, at 115.

broad proactive approach to operational measures taken in *Rantsev*.¹¹²

When looking at *J. and Others*, however, we note again a lack of coherence, with the Court taking a very different perspective. It reduces the scope of measures considered under this operational duty, to the extent that it changes the title of that heading, which becomes the duty to “identify and support” victims. In fact, in *L.E.*, the Court already started narrowing its focus along those lines. When there were at least as many elements as in *Rantsev* for the state to become aware of “circumstances giving rise to a credible suspicion” that Ms L.E. was trafficked during the two years that preceded her self-identification as a trafficking victim, the Court did not establish the failure of authorities to protect her and prevent her exploitation, despite her repeated contacts with police, judges and asylum authorities. On the contrary, the Court found that the duty to identify and protect her was only triggered from the moment she self-identified.¹¹³ This change of perspective is intrinsically wrong as it fully contradicts the Court’s *Osman* test, which requires the adoption of measures from the moment when the circumstances give rise to a suspicion, which can and should happen in the absence of self-identification, as established in *Rantsev*.¹¹⁴

In *J v Others*, the Court more understandably does not look at the proactive aspects of protective measures since the applicants had only stayed in Austria for three days, limiting the capacity of Austrian authorities to proactively become aware of the situation. It therefore referred exclusively to the victims’ reactive identification and their subsequent protection and support. While this is understandable, I don’t believe that, in methodological terms, it was necessary to change the scope and title of this category of obligations. It would have been more coherent to apply its usual *Osman* test and find that Austria did not fail to its proactive duties since there were no elements for it to become aware of “circumstances giving rise to a credible suspicion” that the applicants were trafficked before they turned to the police.¹¹⁵

(b) Reactive victim protection duties

As mentioned, in addition to measures aimed at proactively preventing and detecting trafficking cases, there is a reactive component to this duty that requires states to adopt protective measures once a victim is identified. While in *Rantsev* the Court was not able to address this aspect since Ms. Rantseva was found dead before being identified as a potential victim, in *L.E.* the Court first referred to this type of measures. The immediate referral of the victim to specialized anti-trafficking police services for them to start an investigation, the termination of the deportation procedures, the granting of a residence permit and the official recognition of the status of trafficking victim by judicial authorities were identified as good practices.¹¹⁶ On the contrary, the nine months’ delay between Ms. L.E.’s self-identification and the official recognition of that status by the prosecutor was considered to

¹¹² However, as opposed to what it did in *Rantsev* (at 297-298), the Court does not point to which failures triggered the state’s responsibility in this case, which deprives the reader of essential information on which actions or omissions constituted a violation of the state’s obligation to adopt protective measures.

¹¹³ *L.E.*, at 75.

¹¹⁴ For a full reasoning on this point, see Milano, *supra* n. 84, at 716-721.

¹¹⁵ *J. and Others*, at 110-111.

¹¹⁶ *L.E.*, at 76.

violate the positive obligation to adopt operational measures to protect the victim because of the negative impact it had on her, in particular because she continued to be detained for three months after her self-reporting.¹¹⁷

J. and Others provides a better opportunity for the Court to refer to measures required under this duty, as Austrian authorities implemented a broader set of protective measures, that have rightly been considered as adequate by the Court:¹¹⁸ - the police immediately treated the three women as (potential) victims of trafficking; - they were interviewed by specially trained police officers; - they were granted residence and work permits; - a personal data disclosure ban was imposed; - the applicants were supported by the specialized state funded NGO LEFÖ, including during domestic proceedings; and - they were given legal representation, procedural guidance and assistance to facilitate their integration in Austria.¹¹⁹ Also, the Court's clear statement on the independence between victim identification and support and criminal investigation is welcome, in a context where too many countries still condition victims' protection and support to their cooperation with judicial authorities.¹²⁰

