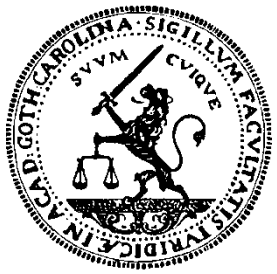

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Unfolding Slavery

A comparative analysis of definitions and positive obligations in the IACtHR case of *Hacienda Brasil Verde Worker v. Brazil* and the ECtHR case law on slavery and forced labour

JAMM07 Master Thesis

International Human Rights Law
30 higher education credits

Supervisor: Vladislava Stoyanova

Term: Spring 2018

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Summary

In October 2016, the IACtHR issued the judgment of the case of *Hacienda Brasil Verde Workers v Brazil*. The case concerns the subjection of 85 workers to slavery-like conditions in a private-owned livestock farm located in the north of Brazil. *Brasil Verde Workers v. Brazil* was the first judgment of the IACtHR on the prohibition of slavery of article 6 ACHR. Moreover, it was also the first time that the court found a violation of article 6 ACHR, that prohibits slavery, servitude, forced and compulsory labour, slave trade and trafficking in women, due to a harm caused by a private party.

This thesis analyses *Brasil Verde Workers v. Brazil* and demonstrates that the judgment is unique as the court engaged with the definition of slavery of article 6 ACHR, elucidating what is the essence of the abuse as well as that it can cover contemporary forms of slavery. Moreover, the judgment spelt out a concise set of positive obligations that states must undertake to ensure the rights enrishned in article 6 ACHR. Notwithstanding that, some crucial aspects of the judgment possess problematic features and lack clarity thus, presenting remaining challenges to the IACtHR for the protection of the rights envisaged in article 6 ACHR.

To critically engage with the judgment, the thesis compares *Brasil Verde Workers v. Brazil* with the ECtHR case law under article 4 ECHR concerning two aspects: definition of the abuses and positive obligations. Therefore, it first explains the ECtHR case law on definitions and positive obligations under article 4 ECHR, while pointing out deficiencies on the court's reasoning. Thereafter, it explains definitions and positive obligations enshrined in *Brasil Verde Workers v. Brazil*. Subsequently, it addresses what are the commonalities and distinguishing features of the IACtHR case to then conclude, in relation to the ECtHR case law, what are the novelties brought by the IACtHR on the prohibition of slavery, servitude, forced labour and human trafficking and what are future challenges for the court to foster the protection and promotion of such rights.

Preface

First and foremost, I would like to thank my supervisor Vladislava Stoyanova for her valuable guidance and academic support at every stage of my thesis. I would also like to express my sincere gratitude to the Swedish Institute, for providing me with the unique opportunity to pursue a Master of Laws at Lund University.

I am also thankful to my friends Ana Maria, Victoria, Erlina and Get. I feel lucky to have shared this experience with such bright, passionate and kind people like you. I also own gratitude to Juan, whose friendship has helped me since my first days in Sweden. I would like to thank my dear friend Ana, who has been supportive and thoughtful throughout this process even with an ocean of distance away.

I owe special gratitude to my mother, father and brother whose constant support has always encouraged me, *obrigada!*

My last thanks are to Jonathan for this everlasting support and companionship.

Abbreviations

ACHR	American Convention on Human Rights
ACHPR	African Commission on Human and Peoples Rights
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICC	International Criminal Court
ICTY	International Criminal Tribunals for the Former Yugoslavia
SCSL	Special Court for Sierra Leone
UDHR	Universal Declaration of Human Rights

1 Introduction

1.1. General Background

Slavery was outlawed by the 1926 Slavery Convention.[1] Thereafter, human rights treaties have reaffirmed its prohibition. International instruments such as the UDHR and the ICCPR have dispositions prohibiting slavery. Regional human rights conventions also contain the right not to be subjected to slavery as well as servitude and forced and compulsory labour.[2] Additionally, enslavement as a crime against humanity is an international crime prescribed by statutes of international criminal courts.[3]

Despite a long-standing prohibition, the number of international court's judgments on the prohibition of slavery, servitude and forced labour is considerably low. Allain points out that 'slavery as a violation of general international law and international human rights law or enslavement as an international crime was not tried during the Twentieth Century'.[4] The first cases on slavery and practices similar to slavery were tried before international courts only in the twenty-first century, with judgments from the ECtHR, ECOWAS Court of Justice, the ICTY and the SCSL.[5]

Regional Human Rights Courts also have a small number of cases on the prohibition of slavery, servitude, forced and compulsory labour. The ECtHR has only a few cases on servitude and forced labour and the court has never found a state in violation of the prohibition of slavery of article 4 ECHR.[6] The ACHRPR has issued only one decision on slavery and the African Court on Human and People's rights has never addressed the issue.[7]

[1] Slavery Convention (adopted 25 September 1926, entered into force 9 March 1927) (1926 Slavery Convention) 3952 LNTS 77

[2] See Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217(III) (UDHR) article 4; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) article 8; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) article 4; American Convention on Human Rights 'Pact of Jan José of Costa Rica' (entered into force 7 August 1978) OAS Treaty Series N 36 (ACHR) article 6; African Charter on Human and People's Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982(21 ILM 58 (African Charter)

[3] See Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002) UN Security Council, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827 (1993) (ICTY Statute), article 5(c); Rome Statute of the International Criminal Court (Last Amendment 2010) ISBN no 92-922-7-227-6 (1998) (ICC Statute), article 7(1)(c); Statute of the Special Court for Sierra Leone, UN Security Council 1315 (2000) 2178 UNTS 138 (16 January 2002) (SCSL Statute), article 2(c); see also chapter 2.

[4] Jean Allain, *Slavery in International Law*: of human exploitation and trafficking (Martinus Nijhoff Publishers 2013) 118

[5] ibid, see also *Prosecutor v Kunarac et al* IT-96-23 & IT-96-23/1-A, Appeal Chamber (ICTY, 12 June 2002); *Hadijatou Mani Karaou v the Republic of Niger* no. ECW/CCJ/JUD/06/08 (27 October 2008); *Brima el als*. SCSL-2004-16-T, Trial Chamber (20 June 2007). See also chapter 2

[6] See Chapter 2

[7] *Malawi African Association and Others v Mauritania*, African Commission on Human and People's Rights Comm. Nos. 54/91,61/91, 98/93, 164/97 – 196/97 and 210/98(200)

The IACtHR delivered its first judgment on the prohibition of slavery in October 2016: *Hacienda Brasil Verde Workers v. Brazil*.[8] The judgment dealt extensively with the definition of slavery under article 6 ACHR. Additionally, the IACtHR defined servitude, forced labour, slave trade and trafficking in women, which are the other prohibitions of the said article. Moreover, the judgment also determined what obligations states must undertake under article 6 ACHR.

2.2. Status of Research

The judgment of *Brasil Verde Workers v. Brazil* has been poorly explored by human rights scholars. The few doctrinal commentaries on the case are mostly explanatory on the court's reasoning [9] or access the implications of the judgment to the context of slavery in Brazil.[10] Therefore, international human rights law scholarship lacks in-depth studies on the judgment. Additionally, there is no comparative analysis of the IACtHR case with the ECtHR case law on article 4 ECHR. It must be mentioned, that there are, however, many comparative studies of the ECtHR and the IACtHR jurisprudence. Such studies relate, however, to other rights such as migrants' rights, prisoner's rights or issues such as interpretative approaches.[11]

Moreover, international human rights law scholarship on the prohibition of slavery is also considerably underdeveloped. Allain, however, has written on the prohibition of slavery in international law.[12] His contribution stands out for the explanation of the 1926 Slavery Convention definition of slavery.

The ECtHR has attracted attention for its judgments of article 4 ECHR relating to trafficking in persons.[13] Consequently, most scholarship work on article 4 ECHR has focused on the introduction of trafficking in persons within the scope of the article.[14]

[8] *Hacienda Brasil Verde Workers v. Brazil*, Preliminary Objections, Merits, Reparations and Costs, Series C No. 318. (IACtHR, 20 October 2016)
[9] *See* Plant R, *Workers of the Hacienda Brasil Verde v Brazil*: Putting the Judgment in Perspective [2017] Volume 3, issue 3, International Labour Rights Case Law 387
[10] *See* Rebecca J. Scott, Leonardo Augosto de Andrade Barbosa & Carlos Henrique Borlido Haddad, How Does the Law Put a Historical Analogy to Work: Defining the Imposition of 'A Condition Analogous to That of a Slave' in Modern Brazil [2017] *Volume 13, issue* 1 *Duke Journal of Constitutional Law & Public Policy* 46
[11] *See* among others Francesco Seatzu; Simona Fanni, A Comparative Approach to Prisoners' Rights in the European Court of Human Rights and Inter-American Court of Human Rights Jurisprudence [2015] Volume 44, Issue 1, Denv. J. Int'l L. & Pol'y 21; Pablo Contreras, National Discretion and International Deference in the Restriction of Human Rights: A Comparison between the Jurisprudence of the European and the Inter-American Court of Human Rights [2012] Volume 11, issue 1, Nw. U. J. Int'l Hum. Rts 28; Marie-Bénédicte Dembour, *When Humans Become Migrants*: Study of the European Court of Human Rights with an Inter-American Counterpoint (OUP 2015)
[12] See Allain, *Slavery in International Law* (n 4); Jean Allain, 'Rantsev v Cyprus and Russia: The European Court of Human Rights and Trafficking as Slavery' [2010] 10 Hum. Rts. L. Rev. 546
[13] *See* section 2.5. It is worth mentioning that this thesis uses trafficking in persons as a synonym to human trafficking and it refers to both terminologies.
[14] See inter alia Allain, *Rantsev v Cyprus and Russia* (n12); Valentina Milano, The European Court of Human Rights' Case Law on Human Trafficking in Light of *L.E. v Greece*: A Disturbing Setback? [2017] Volume 17, issue 4 *Human Rights Law Review* 701; Tenia Kyriazi, Trafficking and Slavery. The Emerging European Legal Framework on Trafficking in Human Beings – Case-law of the European Court of Human Rights in perspective [2015] Volume 4, issue 1 International Human Rights Law Review 33

Stoyanova departs from this pattern and examines the ECtHR definition of slavery, servitude and forced labour.[15]

The positive obligation doctrines of the ECtHR have long been under the radar of international human rights law scholars. Studies on positive obligations under article 4 ECHR have mainly focused on positive obligations relating to trafficking in person.[16] Stoyanova's work also departs from such trend and provides clarifications and valuable critics of positive obligation under article 4 ECHR.[17] The positive and negative obligation doctrine of the IACtHR is discussed by the works of the IACtHR judge Ferrer MC Gregor.[18] Additionally, Lavrysen clarifies the IACtHR approach to positive obligations.[19]

Therefore, I rely on the above-mentioned work of Stoyanova and Allain to understand the ECtHR definitions of article 4 ECHR and critically approach the IACtHR definitions of article 6 ACHR. Concerning positive obligations, I also rely on Stoyanova's work to explain the ECtHR positive obligation doctrine. To explain and critically engage with the positive obligations doctrine of the IACtHR I consider both Lavrysen and Stoyanova's work.

2.3. Purpose

Considering the status of research, the purpose of this thesis is to fill a scholarship gap by analysing the case of *Brasil Verde Workers v. Brazil* from an international human rights law perspective. This thesis attempts to reach two objectives: first, it intends to determine if *Brasil Verde Workers v. Brazil* has brought novelties for the prohibition of slavery, servitude, forced labour and trafficking in persons in international human rights law. Secondly, it intends to reveal future challenges for the IACtHR in relation to these prohibitions that, if considered, can improve the protection against the above-mentioned abuses.

2.4. Research Questions

i. What are the definitions and positive obligations under article 4 ECHR?
ii. What are the deficiencies of the ECtHR jurisprudence under article 4?
iii. What are the definitions and positive obligations under article 6 ACHR according to the judgment of *Brasil Verde Workers v. Brazil*?

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[15] Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and State's Positive Obligations in European Law* (CUP 2017) 280

[16] See Pati Roza, States' Positive Obligations with Respect to Human Trafficking: The European Court of Human Rights Breaks New Ground in Rantsev v. Cyprus and Russia, Boston University International Law Journal (2011) 29 B.U. Int'l L.J. 779; Ryszard Piotrowicz, States' Obligations under Human Rights Law towards Victims of Trafficking in Human Beings: Positive Developments in Positive Obligations [2012] 24 International Journal of Refugee Law 181.

[17] Stoyanova (n 15)

[18] Eduardo Ferrer Mac-Gregor, La obligación de 'respetar' y 'garantizar' los derechos humanos a la luz de la jurisprudencia de la Corte Interamericana [2012] 10 Estudios Constitutionales: Revista del Centro de Estudios Constitucionales 141

[19] Laurens Lavrysen, Positive Obligations in the Jurisprudence of the Inter-American Court of Human Rights [2014] Inter-American and European Human Rights Journal 94

iv. What are the similarities and differences between the ECtHR and IACtHR concerning definitions and positive obligations under the prohibition of Slavery, Servitude and Forced Labour and Human trafficking?
    a. Did the IACtHR innovates positively and overcome deficiencies of the ECtHR case law?
    b. What are the future challenges for the IACtHR? Does it repeat deficiencies of the ECtHR case law or additionally, does the comparison with the ECtHR point out for any problematic features of the IACtHR review of article 6 ACHR?

2.5. Method and Material

The method used in this thesis corresponds to a *'classic' comparative analysis* between two human rights systems. As such, the thesis will compare-and-contrast the IACtHR and the ECtHR approach to the prohibition of slavery, servitude, forced and compulsory labour and trafficking in persons, identifying *crucial differences and commonalities*. The comparative analysis will take shape of a 'lens' comparison. Therefore, by comparing *Brasil Verde Workers v. Brazil* to the ECtHR case law of article 4 ECHR and scholarship critics to this ECtHR jurisprudence this thesis will challenge the IACtHR approach to the protection against the above-mentioned abuses. Additionally, through this comparison, the thesis will reveal novelties brought by the IACtHR to the prohibition of slavery, servitude, forced labour and trafficking in persons.

Accordingly, the *primary source of material* corresponds to the case law of the ECtHR and IACtHR. My *objects of analysis* are the ECtHR case law under article 4 ECHR and the IACtHR case law on article 6 ACHR. However, the jurisprudence of both courts relating to other rights, such as the rights to life, prohibition of torture and ill-treatment and right to private and family life are accessed to understand different features of the definitions and positive obligations under articles 4 ECHR and 6 ACHR.[20]

International treaties are also a primary source of material of this thesis. Besides the ACHR and the ECHR, other treaties such as the 1926 Slavery Convention and the ILO Forced Labour convention are crucial to understanding the definitional scope of articles 4 ECHR and 6 ACHR. Additionally, other international instruments and jurisprudence of other international courts are also scrutinized. Moreover, the *secondary source of materials* used in this thesis corresponds to international human rights law scholarship.

2.6. Delimitations

Important clarifications must be made on the delimitations of the comparative analysis between the IACtHR and the ECtHR. Firstly, this thesis does not intend to address the *interaction* between the ECtHR and the IACtHR. There is to say that the purpose of the analysis is not to understand the influence of the jurisprudence of one court over another.

Instead, the analysis will focus on accessing the case of *Brasil Verde Workers v. Brazil* in relation to the ECtHR case law and, accordingly, assess positive innovations and flaws in the IACtHR's reasoning.

Additionally, it is beyond the scope of this analysis to address empirical implications of the judgment to the national context. Moreover, the present analysis focus on *legal definitions and positive obligations* under article 6 ACHR. It does not attempt to understand the forms of exploitations in hand outside the domain of international human rights law.

2.7. Disposition

Chapter 2 will explain the ECtHR definition of slavery, servitude and forced labour and the relationship between them. Moreover, it will describe deficiencies of the ECtHR 's definitions. Additionally, the chapter presents critics on the inclusion of trafficking into the definitional scope of article 4 ECHR. *Chapter 3* explains positive obligations under article 4 ECHR as well as jurisprudential flaws concerning positive obligations identified by human rights scholars.

Chapter 4 will turn to the definitions of article 6 ACHR enrishned in the judgment of *Brasil Verde Workers v. Brazil*. The chapter will first explain the court's definition of slavery, servitude and forced labour as well as the relationship between them. Moreover, it describes the court's reasoning on the prohibition of slave trade and traffic in women. Subsequently, *Chapter 5* will address positive obligations under article 6 ACHR identified in the judgment of Brasil Verde Workers v. Brazil.

At last, *Chapter 6* will present a comparative analysis of *Brasil Verde Workers v. Brazil* and the ECtHR case law under article 4 ECHR. It first explains the similarities and differences of both courts in relation to definitions and positive obligation to, subsequently, present innovations of the IACtHR for the protection against slavery, servitude, forced labour and human trafficking as well as future challenges to the court.

2 Definitions and Challenges under Article 4 ECHR

Article 4 of the European Convention on Human Rights[21] guarantees Freedom from slavery, servitude, forced or Compulsory Labour. Article 4(1) provides the absolute prohibition of slavery and servitude while Article 4(2) prohibits Forced or Compulsory Labour. Article 4(3) by its turn, delimits the content of the above paragraph, by establishing situations that do not constitute forced or compulsory labour.

Freedom from Slavery and Servitude of article 4(1) is an absolute right. Pursuant to article 15(2) of the ECHR, the freedoms of article 4(1) cannot be derogated from in time of war or public emergency.[22] Article 15(2), however, allows derogations from the prohibition of forced and compulsory labour. Despite that, the ECtHR has held that there is a general and absolute prohibition of forced or compulsory labour.[23] The absoluteness of article 4(3) is unclear in the ECtHR case law. However, it can be said that 'from a purely formal perspective'[24] article 4(2) is not an absolute right.[25]

The ECHR does not prescribe the meaning of the four prohibitions of article 4. Thus, in the present chapter, I will explain how the ECtHR has defined them through the analysis of the court's case law. I will focus on cases that article 4 dealt with interpersonal harm.[26] Until the present day, there are only seven cases of such nature: *Siliadin v. France*, *Rantsev v. Cyprus and Turkey*, *M. and Others v. Italy and Bulgaria*, *CN and V. v. France*, *CN v. the UK*, *J., and Others v. Greece and Chowdury and Others v. Greece.* I will scrutinize these cases, describe the court's reasoning, the definitions of the prohibitions and how they relate to each other. I will also point out relevant critics and challenges made in Human Rights Law Scholarship to the definitional scope of article 4.

2.1 Definition of Slavery

The first time that the ECtHR dealt with the definition of slavery was in the case *Siliadin v. France*[27]. The case concerned a Togolese national that lived in France. She was an unpaid housemaid for Mr and Mrs D and, subsequently, of Mr and Mrs B Siliadin worked 13 hours per day, 7 days a week and received no salary for it. Moreover, she had her passport confiscated by her employees and her migration status was irregular. In 1998, a neighbour that was aware of her situation reported the case to the French Committee against Modern Slavery. Criminal proceedings were brought against Mr and Mrs B for obtaining unpaid service of a vulnerable person and subjecting a person to working and

[21] ECHR (n 2)
[22] David Harris, Michael O'Boyle, Edward Bates, and Carla Buckley, *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights* (3rd edn, OUP 2014 ,3rd edn) 19
[23] *Van der Mussele v Belgium* App no. 8919/80, (ECtHR, 23 November 1983), para. 32
[24] Stoyanova (n 15) 280
[25] ibid.
[26] Harm was caused by a private party and not by the state.
[27] *Siliandin v France* App no 73316/01, (ECtHR, 26 July 2005)

living conditions incompatible with human dignity.[28] The final judgment acquitted Mr and Mrs B. from criminal charges but it ordered financial compensation in 'respect of arrears of salary, notice period and holiday leave'.[29]

In *Siliadin,* the ECtHR adopted the definition of slavery as laid down on the 1927 Slavery Convention[30] and held that 'slavery is the status or condition of a person over whom any or all of the powers attaching to the right of legal ownership are exercised'.[31] The court noted that this definition corresponded to the 'classic meaning of slavery as it was practised for centuries'[32] and concluded that:

> Although the applicant was deprived of her personal autonomy, the evidence does not suggest that she was held in slavery in the proper sense, in other words, that Mr and Mrs B exercised a genuine right of legal ownership over her thus reducing her to the status of an 'object'.[33]

In the above-mentioned paragraph, the court refers to '*legal* ownership' and '*status* of an object'. Both these terms impel the understanding of slavery as 'ownership over another person sanctioned by a legal system.'[34] Although the judgment has been interpreted differently,[35] it can be argued that slavery was understood as a *de jure* situation.

In the case of *Rantsev v. Cyprus and Turkey,*[36] the ECtHR revisited its jurisprudence on slavery. The factual circumstances of *Rantsev* will be dealt with in *section 2.5*. of this chapter. In *Rantsev*, the court held that the 'traditional concept of slavery has evolved to encompass various contemporary forms of slavery based on the exercise of any or all of the powers attaching to the right of ownership'.[37] It can be said that in the judgment, the ECtHR departed from understanding that slavery implies a 'genuine right of legal ownership' to acknowledge 'that slavery can cover forms of de facto abuses'.[38] In spite of such changes, the court did not characterize the factual circumstances of the case as slavery. It found that the applicant was subjected to trafficking in persons and that such conduct falls within the scope of article 4.

The changes in the definition of slavery indicated in *Rantsev* were later confirmed in the case *M. and Others v. Italy and Bulgaria.*[39] The case was brought to the court by three Bulgarian nationals of Roma ethnic origin. They claimed, among other things, that both Italy and Bulgaria violated article 4 as one of the applicants was trafficked to Italy and

[28] ibid para. 20.
[29] ibid para. 45.
[30] 1926 Slavery Convention (n 1)
[31] ibid para. 122.
[32] ibid.
[33] ibid.
[34] Stoyanova (n 15) 246
[35] ibid.
[36] *Rantsev v Cyprus and Russia* App no. 25965/04 (ECtHR, 7 January 2010)
[37] ibid para. 280.
[38] Stoyanova (n 15) 246.
[39] *M. And Others v Italy and Bulgaria* App no. 40020/03 (ECtHR,31 July 2012)

forced to marry. After marrying, she was forced to take part in organised crime, constantly beaten, raped and threatened with death.[40]

In the judgment, the ECtHR determines that slavery entails 'the exercise of a genuine right of ownership and reduction of the status of the individual concerned to an object'.[41] If compared with the above-mentioned passage of *Siliadin*,[42] it is evident that the court does not mention the terms '*legal* ownership' and '*status* of an object'.[43] It thus has been argued that in *M. and Others* the court implicitly recognized that slavery can cover forms of *de facto* abuses.[44] Despite such changes, the definition of slavery was only mentioned in the judgment without any assessment weather if the factual circumstances amounted to it. In fact, the court found that there was not enough evidence supporting the complaint of trafficking in persons and, therefore, that the complaint under article 4 was inadmissible.[45]

Even though the ECtHR has engaged with the concept of slavery and has demonstrated some positive changes in recognising that slavery can cover *de facto* abuses, the term is still defined in vague terms by the court. Perhaps due to the lack of clarity of what constitutes slavery or even lack of willingness on finding such violation, until the present day the ECtHR has never characterized a situation as slavery.

Allain criticizes the ECtHR for its unwillingness to engage with the 1926 Slavery Convention.[46] He argues that international courts have 'struggled with the concept of slavery and they lack established jurisprudence and doctrinal studies to base their findings.[47] The author explains that even though the 1927 Slavery Convention definition has been accepted in many international courts:

> [T]here appears to be some coalescing of an understanding of what slavery means in law, it has come with reference to the Kunarac case before the ICTY, as each of the other international courts have taken this case as the basis for formulating their approach to the issue'. While each court acknowledges the definition of enslavement/slavery turns on the exercise of any or all of the powers attaching to the right of ownership, in each instance where a court makes referred back to Kunarac, it quotes sections of the Judgment which do not truly address the definition of slavery.[48]

Allain sustains that the ECtHR when accessing the definition of slavery refers the *Kunarac indicia* of slavery, which are 'control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape,

[40] ibid para. 7-18; 129
[41] ibid, See also *Siliadin v France* (n 27) para. 122
[42] ibid.
[43] See Stoyanova (n 15) 247
[44] See Stoyanova (n 15) 247
[45] *M. And Others v Italy and Bulgaria* (n 39) para. 153
[46] Allain, *Slavery in International Law*
[47] ibid 118.
[48] ibid 119.

force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexually and forced labour'.[49] Allain points out that other international courts such as the ECOWAS Court of Justice and the SCSL have also taken the same approach.[50] Allain explains that by focusing on the *indicia* of slavery, international courts do not capture what is the essence of slavery. Instead, their analysis either focus on the enslavement process, which is 'the means by which a person is brought into the condition of slavery'[51] or on 'what transpires from the enslavement process, which is the manner in which the individual is exploited.'[52]

The author advocates for international courts to engage with the definition of slavery rather than looking into its indicators.[53] After considering developments in international and domestic law as well as jurisprudential work on ownership, Allain interprets the meaning of 1927 Slavery Convention definition of slavery, namely *the status or condition of a person over whom any or all the powers attaching to the right of ownership are exercised*.[54] Concerning the *status or condition of the person,* he explains that the term status implies a legal right of ownership over a person, namely slavery as a *de jure* situation. Conversely, *condition* refers to a de facto situation of slavery.[55]

As regard to *powers attaching to the right of ownership*, he explains that what needs to be understood is that ownership implies a background relationship of control which corresponds to possession. Possession is the fundamental power attaching to the right of ownership.[56] It might be exercised through 'physical, psychological or otherwise operations in such a manner as to significantly deprive the enslaved person of its individual liberty'[57]

Additionally, Allain also explains that there are other powers attaching to the right of ownership. Namely, buy and sell, transfer, use, manage the use, profit from the use and dispose of a person.[58] However, possession is the 'foundation upon which the edifice of ownership is built' and, therefore is 'the exercise of control tantamount to possession that makes possible the exercise of further powers while on the other hand, an exercise of a further power attaching to the of ownership may serve to indicate the presence of control tantamount to possession'[59]

Allain's definition of slavery is an expression of the 2012 Bellagio Harvard Guidelines on the Legal Parameters of Slavery.[60] A guideline developed by scholars from different

[49] *Prosecutor v Kunarac* [AC] (n 5) paras. 117-119
[50] Allain, *Slavery in International Law*, p 142
[51] ibid 142.
[52] ibid.
[53] ibid 121
[54] 1927 Slavery Convention (n 1)
[55] Allain, *Slavery in International Law* (n 14) 122
[56] ibid 128.
[57] ibid.
[58] ibid 131-138.
[59] ibid 131-132.
[60] *Bellagio-Harvard Guidelines on the Legal Parameters of Slavery*

areas, including Allain, which attempts to clarify the content of the 1927 Slavery Convention definition in a way that captures the essence of slavery.