Undoubtedly, the emphasis on protection and assistance measures is welcome as it consolidates the importance of states' obligations in this field, which are central to the entire anti-trafficking framework. It is only through victims' empowerment that the current trend can be inverted, that victims will feel confident enough to come out, investigations will take place and the current climate of impunity might finally be disrupted. However, I do not share the view that the Court framed "in very lucid and firm terms that Article 4 of the ECHR generates a positive obligation upon states to identify and support (potential) victims of trafficking and [that] for this purpose states have to build a legal and administrative framework".¹²¹ Aside from the fact that the concept of identification the Court conveys in *J. and Others* is narrow—due to the circumstances of the case, it only covers the reactive aspects of identification, not the proactive ones— my main point is that the Court does regrettably not say that states *have to build a legal and administrative framework* for the purpose of identification and support. The Court simply noted that the "applicable legal framework was applied" and that it "appears to be sufficient",¹²² which is quite different. Indeed, in relation to the obligation to build a legal and administrative framework, this is the worst ECtHR's judgment, as already mentioned, as it failed in the overall to consider states' duty to establish that framework. I do not believe that it is enough to state that the protective measures taken demonstrate that the legal framework was sufficient. Indeed, the fact that adequate measures have been taken in this case does not tell us that these are provided for in the law. Only a review of the legal framework would tell us whether these measures are set out in the law or whether they have been taken on a case by case basis.

Finally, as far as *Chowdury* is concerned, the judgment mentions some of the protective measures that are required in principle, referring to the need to adopt, inter alia, measures "to facilitate the

¹¹⁷ *Ibid.*, at 77–78.

¹¹⁸ *Ibid.*, at III.

¹¹⁹ *J. and Others*, at IIO.

¹²⁰ *Ibid.*, at IIS.

¹²¹ V. Stoyanova, "J. and Others v. Austria and the Strengthening of States' Obligation to Identify Victims of Human Trafficking", *Strasbourg Observer* (2017).

¹²² *J. and Others*, at III.

identification of victims by trained persons and to assist victims in their physical, psychological and social recovery”¹²³. However, when it proceeds to examine the concrete case, the Court fails to assess possible failures in that regard. While it is welcome that the Court referred for the first time to the obligation to assist victims in their physical, psychological and social recovery, coherence would have required it to review compliance in this area, considering in particular that the applicants complained that the Patras Court had rejected their claim to receive psychological support.¹²⁴ No reference to it is made by the Court, which reveals an unjustifiably low level of attention given to this obligation. Unlike the Palermo Protocol, assistance measures under the ECT are mandatory. Then, what justifies the Court’s lack of attention to Greek authorities’ refusal to provide psychological support?

One cannot avoid noting, again, a certain lack of consistency. In *J. and Others*, the Court praises Austrian authorities for implementing a wide range of protection and assistance measures and, on that basis, finds that Austria complied with the positive obligation to take operational protective measures, while the applicants had not invoked any failure in that respect. And in *Chowdury*, the Court fails to assess whether protection and assistance measures have been implemented, while the applicants had pointed to failures in that regard.

(4) Procedural obligation to investigate and prosecute

Like Articles 2 and 3, Article 4 entails a procedural obligation to investigate situations of potential trafficking or other conducts prohibited under that article.¹²⁵ The Court has consistently highlighted that the relevant investigation should satisfy a series of requirements: authorities must act on their own motion once the matter has come to their attention, the investigation must be independent from those implicated in the events, it must be capable of leading to the identification and punishment of individuals responsible (an obligation not of result but of means), it requires promptness and, where the possibility of removing the individual from the harmful situation is available, even urgency, and the victims or next-of-kin must be involved in the procedure to the extent necessary to safeguard their legitimate interest.¹²⁶

In *Chowdury*, the Court finds a violation of the procedural obligation to investigate and prosecute potential trafficking cases under Article 4(2)¹²⁷, while in *J. and Others* it finds no such violation.¹²⁸ In this section, I will explain why I consider the decision in *Chowdury* reasonable and well-argued, while, on the contrary, I consider the second decision inadequate.

(a) *Chowdury*

The first violation under the procedural limb of Article 4(2) identified by the Court refers to the dismissal by the Amaliada prosecutor of the complaints filed by a group of 120 Bangladeshi workers

¹²³ *Chowdury*, at 110 (translation by the author).

¹²⁴ *Ibid.*, at 71.

¹²⁵ *Rantsev*, at 288.

¹²⁶ *Rantsev*, at 288; *L.E.*, at 6; *C.N. v United Kingdom*, at 69; and *Chowdury* at 116.

¹²⁷ *Chowdury*, at 122 and 127.