2.2. The Definition of Servitude

The first time the ECtHR dealt with servitude was also in *Siliadin.* The court defined servitude as 'an obligation to provide one's services that are imposed using coercion and is to be linked with the concept of slavery'.[61] The court further explained in the judgment that:

> With regard to concept of 'servitude' what is prohibited is a 'particular serious form of denial of freedom' (…) it includes, 'in addition to the obligation to perform certain service for others (…) the obligation for the self to live on another person's property and the impossibility of altering his condition.[62]

The court first found that the applicant was subjected to forced labour.[63] It considered, however, that the situation of forced labour was aggravated to a situation of servitude.[64] The circumstances taken into account to characterize the situation as servitude were firstly, 'the fact the labour lasted almost fifteen hours a day, seven days per week'.[65] Secondly, the fact that she was brought to France by a relative and did not choose to work for Mr and Mrs B.[66] Thirdly, that she was a minor and an irregular migrant and, therefore she was in a situation of vulnerability, isolation and had no resources to leave Mr and Mrs B's home. Moreover, she had no freedom of movement and free time, as she was afraid of being arrested due to her migration status and was only authorized to live the house in rare occasions.[67] Lastly, she could not alter her situation as she was not sent to school.[68]

The ECtHR requirements to classify a situation as servitude were further clarified in the judgment of *C.N. and V. v. France*.[69] The case concerned two sisters originally from Burundi, that moved to France in 1993 due to a civil war. They were under the guardianship of their uncle and aunt, Mr and Mrs M. Once the sisters moved to France, CN became responsible for household chores and taking care of Mr and Mrs M. disabled son. She worked long hours, seven days per week and received no payment for it. Moreover, after turning 18 her migration status was not regularized by her legal guardians. V. was able to go to school, but once she got home she was obliged to help her sister with house chores. They both claimed being subjected to physical and psychological harassment by their aunt and uncle and to live in unhygienic conditions. In the judgment, the court clarified the concept of servitude by holding that:

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[61] *Siliadin v France* (n 27) para. 124
[62] ibid para. 123.
[63] ibid para. 120.
[64] ibid para. 129.
[65] ibid para. 126.
[66] ibid.
[67] ibid para. 127.
[68] ibid para. 128.
[69] *CN and V. v France* App no. 67724/08, (ECtHR, 11 October 2012)

> Servitude corresponds to a special type of forced or compulsory labour or, in other words, 'aggravated forced or compulsory labour'. As a matter of fact, the fundamental distinguishing feature between servitude and forced or compulsory labour within the meaning of article 4 of the convention lies in the victim's feeling that their condition is permanent, and that the situation is unlikely to change. It is sufficient that this feeling is based on the above-mentioned objective criteria or brought about or kept alive by those responsible for the situation.[70]

Thus, the court concluded that CN was subjected to forced labour and that the situation was aggravated, because she had the feeling that her condition was permanent, characterizing it as servitude. The feeling of a permanent condition was demonstrated in the judgment by the fact that she did not go to school or had professional training that would allow her to have a job outside Mrs And Mr M's house. Moreover, the court highlighted that she was in a state of isolation and could not create contact outside the house.[71]

Stoyanova[72] points out that the definition of servitude in the ECtHR case law encompasses three cumulative characteristics. The first one is '*serious form of denial of freedom',*[73] which are related to "aspects of the victim's life other than the provision of labour or service".[74] The denial of freedom implies that someone exercises control over different aspects of a victim's life and, therefore, that she or he loses a certain level of autonomy.[75] Denial of freedom also implies a certain degree of isolation of the victim.[76]

In both *Siliadin* and *CN and V* the ECtHR found a serious form of denial of freedom the fact that the victims were subjected to a considerable degree of control and isolation by living in the house of their employee/abuses. As the situation allowed the employee to control 'not only the working environment but many other intimate spheres of the individual's life'. [77] Stoyanova points out that the court needs to be cautious not to equate the requirement of serious forms of denial of freedom with the obligation to live in another persons' property. She sustains that the denial of freedom does not always correspond to limitations on freedom of movement, which will happen in cases where the victim has the obligation to live in someone else's property. It can occur in many different and subtle forms.[78] Therefore, according to the author, the limitation on freedom of movement should be seen as a manifestation of the 'overall isolation of the victims and of the exercise of control over various aspects of their lives'.[79]

[70] *CN and V v France* (n 69) para. 91.
[71] *CN and V v France* (n 69) paras. 89-92. See also Stoyanova (n 15) 255
[72] Stoyanova (n 15) 255
[73] ibid 257.
[74] ibid.
[75] ibid.
[76] ibid.
[77] ibid 257.
[78] ibid 258.
[79] ibid.

The second characteristic is '*usage of labour capacity'.*[80] Servitude constitutes an aggravated form of forced labour[81] and therefore, involves 'the usage of labour capacity that amounts to forced labour'.[82] Thus, before determining if a situation classifies as servitude, the ECtHR must establish if the situation amounts to forced labour.[83]

The third characteristic is the '*victim´s feeling that their condition is permanent and that the situation is unlikely to change'*.[84] Stoyanova points out that this characteristic can lead to a flawed understanding of servitude and that the ECtHR should change its current stance.[85] She argues that the 'feelings of the victim should be disregarded as a relevant factor'[86] and that it is 'unconvincing to structure the distinction between servitude and forced labour on the subjective feelings of the victim'.[87] She adds that if this characteristic prevails situations of debt bondage, for example, could not be classified as servitude, as in many cases the victim may know how long the situation will last.

Additionally, Stoyanova argues that the ECtHR does not assess the permanence of the situation or if the victim has the feeling that the situation is permanent while reviewing this requirement of servitude. Instead, what the court does is to assess the victim's isolation. The author concludes that the distinguishing feature of servitude is 'the person´s isolation owing to the control exercised over different aspects of his/her life' and, therefore, it must be the criteria used to assess if a situation of forced labour is aggravated into servitude.[88]

2.3. Definition of Forced Labour

Article 4(2) of the ECHR prohibits forced or compulsory labour while article 4(3) complements the above paragraph by defining situations that do not constitute forced or compulsory labour.[89] The ECtHR dealt extensively with the definition of forced and compulsory labour in the case of *Van der Mussele v. Belgium.*[90] The case does not fall within the scope of the present study, as it does not deal with interpersonal harm.[91]

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[80] ibid.
[81] *CN and V.* v *France* (n 69) para. 91; See also Stoyanova (n 15) 258
[82] ibid.
[83] ibid.
[84] *CN and V.* v *France* (n 69), para. 91. For critics on this last characteristic of the concept of servitude see Stoyanova (n 15), p. 255-257.
[85] Stoyanova (n 15) 257
[86] ibid.
[87] ibid.
[88] See Stoyanova (n 15) 255 -257. It important to clarify that while the adjective forced means "the idea of physical or mental constraint", compulsory refers to the "exercise of compulsion by the law". Practices undertaken by private and public parties can amount to violations of article 4(2). However, compulsory labour can only relate to state's practices as it implies the idea of "compulsion by the law". The scope of this study are practices committed by a private individual that amount to violations of article 4(2). Thus, I will focus on the definition of forced labour once compulsory labour entails state´s conduct. However, I will also assess the case law of the ECtHR concerning state's conducts that amount to violations of article 4(2) as they deal with the definition of forced labour more extensively.
[89] See ECHR (n 2) article 4(3)
[90] *Van der Mussele v Belgium* (n 23)
[91] The applicant's claim that forced labour was inflicted by state related conducts and not by a private party conduct. For this discussion see Section 3.1.1.

However, I will examine it carefully in order to explain the concept of forced labour in the ECtHR jurisprudence.

Van der Mussele was a lawyer appointed as a public defender that claimed to be subjected to forced labour. He was obliged to perform free legal aid due to Belgian national legislation.[92] In the judgment, the Court restored to article 2, paragraph 1 of the ILO Convention No. 29 ('ILO Forced Labour Convention')[93] as a starting point for defining forced labour.[94] In ILO Forced Labour Convention defines forced labour as 'all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily'.[95]

Two elements compose the ILO Forced Labour Convention definition: menace of penalty and involuntariness.[96] In *Van de Mussele v. Belgium*, the court first assessed if both these elements were present in the factual circumstances of the case. Regarding the first one, the court held that if the applicant had refused to provide legal services he could have 'his name off the roll of pupils or reject his application for entry on the register of advocates'.[97] Thus, the court concluded that applicant was under the menace of penalty.

The findings on forced labour in the case of *CN and V v. France* can further explain how the ECtHR approaches menace of penalty. The court explained in the case that 'the notion of penalty is used in the broad sense'.[98] Additionally, the court determined that 'penalty may go as far as physical violence or restraint, but it can also take subtle forms, of a psychological nature, such as threats to denounce victims to the police or immigration authorities when their employment status is illegal'. The court found that CN was subjected to menace of penalty as she did her work under threats to be sent back to her home country. The court concluded that being sent back to her country was a penalty while the threat of being sent back was the menace of that penalty.[99]

Concerning the second element of involuntariness, in *Van de Mussele* the court evaluated the applicant's prior consent to determine if 'offered himself voluntarily'. Namely, that to become a lawyer he knew and consented that occasionally he would be obliged to provide free legal aid.[100] The court recognized that indeed by becoming a lawyer, the applicant warranted prior consent ('even if it what he consented to was a legal regime of a general character').[101] However, the court also held that the applicant's consent was insufficient to conclude that he was subjected to forced labour. Thereafter the court decided to consider all circumstances of the case in light of the objectives of article 4. In

[92] See *Van der Mussele v. Belgium* (n 23) para. 18-23
[93] ILO Convention concerning Forced or Compulsory Labour (ILO No. 29) (adopted 28 July 1930, entered into force 1 May 1932) (ILO Forced Labour Convention), 39 UNTS 55
[94] ibid.
[95] ibid.
[96] See Stoyanova (n 15) 266
[97] *Van der Mussele v. Belgium* (n 23) para. 35
[98] See *CN and V France* (n 69) para. 77
[99] ibid para. 78.
[100] ibid para. 36.
[101] ibid para. 36.

doing so the court applied the disproportionate burden test which I will discuss in *section 2.3.3.*[102]

Thus, concerning the element of involuntariness, the ECtHR investigates if the person consented to provide work or service. However, as the case of *Van de Mussele* shows, consent has been proven ineffective to determine if a person was subjected to forced labour and therefore, the court usually apply the disproportionate burden test.

The ECtHR has also used the ILO Forced Labour Convention as a starting point to define forced labour in the cases of *Siliadin v. France*[103]*, CN and V. v. France*[104] and *Chowdury and Others v. Greece*[105]. Equally as in *Van de Mussele,* in *CN and V* and *Chowdury,* the court also found that this definition gave insufficient aid to classify the factual circumstances as forced labour and restored to the disproportionate burden test[106].

The ILO Forced Labour Convention definition has been criticized for being 'inoperative and unhelpful for the assessments of violations of article 4(2)'.[107] Regarding its element of 'involuntariness', Stoyanova points out that the binary between voluntary versus involuntary labour is 'not helpful for responding to the empirical reality'.[108] This was in fact acknowledged by the ECtHR in *Van der Mussele,*[109] as previously shown. Stoyanova draws attention to the fact that the definition does not 'capture exploitative and abusive working conditions per se; one can labour in acceptable working condition, but still involuntarily and thus be subjected to forced labour'.[110]

Stoyanova also criticizes that the elements of the definition 'seem to collapse into each other since the elements of menace of penalty logically imply that the work is not done voluntarily'.[111] Moreover, the author sustains that 'menace of penalty' is understood broadly, covering various forms of sanctions and coercion. This, together with the fact that menace of a penalty implies involuntariness, results in a danger of 'indeterminate expansion of the meaning of forced labour'.[112]

2.3.1. Definitional Boundaries of Forced Labour

Article 4(3) determines that 'forced and compulsory labour' shall not include:

> (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention; (b) any service of a

[102] ibid para. 36.
[103] *Siliadin v. France* (n 27) paras. 116-120
[104] *CN and V v. France* (n 69) paras. 70-74
[105] *Chowdury and Others v. Greece* App no 21884/15 (ECtHR, 30 March 2017) para. 90
[106] *CN and V v. France* (n 69), paras. 74; Chowdury and Others v. Greece (n 65) para. 90-91
[107] Stoyanova (n 15) 267-268
[108] Stoyanova (n 15) 267
[109] Stoyanova (n 15); See *Van der Mussele v Belgium* (n 23) paras. 35-36
[110] Vladislava Stoyanova,'Sweet Taste with Bitter Roots—Forced Labour and Chowdury v Greece' [2018], European Human Rights Law Review 67
[111] Stoyanova (n 15) 267
[112] Stoyanova (n 15) 268

> military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service; (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community; (d) any work or service which forms part of normal civic obligations.[113]

In *Van der Mussele v. Belgium*, the court explained that the purpose of article 4(3) is:

> To delimit the very content of this right, for it forms a whole with paragraph 2 and indicates what the term 'forced or compulsory labour' shall not include. This being so, paragraph 3 serves as an aid to the interpretation of paragraph 2. The four subparagraphs of paragraph 3, notwithstanding, their diversity, are grounded on the governing ideas of the general interest, social solidarity and what is normal in the ordinary course of affairs.[114]

Article 4(3) does not prescribe exceptions to article 4(2). When the factual circumstances of a case correspond to one of the situations of article 4(3), they can still be classified as forced labour and in such cases, the State will be in breach article 4(2). If article 4(3) imposed exception to article 4(2), that would not be the case and the assessment of the court would be done differently.[115] If article 4(3) was an exception, after classifying the situation as forced or compulsory labour the court would 'proceed to determine if the subjection to forced or compulsory labour was justified'.[116] If the court found the reasons for interfering with the right were justifiable, even if the situation amounted to forced or compulsory labour there would be no violation of article 4(2). Therefore, article 4(3) does not allow justifiable interference with the right not to be required to provide forced or compulsory labour. Conversely, the article is 'of assistance in determining the definitional boundaries of the rights (…) it relates to the matters of interpretation concerning the essence of the right itself.'[117]

2.3.3. Disproportionate Burden Test

The ECtHR uses the disproportionate burden test when the ILO Forced Labour Convention definition is unhelpful to determine if the factual circumstances of a case amount to forced labour.[118] The test consists of a proportionality assessment and

[113] ECHR (n 2) article 4(3)
[114] *Van der Mussele v Belgium* (n 23) para. 38
[115] Stoyanova (n 15) 262-263. It is important to notice that article 4(2) is an unqualified right. The ECHR rights are divided into two categories: qualified and unqualified rights. Qualified rights are those that the "Convention specified a right, but goes on to indicate that the State may interfere with it in order to secure certain interests". Conversely, unqualified cannot bear such interference. The ECtHR assess alleged violations of these two categories in different ways. Only in cases involving qualified rights the court will, after determining if a situation corresponds to the prohibition of the right in question, assess if the interference with the right was justifiable. If the answer is positive, then the court will not find a violation. This will involve "showing that the interference was in accordance with the law, that the aim of interference was to protect a recognized interest, and that the interference was necessary for a democratic society(...) " Moreover, the state has to show "that the interference with the qualified right was the minimum needed to secure the legitimate aim" which is determined by a proportionality assessment ("doctrine of proportionality"). On Clare Ovey & Robin C.A. White, Jabocs & White European Convention on Human Rights. Third Edition, Oxford University Press, 5.
[116] Stoyanova (n 15), 262-263.
[117] ibid.
[118] ibid 269.

contextualization.[119] In *Van der Mussele,* the court applied the test after concluding that the applicant's *prior consent (involuntariness)* was insufficient to determine if he was subjected to forced labour.[120] The disproportionate burden test consisted on weighing 'the burden and disadvantages required to the applicant with the advantages following from the service'.[121] The court explained in *Van der Mussele,* that 'if the service imposed a burden which was so excessive or disproportionate to the advantages attached to the future exercise of that profession'[122] the service could not be considered voluntarily accepted and, therefore the situation will characterize as forced labour.[123]

In this balance exercise, the court took into account the interests of the applicant, such as the contribution for his professional training and lack of remuneration,[124] but not only. The ECtHR also added into the equation public interests and rights of others.[125] They were introduced by the using article 4(3)(d) of the ECHR. This article determines that forced or compulsory labour shall not include 'any work or service which forms part of normal civic obligations'.[126] The ECtHR concluded that 'the obligation to defend indigent individuals in criminal proceedings was an obligation of a similar order to the normal civic obligation'[127]and 'was found on a conception of social solidarity and cannot be regarded as unreasonable'.[128] Thus, the obligation was proportional, as it corresponded to normal civic obligations and, therefore, did not amount to forced labour.[129]

The disproportionate burden text was also used to assess 'involuntariness' *in CN and V, v. France*[130] and in *Chowdury and Others v. Greece*[131]. In *Chowdury,* the court held that even though the applicants have given prior consent to work, 'the validity of the consent needed to be assessed in light of the circumstances of the case'.[132] Working conditions and vulnerabilities were important factual elements of the test. According to the judgment, applicants were in a 'situation of vulnerability as irregular migrants without resources and at risk of being arrested, detained and deported'[133]. Moreover, the court considered that 'they probably realised that if they stopped working they would never receive their overdue wages, the amount of which was constantly accruing as the days passed'.[134]

The ECtHR concluded that 'even assuming that, at the time of their recruitment, the applicants had *offered themselves for work voluntarily* and believed in good faith that they

[119] ibid.
[120] ibid.
[121] ibid 269.
[122] *Van der Mussele v. Belgium* (n 23) para. 37
[123] Stoyanova (n 15) 269
[124] ibid 270.
[125] ibid.
[126] ECHR (n 2) article 4(3)(d)
[127] Stoyanova (n 15) 270
[128] ibid.
[129] Stoyanova (n 15) 270
[130] See Stoyanova (n 15) 271-274.
[131] *Chowdury and Others v. Greece* (n 105)
[132] *Chowdury and Others v. Greece* (n 105) para. 98
[133] ibid.
[134] ibid.

would receive their wages, the situation subsequently changes because of their employers' conduct'.[135] Hence, the court disregarded the workers consent and held that due to the excessiveness of the situation (exploitative working conditions) the applicants were subjected to forced labour.[136]

The ECtHR developed the disproportionate burden test to overcome the unhelpfulness of the ILO Convention on forced labour definition. It is a proportionality assessment that determines whether if there is excessiveness on working conditions, that would render the situation one of forced labour. The circumstances assessed to determine excessiveness vary in the ECtHR case law and is still not clear what are the standards to it. In *Van der Mussele*, the court considered the interests of the applicant as well as the right of others determining factors.[137] In *CN and V* as well as in *Chowdury* the court took into account exploitative working conditions and the vulnerability of the victims as relevant circumstances.[138]

In *Chowdury*, the disproportionate burden test allowed the court to consider the nature and volume of work, wages and the applicant's vulnerability due to their migrations status. Thus, the test introduced exploitative working conditions on the definition forced labour. This inclusion seems to overcome one of the main problems of the ILO Forced Labour Convention definition. The fact that it does not 'intent to capture exploitative and abusive working conditions'.[139] As Stoyanova points out, 'one can labour in acceptable working conditions, but still involuntarily and thus be subjected to forced labour'.[140]

2.4. The Gradational Model

The ECtHR interprets the prohibitions of article 4 in a gradual scale. The prohibited conducts represent a 'continuum from the least abusive, forced and compulsory labour, servitude more so and slavery the greatest abuse'.[141]Once a situation classifies as forced labour, for it to be considered servitude there is a need of two aggravating circumstances: 'control over aspects of victim's life other than the provision of labour and service'[142] and 'the victim's feeling that their condition is permanent and that the situation is unlikely to change'.[143] At last, the ECtHR does not address the distinction between slavery and servitude. The court 'has not dwelled on how servitude is linked with slavery and where the similarity between the two lies'.[144]

Stoyanova adverts that the gradational model is incomplete.[145] That is because slavery might happen in situations that do not involve usage of labour capacity. Therefore, slavery

[135] ibid para. 97.
[136] ibid para. 97; 100-101
[137] *Van der Mussele v Belgium* (n 23) paras. 38-39
[138] *CN and V v. France* (n 69) paras. 74-75; *Chowdury and Others v. Greece* (n 105) para. 94-97
[139] Stoyanova, *Sweet Taste with Bitter Roots* (n 110) 3;*Chowdury and Others v. Greece* (n 105) para. 70
[140] ibid.
[141] Stoyanova (n 15) 285
[142] ibid.
[143] *CN and V. v. France* (n 69) para. 91
[144] Stoyanova (n 15) 286
[145] ibid 287

might not overlap with the other two conducts prohibited by article 4.[146] That is because, slavery is based on *any* of the powers attaching to the right of ownership exercised on a context of control.[147] Thus, there might be cases where the person is subjected to control that amount to deprivation of liberty, but where the said person is not exploited through *use* but through *transaction*, which is one of the powers attaching to the right of ownership.[148] The author explains that this would be the case of migrants that are 'brought to countries of destination, in which the conditions in which they are kept, taking away of their passport, their having no knowledge of the country or its language, being kept in isolation, and being placed outside the protection of the law.'[149]

2.5. Trafficking in Persons under Article 4 ECHR

Rantsev v. Cyprus and Russia was the first time that the ECtHR dealt with a claim of human trafficking under article 4.[150] The case concerned the death of Oxana Rantseva, a Russian national that arrived in Cyprus with an 'artiste visa' and work permit to work in a cabaret owned by X.A. Rantseva disappeared after a few days staying in an apartment belonging to X.A. She was found by M.A., X.A. brother that managed the cabaret. He took her to the police aiming that she would be deported. The police determined that Rantseva was not an illegal migrant and therefore, was not to be detained. The police also demanded that her employers were to pick her up. After following police orders, M.A. took Rantseva to the apartment of one of the cabaret's employees. Rantseva escaped again but this time she was soon found by M.A., that took her back to where she was staying. Rantseva was subsequently found dead in front of the apartment's balcony.[151]

Rantseva´s father, Mr. Rantsev, brought a case to the ECtHR. Among other claims, Mr Rantsev urged the court to find both Russia and Cyprus in violation of article 4 due to 'failure to protect Rantseva from being trafficked and to conduct effective investigations into the circumstances of her arrival in Cyprus and the nature of her employment there'.[152]

Article 4 of the ECHR does not prohibit Human Trafficking. In the judgment, the court explained that it was unsurprising that the ECHR was silent about human trafficking, as when the convention entered into force trafficking was not referenced in major human rights treaties.[153] However, the court noted that the ECHR is a living instrument which

[146] Stoyanova (n 15) 287
[147] ibid
[148] ibid
[149] ibid 288.
[150] Harris, O'Boyle, Bates, Buckley (n 22) 284
[151] *Rantsev. v. Cyprus and Russia* (n 36) paras. 13 – 29.
[152] Ibid para. 253.
[153] ibid para. 277.
[153] *CN and V. v. France* (n 69) para. 91.
[153] Stoyanova (n 15) 286
[153] ibid p. 286.
[153] Stoyanova (n 15) 287
[153] Harris, O'Boyle, Bates, Buckley (n 22) 284
[153] *Rantsev. v. Cyprus and Russia* (n 36), paras. 13 – 29
[153] ibid para. 253

must be interpreted in light of present-day conditions.[154] The court held that trafficking in human being is a global phenomenon that has recently grown in Europe and elsewhere. In light of the 'proliferation of both trafficking itself and of measures taken to combat it'[155] the court considered appropriate to 'examine to which extent trafficking itself may fall within the scope of article 4, without the need to classify it as servitude or forced and compulsory labour'.[156]

By referencing the ICTY's jurisprudence,[157] the ECtHR held that the 'traditional concept of slavery has evolved to encompass various forms of slavery based on the exercise of any or all of the powers attaching to the right of ownership'.[158] The court thus concluded that:

> [T]rafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership. It treats human beings as commodities to be bought and sold and put to forced labour, often for little or no payment, usually in the sex industry but also elsewhere.[159]

Hence, the court found that 'trafficking itself, within the meaning of Article 3(a) of the Palermo Protocol[160] and Article 4(a) of CoE Anti-Trafficking Convention[161] falls within the scope of Article 4 of the Convention'.[162]

In International Law, a well-established definition of Human trafficking can be found in the Palermo Protocol. Such definition is repeated in The CoE Anti-trafficking Convention. It reads as the following:

> Trafficking in human beings' shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum,

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[154] ibid para. 276; In Rantsev the court explains that "The living instrument principle" : derives from the rules of treaty interpretation enshrined in article 31(1) of the Vienna Convention on Law of treaties. The article provides that that "a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose". The ECtHR has given significant emphasis to the "object and purpose" of the ECtHR and identified it as "the protection of individual human rights" (Soering v. UK, para 87) and "the ideals and values of a democratic society" (Kjeldsen, Busk Madsen, and Pedersen v. Denmark, para. 53). Following from the object and purpose, the ECtHR sustains that the convention must have a "dynamic or evolutive interpretation". An evolutive interpretation is by its turn the fact that "the Convention is a living instrument which must be interpreted in light of present-day conditions" (Tyrer v. the UK, para. 31). See *Rantsev. v. Cyprus and Russia* (n 16) para. 276

[155] *Rantsev. v. Cyprus and Russia* (n 36) para. 278

[156] ibid para. 276

[157] *Prosecutor v. Kunarac* [AC] (n 5) paras. 117-119.

[158] *Rantsev. v. Cyprus and Russia* (n 36) para. 280

[159] ibid para. 272; *M. and Others v. Italy and Bulgaria* (n 39) para 151.

[160] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children to the UN Convention Against Transnational Organized Crime (Palermo Protocol) (2001) GA Res. 55/25 A/55/383

[161] Council of Europe Convention on Action against Trafficking in Human Beings (CoE Anti-Trafficking Convention) (2005) CETS No:197

[162] *Rantsev. v. Cyprus and Russia* (n 36) para. 272

> the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.[163]

Allain[164] explains that in accordance with the Palermo Protocol definition, to find someone criminally responsible for human trafficking, three elements are required.[165] First, the person must engage with one of the following activities (i.e. methods of trafficking): 'recruitment, transportation, transfer, harbouring or receipt of persons'.[166] Secondly, the methods must be done 'by the means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person'.[167] Thirdly, these methods and means must have as its ultimate aim the exploitation of a person.[168]

Allain criticizes the inclusion of human trafficking within the scope of article 4 of the ECHR. The author explains that in *Rantsev* trafficking is understood as being based on slavery.[169] In the judgment, the court held that 'trafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership'.[170] Powers attaching to the right of ownership is precisely the definition of slavery of the 1926 Slavery Convention.[171]

Equating trafficking to slavery is problematic in Allain's view. That is because according to the Palermo Protocol and CoE Anti-trafficking Convention there can be situations of trafficking that do not have slavery as the exploitative aim (e.g. human trafficking for the purpose of removal of organs or forced labor). He argues that the court excludes from its understanding, types of exploitation that might take place in situations of trafficking, such as exploitation of the prostitution of others or forced labour or service.[172] Moreover, he sustains that the court also excludes trafficking methods of 'recruitment, transportation, transfer, harbouring or receipt of persons'[173] as well as the utilization of specific means, such as 'the threat or use of force or other forms of coercion, of abduction'.[174]

Another aspect of *Rantsev* criticized by Allain is that by determining that trafficking falls within the scope of article 4, without categorizing it as slavery, servitude, forced or compulsory labour, the court:

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[163] Palermo Protocol (n 160) article 3(a); article 4(a) CoE Anti-Trafficking Convention (n 161) No: 197
[164] Allain, *Rantsev v Cyprus and Russia* (n 14)
[165] ibid 552
[166] ibid 552.
[167] ibid.
[168] ibid.
[169] ibid 553.
[170] *Rantsev. v. Cyprus and Russia* (n 36), para. 281
[171] 1926 Slavery Convention (n 1) article 1(1): 'Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised'
[172] Allain, *Rantsev v Cyprus and Russia* (n 14) 553
[173] ibid.
[174] ibid.

> [D]id not narrow the scope of application to make trafficking synonymous with slavery, but instead expanded the scope of Article 4, beyond the textual boundaries of slavery, servitude and forced labour, to apply to any type of exploitation including those others enumerated in the treaty definitions of 'trafficking in human beings'.[175]

Stoyanova further develops this critic. She sustains that in *Rantsev* the court held that 'Rantseva was a victim of trafficking or exploitation'.[176] The author points out that in spite of mentioning, the ECtHR does not explain the meaning of exploitation. The judgment does not clarify if Rantseva was a victim of exploitation within the context of trafficking, which would require the elements of the Palermo Protocol and CoE Anti Trafficking Convention definitions to be fulfilled, or simply a victim of exploitation in general. Stoyanova argues that if the last option was the case, the 'material scope of article 4 was enlarged to such an extent as to cover *any* exploitation'.[177]

Hence, these critics underlined conflicting and problematic pronouncements made in *Rantsev*. On the one hand, the court determined that trafficking equals slavery, which is problematic as it gives a narrow and wrong interpretation of trafficking if compared to the Palermo Protocol and CoE Anti-trafficking Convention definitions. On the other hand, the court also sustained that trafficking in itself with the meaning of the Palermo Protocol and the CoE Convention falls within the scope of article 4. This last pronouncement expanded the scope of the article to cover forms of exploitation beyond slavery, servitude and forced labour.[178]

The court also engaged with the concept of human trafficking in the cases of *M. And Others v. Italy and Bulgaria*,[179] *J. And Others v. Austria*,[180] *L.E. v. Greece*[181] and in *Chowdury and Others v. Greece*.[182] It is worth noting that in such cases the court restated that human trafficking falls within the scope of article 4. The court repeatedly referenced *Rantsev*'s reasoning without adding any further explanation to the concept of trafficking nor the relationship between trafficking and slavery, servitude and forced labour.[183]

[175] ibid 555.
[176] Stoyanova (n 15) 300-301
[177] Stoyanova (n 15) 301
[178] ibid.
[179] *M. and Others v. Italy and Bulgaria* (n 39), para. 151
[180] *J. and Others v. Austria* App no 58216/12 (ECtHR, 17 January 2018), para. 104
[181] *L.E. v. Greece* pp no 71545/12 (ECtHR, 21 January 2016), para. 58
[182] *Chowdury and Others v. Greece* (n 105), para. 93
[183] See *L.E. v. Greece* (n 181), para. 58, See Also Milano (n 14)

3 Positive Obligations under Article 4 ECHR

After elucidating the definitional dimension of article 4 ECHR, I will now explain states obligations under this article. I will first present how the ECtHR developed obligations under the Convention's rights. Particularly, I will describe the court's doctrine on positive obligations.[184] Thereafter, I will describe positive obligations triggered by article 4. I will demonstrate the court's approach on each of these obligations, the specificities that they might have in connection with article 4 and finally, I will introduce critics that have been made in international human rights scholarship on such obligations.

3.1. The ECtHR Positive Obligations Doctrine

Article 1 ECHR compels state parties to secure rights and freedoms defined in the Convention to those within their jurisdiction.[185] The ECtHR interprets this article as giving rise to negative and positive obligations.[186] Accordingly, negative obligations entail that a State must refrain from interfering with a certain right (e.g. not torture) and positive obligations are actions that a States must take to secure human rights.[187]

Positive obligations are commonly associated with economic, social and cultural rights. However, they 'can also be imposed in respect of civil and political rights'.[188] Some positive obligations derive from the text of the Convention, such as the obligation to protect the right to life of article 2(1)[189]. Other positive obligations 'have been read into the Convention by the ECtHR.'[190] The first time that the ECtHR conceived that the convention's rights can imply positive obligations was in *Merckx v. Belgium*[191]. In the judgment, the court determined that 'the right to respect for family life in article 8 does not merely compel the state to abstain from such interferences: in addition to this primarily negative undertaking, there may be positive obligations inherent in an "effective respect" for family life'.[192]

The ECtHR has not developed a 'classification of positive obligations'.[193] The court has, however, referred to two types of positive obligations: substantial and procedural.[194] The

[184] Stoyanova (n 15) 322
[185] ECHR (n 2) article 1
[186] Harris, Boyle, Bates (n 22) 21
[187] ibid 22
[188] ibid.
[189] ECHR (n 2) article 2(1) determines that 'Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.'
[190] Harris, Boyle, Bates (n 22) 22; Positive obligations have been developed in the ECtHR jurisprudence using principles of interpretation of International Law. The court used the 'living instrument principle', which implies a dynamic and evolutive interpretation. As well as the principle of effectiveness to sustain that the ECHR rights entail positive obligations. The latter is the idea that 'the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective', *Tyrer v. The United Kingdom* App no. 5856/72 (78); Stoyanova (n 15) 321.
[191] *Marckx v. Belgium* App no. 6833/74 (ECtHR, 13 June 1979)
[192] Harris, O'Boyle, Bates (n 22) 22
[193] ibid 329
[194] Stoyanova (n 15) 329

court's assessment of positive obligations under article 3 in the case of *O'Keeffe v. Ireland*[195] is useful to understand and distinguish these two types of obligation. The case concerned 'sexual abuse of a minor by her teacher in a non-state (Catholic) primary school'.[196] The court found that article 3 gives rise to a *substantive* positive obligation to 'adopt effective mechanisms for the detection and reporting of any ill-treatment (within the field of primary education) by and to a State-controlled body'.[197] Additionally, the court found that article 3 called for a *procedural* positive obligation to 'conduct an effective official investigation into alleged ill-treatment inflicted by private individuals.'[198]

Lavrysen[199] points out that the ECtHR is not consistent in distinguishing these two types of obligations. The author highlights that this classification is not applied outside the sphere of article 2, 3, and 8 of the ECHR and even under these provisions,[200]'sometimes both aspects are conflated and the examination collapses in a single global examination'.[201]

Stoyanova points out that 'substantive and procedural' dichotomy, although useful, 'imposes the risk of ignoring specificities that can be identified within different types of obligations'.[202] Thus, The author proposes a method of systematization of positive obligation in accordance with the nature of actions the state is required to take.[203] Accordingly, she identifies the following positive obligations in the ECtHR case law: 'the obligation to criminalize; obligation to adopt substantive criminal law of a certain quality; obligation to investigate and potentially apply the relevant criminal law framework by prosecuting and punishing; obligation to put in place effective regulatory framework; obligation to take protective operational measures; obligation to provide an effective remedy'.[204] Moreover, the author affirms that 'obligations that could imply socio-economic assistance and prohibition of deportation are considered in relation to the right to effective remedy'.[205]

3.1.1. Interpersonal Harm

Through positive obligations, the ECtHR addressed interpersonal harms, which are abuses of convention's rights inflicted by private parties.[206] Only States are party to the Convention and therefore, only a State can violate the ECHR as well as be required to perform an obligation. In cases where individual rights are abused by another private

[195] O'Keefee v. Ireland [GC] App no. 35819/09 (ECtHR, 28 January 2014)
[196] Laurens Lavrysen, Human Rights in a Positive State: Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights (Intersentia Ltd, 2015) 48
[197] O'keefee v. Ireland (n 174) para. 162;172; Lavrysen (n 176) 48
[198] Lavrysen, *Human Rights in a Positive State* (n 196) 48
[199] ibid 49
[200] ibid
[201] ibid
[202] Stoyanova (n 15) 330
[203] ibid 329
[204] ibid.
[205] ibid.
[206] ibid 320

party, the conduct cannot be directly attributed to the State[207] nor can the private party be liable for a human rights violation. The court can only address the situation by finding the state in violation of the positive obligation to protect a person from such harm.[208] Hence, the states cannot be directly 'in breach of their human rights obligations because of the acts of the private party, but as a result of their own omission, which can be linked to the harm'.[209] I will discuss how the court finds the state responsible for not complying with positive obligations, and thus, addresses interpersonal harms in *section 3.2.1.*

3.2. Positive Obligations Under Article 4 ECHR

After considering general aspects of positive obligations, I will identify now, which positive obligations are triggered under article 4. I will adopt the above-mentioned typology developed by Stoyanova to explain them. However, I will also pay due attention to the 'procedural and substantive' dichotomy, as they are helpful to understand important aspects of the court's reasoning.

3.2.1. Positive Obligations and State Responsibility

The ECtHR establishes state responsibility for failing to comply with positive obligations under article 4 through a two-level analysis.[210] First, the court will elaborate on the categories of positive obligations in a general and abstract level.[211] It is important to highlight that if the court determines that the factual circumstances of a case fall within the definitional scope of slavery, servitude and forced labour, positive obligations will be automatically triggered.[212]

Secondly, the court will assess the positive obligations in the factual circumstances of the case.[213] At this stage, the court will determine if the state failed to comply with the positive obligations triggered by article 4. If the court identifies a failure, the state will be in breach of the convention. To determine state's failure the court will consider three elements: the proximity element, the knowledge element and the test of reasonableness.[214]

The proximity element concerns the question of 'whether the particular harm can be linked with a particular failure by the state to take action'.[215] This means that the court will determine if the state's omission has contributed to the harm. Such link can be characterized, for example, if the court identifies that the domestic legal system failed to provide effective protection against abuses of the ECHR rights.[216]

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[207] ibid 320
[208] The court has recognized this obligation, *inter alia*, in cases concerning domestic violence (article 3 and 8) and deprivation of liberty by terrorists or other kidnappers (article 5). However, the full extent of the positive obligation to protect against violations caused by private parties is not clear'; See Harris, Boyle, Bates, Buckley (n 22) 23
[209] Stoyanova (n 15)324
[210] ibid 324
[211] ibid
[212] ibid 325
[213] ibid
[214] ibid
[215] ibid.
[216] ibid 327; See also *Beganovic v. Croatia* App no. 46423/06 (ECtHR 25 June 2009), para. 71

The proximity element requires foreseeability of the harm.[217] This means that the State's authority must have known or ought to have known about the harm.[218] Foreseeability implies the need for a 'predictive relationship between the harm and the state conduct'.[219] In important to take note that predictability is different from casualty. If the link between the harm and state's action was one of causality, without state's failure there would be no harm. Predictability, in its turn only requires that the state's failure contributed to the harm.[220]

The element of knowledge will vary according to the positive obligation in question. What is generally required by the ECtHR is that 'the state is aware or should have been aware of the existence of a general problem'.[221] Lastly, the test of reasonableness requires that positive obligations are 'interpreted in such a way as not to impose an excessive burden on the authorities'.[222] Accordingly, state's positive obligations 'should be effective and include reasonable steps'[223] to prevent harms. The two former elements of proximity and knowledge will determine what reasonable steps are. Thus, as Stoyanova concludes:

> Harm, which is more proximate to state's conduct and on which the state has comprehensive knowledge, will call for more intervention by the state and, accordingly, the test of reasonableness will not be stringent from the perspective of the individual applicant (…) The harm that is more difficult to link to state conduct and knowledge thereof will imply less demanding obligations upon the state since it might not be reasonable to expect the state that it acts.[224]

3.3. The Obligation to Criminalize

The ECtHR requires states to put in place criminal law provisions to deter most serious human rights violations.[225] The court has identified the positive obligation to criminalize in relation to the right to life (article 2);[226] in cases were violence was inflicted to a certain extent that amounted to ill-treatment (article 3)[227] and in cases involving the most severe breaches of the right to respect for private and family life (article 8).[228] Similarly, in cases the concerning article 4 of *Siliadin v. France*, *CN and V v. France*, *CN v. the United*

[217] Stoyanova (n 15) 327
[218] ibid 327
[219] ibid 328
[220] ibid
[221] ibid 329
[222] *O'Keefee v. Ireland* (n 195) para. 144
[223] Stoyanova (n 15) 329
[224] ibid 325-326
[225] Lavrysen, *Human Rights in a Positive State* (n 196) 123
[226] ibid; *Öneryildiz v. Turkey* [GC] App no 48939/99 (ECtHR, 30 November 2004), para. 92.
[227] *Beganovic v. Croatia* (n 216), para. 464; Lavrysen explains that 'outside the sphere of violence, it seems that criminal law protection is not necessarily required under article 3', Lavrysen, *Human Rights in a Positive State* (n 196) 123
[228] See *X and Y v Netherlands* App no. 8978/80 (ECtHR, 26 March 1985), para. 27; *Söderman v Sweden* [GC] App no. 5786/08, para. 85.