¹²⁸ *J. and Others*, at 114 and 117.

who were present the day of the shootings but filed a complaint with the police three weeks after the events. The Court finds that the dismissal represents a violation of the duty to investigate under Article 4 ECHR, since:

“By failing to ascertain whether the allegations of that group of applicants were well founded, the public prosecutor failed in his duty to investigate even though he had the factual evidence to suggest that the applicants were engaged by the same employers as the applicants who participated in the proceedings before the Assize Court and were working under the same conditions to which the latter were subjected.”¹²⁹

The Court finds that the prosecutor’s dismissal was wrong on two grounds. First, because the information was sufficient to trigger its duty to investigate. However, nothing in its decision shows that it examined and verified the trafficking allegations.¹³⁰ Indeed, irrespective of their presence the day of the shootings, the workers’ trafficking allegations referred to a prolonged exploitative situation, over many months, that warranted investigation per se. Secondly, the Court refers to the prosecutor’s main argument for dismissing the complaints, i.e. the fact that this group of workers filed the complaint three weeks after the shootings, which in his view demonstrated the lack of veracity of their allegations. Finding that argument untenable, the Court points at the prosecutor’s lack of knowledge of the human trafficking regulatory framework, which provides, inter alia, for the granting of a “recovery and reflexion period” of a minimum of thirty days to potential trafficking victims for them to recover and escape the influence of traffickers and/or to take an informed decision on whether to cooperate with the authorities.¹³¹

It is indeed appropriate for the Court to draw attention to the need to provide victims with time. Trafficked persons feel traumatized and afraid, and they lack confidence and proper understanding of what has happened and may still happen to them. They need sufficient time to recover and take informed decisions on what to do. However, it should be clarified that the three weeks that have elapsed in this case cannot be considered as a recovery and reflection period, since that period is to be granted by authorities once they identify a person as a victim or suspect a person might be one. It does not refer to the time that elapses before that suspicion arises. However, reference to it by the Court is still welcome to the extent that it highlights the lack of any requirement of immediacy in victim’s referral of their situation to authorities.

The second set of violations identified by the Court relates to the other group of workers, whose complaints were filed the day after the shootings and declared admissible. In that context, the Court finds a violation of Article 4(2) on a number of grounds. First, because the Patras Assize Court wrongly acquitted the accused because it confused two distinct purposes of exploitation for which trafficking may take place—forced labour and servitude—and applied to forced labour allegations the higher threshold of servitude, as has already been discussed in detail.¹³² In that context, it also notes

¹²⁹ Chowdury, at 120 (translation by the author).

¹³⁰ *Ibid.*, at 119–120.

¹³¹ *Ibid.*, at 121. Greek Law ([Law n. 4251/2014](#)) provides for a longer period, establishing a three months’ recovery and reflection period. See [GRETA, Reply to the Questionnaire from Greece, submitted on 16 June 2016, GRETA\(2016\)22](#), at 26.

¹³² See Part C(2).

with concern that the Court transformed the penalty of imprisonment for serious bodily injury imposed on two of the accused into a minor pecuniary penalty.¹³³ Secondly, the Court of Cassation's prosecutor arbitrarily refused to appeal in cassation against the acquittal under the human trafficking charges. On the face of the workers' lawyers claim that the Assize Court had not adequately examined the human trafficking charges, the public prosecutor simply dismissed the appeal without explanation, simply stating that "the conditions laid down by the law to form an appeal were not met".¹³⁴ Thirdly, the Court considers that the compensation granted to each victim —43 euros— is inappropriate, in light of states' obligation under Article 15 of the ETC to guarantee victims' right to compensation from their traffickers, as well as to take additional measures to guarantee compensation, which may include, among others, the establishment by the state of a compensation fund for victims.¹³⁵ In sum, the Court's assessment of the failures relating to the procedural limb of Article 4(2) is reasonable and well-argued.

(b) J. and Others

The circumstances of the trafficking situation in J. and Others are more complex. The fact that the trafficking cycle the victims were subjected to mainly took place in Asian and Middle East countries, and for only three days in Austria, undoubtedly made Austrian authorities' task of investigating and prosecuting much more difficult. However, this should not be taken as a justification to relieve Austria of its obligations too promptly. The Court examines compliance by Austria with its obligations under two perspectives. On the one hand, the duty to investigate the crimes allegedly committed abroad, and, on the other hand, the duty to investigate the events that took place in Austria.

(i) The duty to investigate the crimes allegedly committed abroad

On the first point, the Court finds that there was no obligation incumbent on Austria to investigate the applicants' recruitment in the Philippines or their alleged exploitation in the UAE. The Court finds that Article 4 of the Convention does not require states to provide for universal jurisdiction over trafficking offences committed abroad, since "the Palermo Protocol is silent of the issue of jurisdiction and the Anti-Trafficking Convention only requires states parties to provide for jurisdiction over any trafficking offence committed on their own territory, or by or against one of their nationals".¹³⁶ Indeed, the conclusion reached by the Court cannot be questioned. However, the

¹³³ Chowdury, at 124.

¹³⁴ *Ibid.*, at 125.

¹³⁵ *Ibid.*, at 126. See Article 15 (3) and (4) ETC.

¹³⁶ J. and Others, at 114. On the use of systemic integration under Article 31(3)(c) of the Vienna Convention on the Law of Treaties by the ECtHR when interpreting the ECHR, see M. Forowicz, *The Reception of International Law in the European Court of Human Rights* (OUP, 2010), at 43-58; and S. De Vido, "[States' Positive Obligations to Eradicate Domestic Violence: The Politics of Relevance in the Interpretation of the European Convention of Human Rights](#)", 6(6) *EJIL Reflections* (2017).

reasoning deserves a brief comment in relation to the Palermo Protocol, as well as a broader reflection on whether something more could have been added to this conclusion.

First, it is surprising that the Court, once again,¹³⁷ states that “the Palermo Protocol is silent of the issue of jurisdiction”. In fact, that silence is only apparent. The provisions that require states party to establish jurisdiction over trafficking offenses are set out in the mother convention, the Convention on Transnational Organized Crime (UNTOC),¹³⁸ as for all other provisions of a general character that are not specific to trafficking but concern all offenses established under the Convention and its Protocols: extradition, mutual legal assistance etc.¹³⁹ Indeed, UNTOC requires states to establish jurisdiction over trafficking offences committed on their own territory, while the establishment of jurisdiction over offenses committed by or against one of their nationals is optional.¹⁴⁰

Clearly, the conclusion reached by the Court on the absence of universal jurisdiction would have been the same. However, recognizing this element might lead to a separate conclusion. The UAE, as a state party to the Palermo Protocol, are under the obligation to investigate and prosecute the exploitation side of the applicants’ trafficking that happened in their territory, and Austria, also a state party, may legitimately raise that point using the Palermo Protocol as a legal basis for initiating cooperation. That obligation is reinforced by the Preamble to the Palermo Protocol that calls upon states to adopt a comprehensive international approach to trafficking in the countries of origin, transit and destination.¹⁴¹ On that basis, Austria might have been required to at least inform the UAE of the elements of suspicion concerning two of their nationals, and indicate its willingness to cooperate in any investigation that the UAE might consider necessary to carry out. If one of the main purposes of the Palermo Protocol is to promote international cooperation in preventing and prosecuting trafficking, with the ultimate aim of avoiding impunity, I would suppose that the least states parties should do is to inform another state party when it holds information on traffickers of its nationality and/ or residing in their country. While I am not saying that the probability that the UAE would have initiated an investigation was high, I argue that the possible failures of some states should never become a justification for other states to fail to comply with their obligations under international law.

(ii) *The duty to investigate the events that took place in Austria*

Essentially, the Court agrees with the two main arguments developed by Austria. First, the events that took place during three days in Austria did not amount to trafficking. Second, even if the events that took place in the Philippines, the UAE and Austria were considered as a continuum and would thus constitute trafficking, there is not much the Austrian authorities could have done in terms of

¹³⁷ See *Rantsev*, at 289.

¹³⁸ United Nations Convention against Transnational Organized Crime 2000, 2225 UNTS 209 (UNTOC).

¹³⁹ Art. 1 of the Palermo Protocol establishes that “2. The provisions of the Convention shall apply, mutatis mutandis, to this Protocol unless otherwise provided herein”. For an explanation, see [UNODC, The Legislative Guide for the Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children \(2004\)](#), at 253-255 and 272-275; and Gallagher, *supra* n. 22, at 73-74 and 379-380.