Kingdom, Rantsev v. Cyprus and Russia, the ECtHR found the respondent states under the obligation to enact legislation to criminalize abuses prohibited by the article.[229]

From the ECtHR viewpoint, criminalization of the most serious human rights violations protects individuals 'from abuses inflicted by other individuals'.[230] Hence, the court sees criminalization as an instrument for effective deterrence.[231] Accordingly, states must 'send a clear message to the abuses that, if detected, they can expect prosecution, conviction and punishment in the normal course of events'.[232] The issue whether criminal law can actually guarantee effective deterrence from human rights abuses is not discussed by the ECtHR.[233]

3.3.1. Criminalization under Specific Labels and Definition of Crimes

The ECtHR has never categorically held that states are under the obligation enact specific criminal offences under the labels of slavery, servitude and forced labour.[234] Despite that, Stoyanova sustains that there is an implicit requirement for such labels.[235] Her conclusion is drawn from the court's findings in *Siliadin v. France*, *CN and V* v. *France* and *CN v. the United Kingdom*.

In the two cases against France, the court adverted that articles 225-13 and 225-14 of the French Criminal Code were an inappropriate vehicle to address abuses under article 4.[236] According to the court, these criminal offences did not specifically criminalized slavery, servitude, forced or compulsory labour. Conversely, they concerned 'in a much more restrictive way, exploitation through labour and subjection to working and living conditions that are incompatible with human dignity'.[237] The court found that the uncertainty of the criminal offences definitions allowed different interpretations within national courts. Thus, in both cases, the court concluded that the French Criminal Code was not able to afford effective protection against abuses under article 4.[238]

Moreover, Stoyanova demonstrates that in *CN v. the United Kingdom*,[239] the court identified domestic servitude as a specific offence and that, the absence of such offence in the United Kingdom's criminal legislation, prevented national authorities 'to give due weight to factors pertaining the applicant's situation, such as overt and subtle forms of coercion'.[240]

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[229] *Siliadin v. France* (n 27), para. 141; *CN and V v France* (n 69), para. 105; *CN v United Kingdom* App no. 4239/08 (ECtHR, 13 November 2012, paras. 66;47); Stoyanova (n 15) 331
[230] Stoyanova (n 15) 332
[231] ibid 332
[232] ibid.
[233] ibid. To further discussion if criminal law can guarantee deterrence see Stoyanova (n 15) 332
[234] Stoyanova (n 15) 340
[235] ibid.
[236] *Siliadin v. France* (n 27), para. 142
[237] ibid.
[238] ibid paras. 147-148; Stoyanova (n 27) 341
[239] *CN v. the United Kingdom* (n 229) para. 47
[240] Stoyanova (n 15) 340

Stoyanova argues that criminal offences under the labels of slavery, servitude and forced labour are necessary because they have an impact on how these abuses are interpreted.[241] For instance, if domestic servitude is not typified as a criminal offence, the state might run the risk of ignoring 'a complex set of dynamic, involving both overt and more subtle forms of coercion, to force compliance (…) and the subtle ways an individual can fall under the control of another'.[242] Moreover, specific labels will allow interpretations of the criminal offences that consider developments in human rights law.[243]

Despite the implicit requirement of specific labels, the ECtHR does not instruct how criminal offences should be defined and formulated in the national legislation.[244] What is required from states is that national criminal laws are 'armed with sufficient clear definition to ensure effective investigation and prosecution of abuses falling within the material scope of article 4'.[245]

3.4. The Obligation to Investigate

Rantsev v. Cyprus and Russia was the first case where the ECtHR recognized that article 4, similarly to article 2 and 3, encompasses a procedural obligation to investigate. Accordingly, article 4 triggers the obligation upon national authorities 'to conduct effective investigations into allegations that individuals have been subjected to criminal forms of abuses'.[246] This obligation aims the identification of those that have committed abuses and to allow the state to prosecute them.[247] It is an independent and autonomous obligation,[248] which means that for it to arise states do not need to be in breach of the substantive duties under the same article.[249]

3.4.1. ECtHR's Review

The procedural obligation to investigate will be triggered when national authorities are confronted with an *arguable claim* that a person has been subjected to treatment that falls within the scope an ECHR's right.[250] This means that national authorities are under the

[241] ibid.
[242] *CN v. the United Kingdom* (n 229) para. 80; Stoyanova also adds several reasons for why states must incorporate specific criminal offences, such as the fact that the essence of slavery, servitude and forced labour might not be captured by other criminal law offences and that 'specific criminalization ensures the deterrent effect and enables tracking and monitoring the specific crime'. Stoyanova (n 15) 341
[243] ibid 341
[244] Stoyanova (n 15) 345
[245] Stoyanova (n 15) 345; See *Siliadin v. France* (n 27); *CN and V v. France* (n 69); *CN v. the United Kingdom* (n 229); MC v. Bulgaria App no. 39273/98, (ECtHR, 4 December 2003).
[246] Stoyanova (n 15) 351
[247] *CN and V v. France* (n 69), para. 109
[248] Stoyanova (n 15) 352
[249] '*[T]*he procedural obligation has not been considered dependent on whether the State is ultimately found to be responsible for the death. When an intentional taking of life is alleged, the mere fact that the authorities are informed that a death had taken place gives rise ipso facto to an obligation under Article 2 to carry out an effective official investigation'. *Silih v. Slovenia*, App no. 71463/01, (ECtHR, 9 April 2009), para. 156
[250] See *Menson v. The United Kingdom* App no. 47915/99 (ECtHR, 6 May 2003); *Rantsev v. Cyprus and Russia* (n 16), para 234, *M. And Others v. Italy and Bulgaria* (n 19), paras. 101,113.

obligation to investigate ill-treatment when they are 'arguable and raise a reasonable suspicious'.[251]

The ECtHR will review the positive obligation to investigate in a two-stage analysis: a definitional stage and an application stage. Thus, the ECtHR will first determine if the factual circumstances of the case fall within the definitional scope of article 4. Thereafter, the court will identify if the state carried out its positive obligations. At this stage, the court will 'determine whether the national authorities had been confronted at the relevant time with arguable claims of ill-treatment'.[252]

The ECtHR's review of the procedural obligation to investigate under article 4 has been somewhat inconsistent. In *Rantsev* and in *CN v. the UK*, the court has skipped the definitional stage and directly entered the application stage.[253] In *M. and Others v. Italy and Bulgaria*, however, the court carried out the definitional as well as application stages of the analysis.[254] Stoyanova elucidates that skipping the definitional stage can render judgments unclear of when article 4 is applicable, a mistake that is not made in cases concerning article 3.[255]

Thus, the ECtHR can find a violation of article 4 if national authorities were confronted with an arguable claim that someone was subjected to slavery, servitude, forced labour or human trafficking and did not start criminal investigations. Beaches of article 4 corresponding to the positive obligation to investigate can also be triggered, however, when states have initiated an investigation but failed to conduct it effectively.[256]

3.4.2. Effective Investigations

The procedural obligation to investigate must be carried out effectively.[257] To assess effectiveness the court does a case-by-case analysis and, therefore, the criteria to determine it can vary. However, the court's case law indicates general criteria of: 'independence, promptness, thoroughness, capability of leading to the establishment of the facts and identification of those responsible'.[258]

Accordingly, the authorities investigating 'must be independent from those involved in the event'.[259] The investigation must also be 'prompt, speedy and through, which means that it should be carried without unreasonable delays'.[260] In *Rantsev*, the court expanded this criterion by ruling that 'where the possibility of removing the individual from harmful situation is available, the investigation must be undertaken as a matter of urgency'.[261] The

[251] Stoyanova (n 15) 352; See *MC v. Bulgaria* (n 245)
[252] Stoyanova (n 15) 355
[253] Stoyanova (n 15) 353, *CN v. The UK* (n 229) para 72
[254] *M. And Others v. Italy and Bulgaria (*n 39) paras. 154-166
[255] Stoyanova (n 15) 354
[256] Stoyanova (n 15) 352
[257] See *L.E. v. Greece (*n 181) para. 68.
[258] Stoyanova (n 15) 360
[259] *L.E. v Greece* (n 181) para. 68
[260] ibid.
[261] *C.N. and V. v France* (n 69) para. 109

investigation must attempt to find out what happened. Lastly, investigations must be capable of leading to the establishment of the facts and identification of those responsible'.[262] This means that authorities should not 'rely on a hasty or ill-founded conclusion to close their investigations.'[263]

In cases concerning article 4, the ECtHR has considered other two additional aspects to assess effectiveness: the involvement of victims in the investigations and the duty to cooperate effectively with authorities of other states. The first one entails that 'victims or the next-of-kin must be involved in the procedure to the extent necessary to safeguard their legitimate interest.'[264] Concerning the second aspect, in cases of cross-border trafficking, the ECtHR held that states have the 'duty to cooperate effectively with relevant authorities of other states concerned in the investigation of events which occurred outside their territories'.[265] *Rantsev v. Cyprus and Russia* was the first judgment where the court recognized this duty. The ECtHR concluded that the Russian authorities failed to investigate 'the possibility that individual agents or networks operating in Russia were involved in trafficking Ms Rantseva to Cyprus'.[266]

3.4.3. Failure to Conduct Effective Investigations

Investigations can be ineffective due to two different types of failures: operational or systematic failures.[267] Operational failures are 'legislative or policy failures'.[268]An example of it can be found in the case of *CN v. the United Kingdom*. In the judgment, the court found that the national criminal law provided a restrictive interpretation of abuses prohibited by article 4, which led to an ineffective investigation.[269] Conversely, systematic failures are 'omissions by individual officers or non-compliance of a state's authority with the existing legislation or guidelines'.[270] They will vary in accordance with the factual circumstances of the case and taken cumulatively they will render the investigation ineffective.[271]

Outside the scope of article 4, the ECtHR has recognized that vulnerability of victims is a factor influences the effectiveness of an investigation.[272] For instance, the court has held that the vulnerability of a victim for being a child 'could explain his "hesitation both in reporting the abuse and in his descriptions of the facts".'[273] Stoyanova alerts that this

[262] Stoyanova (n 15) 360
[263] ibid.
[264] *CN v the United Kingdom* (n 229) para. 69
[265] *Rantsev v Cyprus and Russia* (n 36) 289
[266] *Rantsev v Cyprus and Russia* (n 36) 289; This obligation comes from the interpretation of the positive obligations under article 4 in light of the object and purpose of the Palermo Protocol. Stoyanova explains that the court 'justifies this duty with external rules binding upon the respondent states' as the CoE Trafficking Convention imposes the obligation to cooperate for the purpose of investigations. See article 32 and 34 CoE Trafficking Convention (n 161); Stoyanova (n 15) 361
[267] Stoyanova (n 15) 363
[268] ibid.
[269] ibid.
[270] Ibid.
[271] ibid.
[272] ibid 364
[273] ibid.

criterion could be helpful for cases concerning article 4. In the European context, the victims of abuses prohibited by this article are mainly migrants. Migrants, in the author's point of view, can be considered a vulnerable group. Thus, recognizing that the vulnerability of this group might affect the effectiveness of an investigation, would allow the court to be more vigilant in its assessment under article 4.[274]

3.4.4. An Obligation to Prosecute?

The positive obligation to investigate is an obligation of means and not of results.[275] Accordingly, this obligation does not need to lead to prosecution or conviction.[276] The focus of ECtHR review is whether the investigations were carried in a 'determined manner and whether all was done that could reasonably have been expected to be done with a view to establishing the identity of the perpetrators and their motives.'[277]

Therefore, the court requires the state to take *reasonable measures*. They are accessed through different factors, which will vary from case to case. Such factors can be, for example, 'the gravity of the offence, any systematic failure or a distinguishing characteristic of victims, such as their vulnerability.'[278] What is generally established in the ECtHR case law, is that court will find the state in violation of a right, if there are significant flaws in the national investigation.[279] This means that 'any allegations of failures by the authorities must meet a threshold of culpability that goes beyond a simple or mere erroneous act or omission.'[280]

3.5. The Obligation to Develop Regulatory Framework

The ECtHR has also held that states are compelled to develop an adequate regulatory framework to prevent abuses against article 4.[281] The state can comply with this obligation by adopting criminal laws to deter most serious human rights violations, what I have discussed in *section 3.3*. However, this obligation goes beyond the realm of criminal law and can implicate different regulatory spheres.[282]