¹⁴⁰ Article 15.

¹⁴¹ Referred to in *Rantsev*, at 289.

investigation and prosecution.

The events that took place in Austria did not amount to trafficking

In relation to the first point, the Court considered that the assessment made by Austrian authorities that the events did not constitute trafficking did not appear to be unreasonable.¹⁴² I disagree with this statement. All reasons mentioned by the prosecutor to reach that conclusion and discontinue the investigation appear to be flawed. First, the prosecutor stated that no criminal action that might be qualified as trafficking had taken place in Austria “particularly because the offence had already been completed in Dubai”. How could the offence possibly be considered as completed if the victims continued to be harboured, moved and exploited and were only able to escape from that treatment on the third day of their stay in Austria? Until that time, the trafficking offence was certainly on-going.

Secondly, the following statement reveals the prosecutor’s lack of knowledge of both the regulatory framework and the reality of human trafficking: he considered that since the applicants were “[l]ooking after children, washing laundry, cooking food []”, it did not appear that they had been exploited in Austria, especially since they had managed to leave their employers only two to three days after their arrival in Vienna”. The prosecutor seems to ignore that what is relevant for qualifying the different types of labour exploitation under the definition of trafficking is not the type of duties the victims were carrying out, but the type of control that was exercised over them: whether they were subjected to threats and/or physical and verbal abuses, the degree of voluntariness of their work, the abuses in terms of long hours and insufficient pay, etc., elements that were quite clearly described by the Court in its next judgment, *Chowdury*, when qualifying the situation as forced labour, as has been discussed. If these are the elements that determine whether exploitation amounts to forced labour, servitude or slavery, one wonders why the prosecutor —and the ECtHR— failed to assess the constituent elements of the alleged exploitative situation. The events in Austria are described by the Court as follows:

“They were still required to work from approximately 5.00 a.m. or 6.00 a.m. until midnight or even later. The third applicant was regularly shouted at by her employer, for example if she failed to get all children ready early every morning. In addition, their employers woke the first applicant up at around 2.00 a.m. and forced her to cook food for them. Further, the first applicant was forced to carry the employers’ twenty suitcases into the hotel by herself. While the applicants were in Austria, their passports remained with their employers.”¹⁴³

On the last day, when a child went missing for some time, the Court reports that:

“One of the employers started screaming at the first and third applicants in a manner which the applicants had not experienced before. The first applicant found the level of verbal abuse extreme, and this was a particularly distressing and humiliating experience for her. The employer threatened to beat the third applicant, and said that “something bad” would happen to her if the child was not found safe and well.”¹⁴⁴

However, these elements were not examined in order to identify the type of exploitation the

¹⁴² *J. and Others*, at 116, with cross-references to 29 and 30.

¹⁴³ *Ibid.*, at 22.

¹⁴⁴ *Ibid.*, at 23.

applicants were subjected to.¹⁴⁵

In sum, I consider that the elements of trafficking for forced labour are all present, looking only at the events that took place in Austria. The applicants were moved into Austria and harboured there, through the use of verbal abuse and intimidation as well as the threat of physical violence, where a situation of control was also established through the holding of their passports – a typical feature of trafficking –, with the purpose of exploiting them in domestic work.¹⁴⁶ Even if the definition of trafficking does not require exploitation to take place, exploitation took place in Austria, since the applicants were, among others, required to work excessively long hours (18 to 19 hours every day) and to perform excessively heavy physical tasks.

Thirdly, the Vienna Regional Criminal Court found that the elements of trafficking were not met since the applicants only spent three days in Austria while “exploitation of labour must be committed over a longer period of time”. No such requirement exists under international or even Austrian law. As mentioned, for trafficking to take place, the exploitation does not even need to have started, the intention being sufficient. What is also surprising is that this argument was not at all taken into consideration when deciding to provide protection and social support to the three women: for social support measures, they were definitely trafficking victims, but for criminal prosecution purposes, they were clearly not trafficking victims.