States have a discretion to choose with regulatory framework is best suited to comply its obligations under article 4.[283] The ECtHR requires, however, that the chosen legal framework is practical and effective to protect individuals against abuses.[284] Moreover,

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[274] ibid 365
[275] ibid; See *Mikheyev v. Russia* App np. 77617/01 (ECtHR, 26 January 2006), para. 107-109
[276] Ibid; Under the ECtHR case law, states can be held responsible for not prosecuting an individual. This will be the case when national authorities handle cases 'manifests insufficient determination to sanction those responsible and lack of proportion between the gravity of the abuses and the punishment imposed. Accordingly, it is conceivable a failure to prosecute where there is sufficient evidence justifying prosecution'. On the discussion of the obligation to prosecute see Stoyanova (n 15) 369

[278] Stoyanova (n 15) 365
[279] ibid 365.
[280] ibid 366
[281] ibid 370
[282] ibid.
[283] *DJ v. Croatia* App no 42218/10 (ECtHR, 24 July 2012), para 93
[284] Stoyanova (n 15) 394. There are judgments where the court identifies concrete deficiencies and require remedies. See *Redfearn v. The United Kingdom* App no 47335/06 (ECtHR, 6 November 2012), para. 57.

states also have the discretion to decide on measures to change concrete rules in their regulatory framework once the court has established the state's responsibility for breaching article 4.[285]

In cases concerning article 4, the court has identified this obligation by putting in place criminal law frameworks to deter abuses. Moreover, in those cases where article 4 was triggered because of a situation of human trafficking, the court has recognized that states must put in place a comprehensive approach with measures to prevent trafficking, protect victims and punish traffickers.[286] Thus, in *Rantsev v. Cyprus and Russia*, the ECtHR identified a failure to develop effective regulatory framework.[287] The court held that the regime of artist visa, which was a specific visa for migrants to work in Cyprus, did not afford practical and effective protection against trafficking and exploitation.[288] It can be said that the ECtHR's assessment of this obligation is somewhat incomplete. The court examines if the respondent state has adopted legal frameworks, without going further on questioning their effectiveness.

The same problematic features of the court's analysis can be found in *Chowdury and Others v. Greece.* In the case, the court concluded that Greece complied with the positive obligation to adopt regulatory framework, as the state had ratified several international instruments in the combat against slavery, forced labour and trafficking. The court also recognized that Greece had enacted laws, including of criminal nature, on the same issues.[289] However, the question whether these legal rules effectively protected individuals from abuses of article 4 was not answered.[290]

On a final note, the ECtHR does not scrutinize certain legal frameworks that are crucial for guaranteeing the rights enshrined in article 4. Stoyanova points out two of them. The first one consists of efficient labour laws, that regulate working conditions, safety standards, minimum remuneration, etc. The second corresponds to a regulatory framework for the protection of migrants from abuses of article 4. The latter guarantees that migrants have access to legal protection without triggering immigration law enforcement mechanism, as they can, for example, lead to their deportation.[291]

3.5.1. Procedural Guarantees

In the ECtHR case law, the obligation to adopt effective regulatory framework entails substantive and procedural guarantees. The substantive guarantees correspond to the

[285] Stoyanova (n 15) 391
[286] *Rantsev v. Cyprus and Russia* (n 36) para 284; The court detect these obligations due to the interaction of article 4 with the obligations enshrined in the Palermo Protocol (n 160) and in the CoE Trafficking Convention (n 161)
[287] Rantsev v. Cyprus and Russia (n 36) paras 284-293.
[288] Rantsev v. Cyprus and Russia (n 36) paras 290-293.
[289] *Chowdury and Others v. Greece* (n 105) paras. 105-109. See *L.E. v. Greece* (n 181) para. 70-72
[290] Likewise, in *L.E. v. Greece* the court considered that the legal framework in force guaranteed protection against trafficking. See *L.E. v. Greece* (n 181)
[291] Stoyanova argues that national regulatory frameworks that 'exacerbate migrants vulnerabilities or ensure that they do not have access to protection', such as laws that require private landlords to check the immigration status of tenants, might not be compatible with 'states' obligation to develop legal frameworks effectively protecting individuals' rights under article 4 of the ECHR'. See Stoyanova (n 15) 386-387

adoption of laws, which were discussed in *section 3.4*. I will now explain the procedural guarantees.

Procedural guarantees are necessary as they safeguard the 'effective application of the substantive guarantees'.[292] Procedural guarantees under substantive rights of the ECHR differ from procedural rights enshrined in the Convention, such as the right to effective remedy (article 13) and the right to a fair trial (article 6). Differently from the latter, the former are instruments for the protection of a substantive right and, in this sense, they are not autonomous rights.[293]

Accordingly, the ECtHR require that procedural guarantees are safeguarded by legislative and regulatory frameworks. Moreover, the court also requires that procedural guarantees are effective, in a way that it affords protection against abuses of substantive rights.[294] Therefore, when accessing procedural guarantees under a substantive right, the court will pay due attention to the overall fairness of the decision-making process.[295] The court might look into 'accessibility and effective procedures incorporated in the national regulatory regime; fairness and neutrality of the decision-making body; the possibility of review; participation by the individual in the procedure and motivation of the decision'.[296]

In cases concerning the obligation to adopt regulatory framework under article 4, the ECtHR limit itself to analyse only the substantive aspect of this obligation. This means that the court does not assess if states have adopted an effective regulatory framework that put in place procedural guarantees that might prevent abuses of article 4.

The obligation to identify victims of human trafficking enshrined in the CoE Trafficking Convention, it's an example of a procedural guarantee against abuses of article 4. This CoE Trafficking Convention obligation guarantees 'a national decision-making process for identification of victims of human trafficking and for granting them a recovery and reflection period is instrumental in preventing violations of article 4.'[297] Accordingly, if a migrant victim of human trafficking does not have access to adequate recovery and reflection period as a result of a deficient procedure, she or he might be exposed again to forms of exploitation prohibited by article 4.[298]

The ECtHR, however, has never assessed the obligation to identify victims as a procedural aspect of the obligation to adopt effective regulatory framework under article 4. In a different token, the obligation to identify victims has come under the radar of the ECtHR in relation to the obligation to take operational measures, which I explain in the following section.

[292] Stoyanova (n 15) 394
[293] ibid 395
[294] ibid 396, See *Roche v. The United Kingdom* [GC] App no. 32555 (ECtHR, 19 October 2005) paras. 162-167.
[295] ibid 398
[296] ibid.
[297] ibid 396
[298] ibid 400

3.6. The Obligation to Take Operational Measures

In *Rantsev*, the ECtHR identified the obligation to take operational measures under article 4. The court held that 'the state's authorities were aware, or ought to have been aware, of circumstances given rise to credible suspicion that an identifiable individual had been or was at real and immediate risk of being subjected to abuses'.[299] This obligation corresponds to the state's duty to 'prevent harm against a specific individual who is at risk from the criminal acts of another individual'.[300]

The obligation to take operational measures differ from the obligations to adopt the effective regulatory framework and the obligation to criminalize, both explained in previous sections of this chapter.[301] That is because the last two 'afford general protection to society'.[302] The obligation to take operational measures, by its turn, is only triggered when there is a *real* and *immediate* risk for an *identified* individual.

According to the ECtHR, the obligation to take operational measures will arise if two elements are met: the knowledge element and reasonableness.[303] The knowledge element requires that 'authorities must be aware that abuses are perpetrated'.[304] The information concerning the alleged harm can come from the victim or any other source.[305] Moreover, there could be situations where the authorities ought to have known about the risk.[306] Additionally, as the obligation is triggered when a specific individual is at risk, general awareness of a problem is not sufficient to implicate the state in a breach of the ECHR.[307]

The second element of reasonableness means that when the state is aware of a real and immediate risk and, therefore, is required to take appropriate operational measures, such measures cannot 'impose an impossible or disproportionate burden on the authorities'.[308] Accordingly, the obligation cannot result in an undue burden for the state, obliging it to undertake excessive measures with disproportionate costs.[309] Hence, when reviewing this positive obligation, the ECtHR expects that the measures might have avoided a harm but they do not necessarily need to avoid it. [310]

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[299] *Rantsev v. Cyprus and Russia* (n 36) para .286
[300] Stoyanova (n 15) 400
[301] ibid.
[302] Stoyanova (n 15) 400
[303] *Osman v. the United Kingdom* [GC] App no. 23452/94 (ECtHR, 28 October 1998), para 116
[304] Stoyanova (n 15) 402
[305] ibid.
[306] ibid 493
[307] Accordingly, general awareness of abuses against migrants 'does not suffice to fulfil the first prong of the test'. However, 'official awareness about certain areas where abuses occur, such as domestic, agricultural or construction work, might be important. If a migrant is employed in these problematic areas, it might be easier to conclude that the authorities ought to have been aware of the existence of real and immediate risk to that person'. Moreover, the obligation of identifying victims and of ensuring collaboration between different authorities, including support organizations, under article 10 of the CoE Trafficking Convention can also lead to the conclusions by the court that the authorities out to have known about the real and immediate risk. Stoyanova (n 15) 493.
[308] *Osman v. the United Kingdom* (n 303), para. 116
[309] Ibid.
[310] Thus, the obligation to take operational measures is an obligation of means and not of results; See Stoyanova (n 15) 205

Furthermore, the element of reasonableness allows a degree of discretion for the state to decide on which operational measures to choose. Following from this is the fact that any other international obligation can influence on what constitutes a reasonable measure.[311] An example is that the obligations enshrined in articles 10 and 12 of the CoE Trafficking Convention enlighten the obligation to take operational measures. The CoE Trafficking Convention articles 10 and 12 respectively guarantee the identification and assistance of victims.[312] By taking the CoE Trafficking Convention obligations into account, the court considered that reasonable operational measures should guarantee 'that migrants are referred to formal victim identification procedures, provided with accommodation and assistance and a recovery and reflection period'.[313]

3.7. Effective Remedies and Article 4

The ECtHR has never assessed the right to effective remedy (article 13 ECHR) in relation to article 4. In some cases, it is evident that the applications have not claimed an alleged violation of article 13.[314] In others, the court has dismissed the claim for being 'manifestly ill-founded' or 'unnecessary'[315]. For instance, in *CN and V v. France,* the court held that assessing article 13 was unnecessary as the complaint under this right was subsumed by the findings on the procedural positive obligation to investigate.[316]

The reasons why this assessment is left behind, are beyond the scope of the present analysis. However, the implications of the absence of effective remedy under the court's review of article 4 is of great importance for the comparative analysis of chapter 6. Therefore, in the present section, I demonstrate that by not accessing effective remedies the ECtHR is falling short guaranteeing important aspects of the protection against abuses of article 4.

Article 13 of the ECHR is an additional guarantee to 'effective national remedies for the breach of a Convention Right'.[317] It refers to situations where there is an alleged violation of an ECHR right. Therefore, this right can only be evoked in conjunction with a substantive convention right.[318] Notwithstanding this requirement, article 13 is an 'independent right that can be violated even if there has been no breach of the substantive right.'[319]

[311] Stoyanova (n 15) 405
[312] Article 10 imposes the obligation to identify victims and Article 12 guarantees assistance to victims. See CoE Trafficking Convention (n 161) articles 10;12
[313] In the judgment of *L.E. v Greece* the ECtHR held that as the national authorities delayed the recognition of the applicants as victims of human trafficking for 9 months, the states failed to fulfil its positive obligations to take protective operational measures. See *L.E. v Greece* (n 181) paras. 77-78; Stoyanova (n 15) 406
[314] For example, *Siliadin v France* (n 72), *Chowdury and Others v Greece* (n 105) and *Rantsev v Cyprus and Russia* (n 36) do not bring a claim under article 13.
[315] *CN v the United Kingdom* (n 209) paras. 112-113
[316] *CN and V v France* (n 27) para 112-113
[317] Harris, O'Boyle, Bates (n 22) 764.
[318] Stoyanova (n 14) 407
[319] ibid 408

The court reviews article 13 by 'examining the domestic legal regime relevant to the applicant's Convention claim to see if it was possible for him or her to obtain relief at the national level'.[320] Moreover, the court assesses if the remedy is effective both in law and in practice.[321] Effectiveness entails a remedy that can *prevent* alleged violations or, in cases when it is not possible, that it *redresses* them.

The ECHR does not spell out which specific forms of remedies states must provide.[322] Moreover, the remedy does not need to be a judicial one. However, the Court is of the position that 'judicial remedies indeed furnish strong guarantees of independence, access for the victim and family, and enforceability of awards in compliance with the requirements of article 13'.[323] Independently of which remedy the state chooses it needs to 'enforce the substance of the Convention rights and freedoms'.[324]

3.7.1. The Obligation to Investigate under Effective Remedies

In cases involving serious human rights violations, article 13 can encompass an obligation to carry out effective investigations of the alleged abuses, 'without prejudice to any other remedy available'.[325] This obligation is different from the positive obligation to investigate under article 4. The positive obligation to investigate under a substantive right refers only to criminal investigation.[326] Its purpose is to establish if potential criminals can be prosecuted. Procedural obligations under article 13, however, are investigations 'for affording remedies is a broader sense'.[327] Thus, article 13 might require that the state carry effective investigations in relation to criminal remedies, but not only. The obligation to carry investigations under article 13, might extend to guarantee the effectiveness of civil and administrative law remedies.