Fourthly, to consider the fact that they escaped as an evidence that they were not exploited reveals, again, ignorance of the legal framework, in addition to a marked lack of logic and human compassion. There is no legal basis for that assessment, neither in law nor in practice¹⁴⁷. In fact, the level of freedom of movement of a person subjected to exploitation is an element that should be taken into consideration when assessing the *type* of exploitation the person was subjected to, but not *whether* it was subjected to exploitation or not. As clearly explained when examining the concept of forced labour as described in *Chowdury*, freedom of movement generally exists in cases of forced labour, while it is greatly limited in cases of servitude (and even more so in cases of slavery).¹⁴⁸

Nothing could have been done by Austria even if events had been viewed as a continuum

International judicial cooperation is one of the main purposes of international anti-trafficking instruments. While Austria argued that, even if they had looked at the facts as a continuum, there is not much judicial authorities could have done, and the ECtHR agreed with that position, I disagree with this conclusion. In cases of transnational trafficking, the Court established that “the need for a full and effective investigation covering all aspects of trafficking allegations from recruitment to exploitation is indisputable”,¹⁴⁹ and that each state must investigate the part of the alleged trafficking offense that took part in its territory.¹⁵⁰ In that context, states should not lose sight of the fact that in

¹⁴⁵ The gender aspects of this failure are addressed in the conclusion.

¹⁴⁶ In the same vein, see *J. and Others* Concurring Opinion, *supra* n. 83, at 54.

¹⁴⁷ In *Rantsev*, Ms Rantseva had escaped from her traffickers. In *Hacienda Brasil Verde*, two of the applicants had escaped from a situation that the IACtHR qualified as slavery. Clearly, in none of these cases was the fact of being able to escape given any relevance.

¹⁴⁸ See Part C(2).

¹⁴⁹ *Rantsev*, at 307.

¹⁵⁰ *Ibid.*, at 207 and 289.

cross-border trafficking, the events that took place in their territory are part of a broader cycle and that obtaining information on that overall cycle might be necessary for properly understanding the events that took place in their territory.

This leads us to my main point. As rightly identified by the Court, “Member States must take such steps as are necessary and available in order to secure relevant evidence, whether or not it is located in the territory of the investigating State”.¹⁵¹ Therefore, states have an obligation to seek cooperation from other states where relevant evidence might be found. On that basis, in *Rantsev* the Court found Cyprus to be in breach of its obligation to initiate transnational judicial cooperation in order to obtain evidence located in Russia.¹⁵² In *L.E.*, a case that is even more relevant since it involved a non-European country (Nigeria) where it was believed the perpetrator had returned to, the Court similarly found Greece responsible for the failure to seek cooperation with Nigeria for the purpose of locating and arresting the alleged trafficker.¹⁵³ Why did it not apply that same reasoning to Austria? Instead, the Court failed to refer to this obligation, and simply agreed with Austria’s justification that cooperation would not have had reasonable prospects of success, including because there is no mutual assistance agreement between the two countries.

This is a surprisingly weak engagement of the Strasbourg Court with states’ duties to investigate and cooperate in cross-border trafficking, a point on which the Court had been much more demanding in previous cases. Again, prospects of success in judicial cooperation should not be used as a justification for failing to comply with essential cooperation duties in cross-border trafficking. On the contrary, it should form the basis for exploring other avenues, both at the bilateral and multilateral level. In this context, I fully support judges Albuquerque and Tsotsoria’s view that when bilateral judicial cooperation fails, there are other international legal avenues that allow judicial authorities to promote investigation and the possible detention of alleged traffickers, such as the international warning notice systems and other tools used by EUROPOL, FRONTEX and INTERPOL.¹⁵⁴ None of them were used by Austrian judicial authorities.

Finally, it is hard to understand how the Court supported the prosecutor’s argument that he has a margin of appreciation when deciding which cases to pursue. Aside from the fact that Austrian law does not seem to grant that margin,¹⁵⁵ the Court has consistently held that offenses under Article 4 should be investigated and prosecuted *ex officio*.

The only argument we can agree with concerns the difficulties linked to the fact the applicants alerted Austrian authorities almost a year after the events, which considerably reduced the chances of succeeding in the investigation and prosecution. However, this does not alter the duties we have just mentioned: judicial cooperation from the UAE and from international law enforcement organizations should have been sought, and no margin of appreciation exists as to whether or not to prosecute trafficking. In that context, we are of the view that the investigation should have been stayed instead

¹⁵¹ *Ibid.*, at 241.

¹⁵² *Rantsev*, at 241.

¹⁵³ *L.E.*, at 85.

¹⁵⁴ *J. and Others Concurring Opinion*, *supra* n. 83, at 57.

¹⁵⁵ *Ibid.*, at 58.

of being discontinued,¹⁵⁶ which would have maintained the case “active” and would hopefully have allowed—and continue to allow— intercepting the alleged perpetrators if travelling back to Austria and, hopefully, to any EU country. If EU judicial cooperation is there to function, what should not be tolerated is that, with the trafficking indicia collected, EU countries would let these suspected traffickers travel again freely through UE soil without activating the relevant mechanisms to stop and interrogate them. Or should Austria and the rest of EU countries allow them to continue trafficking domestic workers, including in the EU territory?

(c) *Partial conclusion*

The Court’s reasoning under this limb leaves the impression that it has been too benevolent with Austria. Judicial authorities’ failures in this case, although not as serious as the ones identified in *Chowdury*, might still have been qualified as a violation of the procedural duty to investigate trafficking under Article 4 ECHR. It is also quite striking that the Court reviewed the conformity of Austrian authorities’ conducts in light of its national law instead of assessing it against international law requirement,¹⁵⁷ in particularly when considering that the assessment of the adequacy of its national law was entirely omitted. Ultimately, this decision sends a very weak message to states in relation to judicial cooperation duties in transnational human trafficking cases.

(E) FINAL CONCLUSION

Labour exploitation and trafficking for that purpose remain a huge challenge for European states. When a EU agency urges its member states to put an end to “the current climate of implicit acceptance of severe labour exploitation” in the EU,¹⁵⁸ the extent and gravity of the phenomenon are laid bare. As the last judicial instance for human rights’ protection in the European continent, the Strasbourg Court has a key role in pointing to states’ policies and conducts that allow trafficking for labour exploitation to take place and to last in the face of tolerance and impunity.

Has labour exploitation been addressed with the required forcefulness in these two latest judgements? I argue it has not. Of the two decisions, *Chowdury* deserves to be praised for some important contributions, including for highlighting migrants’ irregular status as a vulnerability factor and for recovering the broad proactive approach to operational protective measures it had taken in *Rantsev*. However, in the overall negative aspects prevail, both on the definitional scope of Article 4 and on the positive obligations that Article entails.

On the one hand, the Court blurs the boundaries between the concepts of human trafficking and forced labour. It is welcome that trafficking be subsumed under Article 4, but not if this is done at the expenses of the autonomy of the forced labour prohibition, which is of utmost importance to allow the numerous forced labour cases where trafficking cannot be established to be prosecuted and

¹⁵⁶ In the same vein, *ibid*, at 59. I disagree, however, with the conclusion to vote for the finding of no violation despite the many shortcomings identified.

¹⁵⁷ *J. and Others*, at 116–117.

¹⁵⁸ FRA, *supra* n. 34, at 3.

sanctioned. On the other hand, cross-border investigation duties and the preventive aspects of states' positive obligations are not properly addressed. In relation to the latter, in *J and Others* the Court's totally curtails the possibility of looking at the systematic shortcomings from a pre-emptive perspective. In *Chowdury*, it only reviews the criminal law framework, but not the way immigration and labour laws promote trafficking and fail to both scrutinize labour conditions and guarantee migrants' rights. As Chuang rightly underlines:

“Conveniently obscured is the need to address the reality that trafficking is often labor migration gone horribly wrong and that it is at least partly due to the combination of tightened border controls, which have created a growing market for clandestine migration services, and lax labor laws, which permit employers and recruiters to coercively exploit their workers with impunity.”¹⁵⁹

Hopefully, the Court will in future cases provide a stronger response to the systemic aspects of this phenomenon, scrutinizing states' role in creating or maintaining “structures that permit, if not encourage, coercive exploitation of workers, particularly migrants”.¹⁶⁰

Trafficking is not a question of few criminals deceiving defenceless victims, it is about well-established economic structures that promote and maintain exploitation of the most vulnerable thanks to states' inaction, tolerance or complicity. In *Rantsev*, the Court had embraced this broad understanding of trafficking, when it established that prevention is about addressing state passivity and requiring action in the face of immigration regulations that provide criminal networks and companies easy ways to traffic people and ideal vulnerability conditions - linked to immigration status and lack of rights - for maintaining them in a situation of exploitation.¹⁶¹

Since then, the Court is steadily but inexorably abandoning that path, eroding the holistic approach initially taken. This is an extremely serious concern not only when considering the need to provide responses that are in line with the reality of today's human rights abuses, but also because it is betraying the human rights-based approach to trafficking enshrined in European law, as well as contradicting its own positive obligations doctrine and the broader due diligence duties established under international human rights law. The Special Rapporteur on trafficking and the Special Rapporteur on violence against women have referred to the “need to create a framework for discussing the responsibility of states to act with due diligence, by separating the due diligence standard into two categories: individual due diligence and systemic due diligence.”¹⁶² Will the Strasbourg Court contribute to that effort, insisting on state's systemic due diligence duties, or will it contribute to restrict states duties in the area of human trafficking, forced labour, servitude and slavery to a

¹⁵⁹ Chuang, *supra* n. 49, at 638. In a similar vein, see the in-depth analysis by Gallagher and her proposals for addressing migration-related exploitation in Gallagher, *supra* n. 7, at 65-70.

¹⁶⁰ J. O'Connell Davidson, “Absolving the State: The Trafficking-Slavery Metaphor”, 14 *Global Dialogue* (2012) 38, at 31 (cited in Chuang, *ibid.*, at 638).

¹⁶¹ In the same vein, Thomas notes that “the focus of policy solutions tends to range from criminal law enforcement to the protection of the human rights of victims, but with little or no direct discussion of the destructive impact of strict immigration law”. For an analysis of this impact, see C. Thomas, “Immigration Controls and “Modern-Day Slavery”, *Cornell Legal Studies Research Paper No. 13-86* (2003).

¹⁶² Special Rapporteur on trafficking in persons, *supra* n. 88, at 20; and *Special Rapporteur on violence against women, its causes and consequences, Report to the Human Rights Council, A/HRC/23/49* (2013), at 70 and 71.

comfortable minimum?

Finally, a couple of reflections on the role discrimination plays in the adjudication of trafficking cases. Firstly, one wonders whether the decision to find Greece responsible for violating its obligations with respect to the Bangladeshi men while no violation was found to have occurred with respect to the Filipino women may have something to do with gender. After reading *J. and Others*, I was left with the impression that domestic exploitation of women had been treated as being less serious, in some way normalized. I wonder, why did the Court fail to explore the role gender may have played in judges' decision-making at the national level? It has already been mentioned that European law requires state to adopt gender-specific strategies in order to prevent, recognize and combat trafficking in women. Therefore, attitudes such as the one shown by the Austrian prosecutor that end up normalizing women working 18-19 hours per day in domestic work under the menace of violence and with their passport being taken away since they "only clean up and take care of children" are to be strongly condemned. It is hoped that the Court will eventually address the gender-aspects of trafficking, including the scourge of gender discrimination and gender stereotyping within the judiciary,¹⁶³ as an important aspect of states' positive obligations under Article 4 ECHR. Discrimination based on multiple grounds—also referred to as intersectionality—as identified in *B.S. v. Spain*,¹⁶⁴ one of the few cases where the Court acknowledged the intersecting gender, racial and "social status" stereotyping in relation to an assault on a young Nigerian woman practicing prostitution and her lack of access to justice, should also be considered as a possible obstacle for trafficking victims to access justice.

And finally, might the Court itself have unconsciously fallen into another sort of stereotyping, i.e. the presumption that northern European states are addressing trafficking more effectively than southern European states? I hope that the Court will soon find an opportunity to contradict this inference through submitting northern and southern European states to the same level of scrutiny. This would be another good reason in favour of using the same analytical framework when reviewing how states fulfil their positive obligations under Article 4: in addition to promoting legal clarity for all stake-holders, it would greatly contribute to dispel any doubts that double standards might have been used.

¹⁶³ See Timmer and the CoE Report, *supra* n. 8.

¹⁶⁴ *B.S. v. Spain*, Application n. 47159/08, Merits and Just Satisfaction, 24 July 2012. See [K. Yoshida, "Towards Intersectionality in the European Court of Human Rights: The Case of B.S. v Spain", 21 Feminist Legal Studies \(2013\) 195–204.](#)