Therefore, the procedural aspect of article 13 offers a broader protection than the procedural obligation to investigate.[328] Thus, the current review of procedural obligations to investigate abuses under article 4 is incomplete as it limits itself only to criminal investigations. Other investigations, that might be crucial to prevent and redress abuses of article 4, are left out of the court's review. Hence, by assessing article 13 in conjunction with article 4, the court can extend its boundaries and scrutinize investigations relating to remedies of different legal natures, such as labour, administrative and civil law procedures.

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[320] ibid
[321] The court has found this obligation in cases involving article 13 relation to article 3, 2, 5 and 8. See Stoyanova (n 14) 409
[322] In the ECtHR jurisprudence states have a margin of appreciation in conforming with their obligations see Stoyanova (n 15) 409
[323] *Z and Others v. The United Kingdom* App no. 29392/95 (ECtHR, 10 May 2001), para. 110; See Stoyanova (n 4) 409
[324] See ECHR article 1 (n 1)
[325] Soy Harris, O'Boyle, Bates, C. M. Buckley (n 22) 779
[326] For instance, in *C.N. and V. v. France* (n 69), the ECtHR held that the procedural obligation to investigate was violated as the authorities were 'unwilling to identify and prosecute the offenders'. See also *J. and Others v. Austria* (n 180) para. 112; *Chorwdury and Others v. Greece* (n 105) para. 116
[327] Stoyanova (n 15) 413
[328] Harris, O'Boyle, Bates, C. M. Buckley (n 22) 780

3.7.2. Additional Obligations

Besides its procedural aspect, article 13 also encompasses a substantive aspect. It concerns the substance of the redress afforded.[329] On this aspect, the inclusion of a claim under article 13 in relation to article 4, might guarantee remedies that so far have not been recognized under article 4. For instance, in cases concerning article 2 and 3, the ECtHR has held that 'compensations for pecuniary and non-pecuniary damage should in principle be possible as part of the range of redress available'.[330] Thus, this compensation could be part of available remedies of article 4.[331]

Moreover, Stoyanova points out that article 13 in conjunction with article 4 could affect immigration proceedings and immigration control enforcement in a positive manner for the victims. She argues, for example, that the procedural aspect of article 13 might entail the suspension of the deportation while a migrant has a claim for being subjected to one of the abuses under article 4.[332] Thus, article 13 could open the court's jurisprudence to access different forms of remedies for victims of slavery, servitude, forced labour and human trafficking.[333]

[329] Stoyanova (n 4) 412
[330] *Z and Others v. The United Kingdom* (n 323), para.109; See Stoyanova (n 15) 412. It is important to understand that such compensations will relate to states failures under article 4 and not for harms caused by private parties. Therefore, a victim of forced labour, for example, will most likely not receive its non-paid salaries as a form of compensation.
[331] Stoyanova (n 15) 412
[332] ibid 414
[333] ibid 414

4 Definitions and Challanges under Article 6 ACHR

In the present chapter, I will explain the IACtHR definitions of slavery, servitude, forced labour and trafficking enshrined in article 6 ACHR. To do so, I will scrutinize the case of *Hacienda Brasil Verde Workers v. Brazil,*[334] which was the first case where article 6 ACHR was accessed in relation to interpersonal harm.[335] Moreover, the case corresponds to the first judgment where the court found a violation of the prohibition of slavery of article 6(1) ACHR.

Article 6 ACHR guarantees freedom from slavery. While Article 6(1) prohibits all forms of slavery, involuntary servitude, as well as slave trade and traffic in women, article 6(2) prohibits forced or compulsory labour. Moreover, article 6(2) also determines that the 'provision shall not be interpreted to mean that, in those countries in which the penalty established for certain crimes is deprivation of liberty at forced labour, the carrying out of such a sentence imposed by a competent court is prohibited. Forced labour shall not adversely affect the dignity or the physical or intellectual capacity of the prisoner.'[336] Furthermore, article 6(3) describes situations that do not constitute forced labour.[337]

In *Brasil Verde Workers v. Brazil*, the IACtHR held that according to article 27(2) the right not to be subjected to slavery, servitude, forced or compulsory labour, slave trade and traffic in women enshrined in article 6 ACHR cannot be derogated from in time of war, public danger, or another emergency that threatens the independence or security of a State.[338] Thus, it can be said that the IACtHR considers all prohibitions enshrined in article 6 are non-derogable rights. Additionally, the IACtHR court only analyses articles 6(1) and 6(2) in the case.[339] Article 6(3) is left out of the court's review as it considers that the factual circumstances of the case only refer to the first two provisions or article 6.[340]

[334] Case of the *Hacienda Brasil Verde Workers v Brazil*, Preliminary Objections, Merits, Reparations and Costs, Series C No. 318. (IACtHR, 20 October 2016)
[335] See section 3.1.1. for definition of interpersonal harm
[336] ACHR (n 2), article 6(2)
[337] ACHR (n 2) article 6(3) determines that: [f]or the purposes of this article, the following do not constitute forced or compulsory labour: a. work or service normally required of a person imprisoned in execution of a sentence or formal decision passed by the competent judicial authority. Such work or service shall be carried out under the supervision and control of public authorities, and any persons performing such work or service shall not be placed at the disposal of any private party, company, or juridical person; b. military service and, in countries in which conscientious objectors are recognized, national service that the law may provide for in lieu of military service; c. service exacted in time of danger or calamity that threatens the existence or the well-being of the community; or d. work or service that forms part of normal civic obligations.
[338] ACHR (n 2) article 27(2)
[339] *Brasil Verde Workers v Brazil* (n 8), para. 242
[340] ibid

The IACtHR's review of article 6 ACHR on the case of *Brasil Verde Worker v. Brazil* is done in three stages. The first one is the definitional stage.[341] At this stage, the court examines the evolution of the concepts of slavery, servitude, forced labour and slave trade and traffic in women in international law and, subsequently, delimits the scope of such concepts in article 6 ACHR.[342] The second stage of the court's review is the application stage. At this point, the court applies the definitions of article 6 to the factual circumstances of the case. Lastly, in the third stage, the IACtHR determines state 's responsibility in relation to the alleged violations of the ACHR.[343]

In the present section, I will focus on the definitional stage and the application stage of the judgment of *Brasil Verde Workers v Brazil*. Firstly, I will provide an overview of the fact and procedural background of the case. Thereafter, I will explain how the IACtHR defines the prohibitions of article 6. I will do so by following the court's review. Subsequently, I will explain the definition of each of these prohibited practices and how the court applied it to the factual circumstances of the case. Lastly, I will also assess the relationship between slavery, servitude and forced labour.

4.1. Facts and Procedural Background

4.1.1. 'Slave Labour' in Brazil

In *Brasil Verde Workers v Brazil*, the IACtHR starts explaining the factual circumstances of the case, by describing the general context of 'slave labour'[344] in Brazil. Accordingly, the court elucidates that slavery was legally abolished in 1888. Notwithstanding that, slavery as a *de facto* situation continued to exist in Brazil due to poverty and the concentration of land ownership.[345] The court also pointed out that in 1995 the government recognized the existence of 'slave labour' and started to adopt measures to eradicate it.[346]

Moreover, the IACtHR points out that most victims of 'slave labour' in Brazil are poor men from afro-descendants between the ages of 18 and 40.[347] The victims are usually from states with high rates of poverty, illiteracy and rural work. Labour recruiters (known as 'Gatos') recruit the victims to work in distant states with promises of attractive salaries.[348] They usually work on livestock farms, with large-scale agriculture, deforestation or charcoal exploration. Upon arriving at such workplace, the workers are informed that they are in debt due to transportation, food and lodging and that such debts

[341] ibid para. 208
[342] ibid para. 240
[343] ibid para .208
[344] The term 'slave labour' is commonly used by national authorities as a synonym to the crime of 'subjecting someone to practices similar to slavery'. See Brazil Criminal Code (Código Penal Brazileiro, Decreto-Lei nº 2.848 de 07.12.1940 alterado pela Lei nº 9.777 em 26/12/9) article 149
[345] *Brasil Verde Workers v Brazil* (n 8) para. 111; HRC 'Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences, Gulnara Shahinian, Miparas, Mission to Brazil' (30 August 2010) UN Doc A/HRC/15/20/Add.4 paras 5; 7; 23.
[346] *Brasil Verde Workers v Brazil* (n 8) para 116
[347] ibid para. 113
[348] ibid paras. 112-114

will be deducted from their salaries.[349] The victims often have no freedom of movement, work in degrading conditions and many suffer physical, mental and verbal abuses.[350] Moreover, in Brazil, there is a high rate of impunity among the perpetrators of slave labour.[351]

4.1.2. Facts not Covered by the IACtHR Jurisdiction

In 1988 the first report of alleged situations of slavery, ill-treatment and the disappearance of workers in the Brasil Verde farm was filed to the Federal Police ('Polícia Federal').[352] Consequently, in 1989 police authorities 'visited' Brasil Verde and concluded that the situation did not characterize as slave labour.[353] Following the 1988 report, in 1993 and in 1995 the Regional Labour Inspection Office ('Delegacia Regional do Trabalho')[354] and Inspection Group of the Ministry of Labour ('Grupo Móvel do Ministério do Trabalho') conducted inspections on the compliance with labour law at Brasil Verde. Both inspections concluded that there were labour law irregularities, including irregular workers, but that the situation at Brasil Verde was not 'slave labour'.[355]

In 1997 two workers escaped from Brasil Verde and filed another report to the Federal Police.[356] They claimed being subjected to human trafficking as well as ill-treatment. Moreover, the two workers informed receiving death threats while at the farm and that it was a common practice at the farm to hire workers when the Ministry of Labor carried out inspections.[357] Consequently, the Mobile Inspection Group of the Ministry of Labour conducted a new inspection and concluded that the workers lived in degrading conditions, had no freedom of movement, suffered threats of use of force and that more than half did not possess working documents ('Carteira de Trabalho e Previdência Social').[358]

Based on the Mobile Inspection Group of the Ministry of Labour inspection report, the Federal Public Prosecutor's Office ('Ministério Public Federal') filed a criminal complaint against the 'Gato', the manager of the farm and its owner.[359] The labour recruiter was charged for the crimes of 'slave labour' ('*trabalho escravo'*), use of violence or serious threats to constrain someone to work ('*atentado contra a Liberdade do Trabalho*') and 'fraudulent recruitment of workers' ('*aliciamento de trabalhadores'*). The manager was

[349] ibid para. 112-114
[350] ibid para. 114
[351] ibid, para. 114
[352] Ibid, para. 129-132
[353] Ibid, para 135. Moreover, other state's organs such as The Council for the Defense of Human Rights ('Conselho de Defesa dos Direitos da Pessoa Humana') and the Attorney General's Office ('Procuradoria Geral da República') were notified of the report filed with the Federal Police.
[354] Regional Labour Inspection Office are service units of the Ministry of Labour responsible for the execution, supervision and monitoring of labour-related public policies. Among other things, they are responsible for supervising compliance with labour laws, workers safety and health. Currently, they are denominated 'Regional Superintendence of Labor and Employment ('Superintendências Regionais do Trabalho e Emprego').
[355] ibid 138
[356] *Brasil Verde Workers v Brazil* (n 8) para. 143.
[357] ibid 143
[358] ibid para. 144
[359] ibid para. 145

also charged with ‘slave labour' and ‘attempt against freedom of work’. The owner of the farm was only charged with the crime of ‘frustrating labour rights'.[360]

4.1.3. Facts within the IACtHR Jurisdiction

More than ten years after the 1997 complaint, in July 2008 a judge of the federal court declared the extinction of the criminal action due to the statute of limitation (general rules of prescription).[361] Despite the attempts from Labour Prosecutor's Office (‘Ministério Público do Trabalho'), no further investigations at Brasil Verde were undertaken.[362]

In 2000 a ‘Gato’ recruited workers from the city of Barras, Piauí, to work at Brazil Verde. He promised attractive salaries to the workers, transportations, food, and lodging.[363] Upon the recently recruited worker's arrival at Brasil Verde, they soon realized that they had been deceived. At first, the manager of the farm withhold their working documents and obliged them to sign blank documents.[364] The accommodations at Brasil Verde were precarious and unhygienic (e.g. there was no electricity or beds) and the workers did not receive appropriate food nor clean water. Additionally, the working hours lasted more than 12 hours a day, 6 days per week and were performed in degrading conditions. Additionally, workers suffered constant physical and psychological threats; acquired debts to buy goods, such as food and medicine; were prohibited from leaving the farm.[365]

Many workers desired to escape, however, it was impossible due to constant surveillance, the isolated site of the farm and, their lack of monetary resources.[366] Nonetheless, two workers escaped and filed a report to the police authorities. Consequently, in March 2000 the Ministry of Labour, together with police authorities, inspected the farm. The authorities found 82 workers, subjected to surveillance by armed guards, and that expressed strong desire to leave the farm. Moreover, the authorities concluded that they were forced to sign blank working contracts. The workers were rescued by labour authorities one day after the inspections. In the rescue, labour authorities required the manager to restituted the withhold wages and to paid compensation for labour law infractions.[367]

Thereafter, the Labour Prosecutor’s Office filed a lawsuit within the labour courts against the owner of the farm. The Labour Prosecutor claimed that the workers were subjected to false imprisonment and ‘slave labour’, and that those situations were aggravated by the workers' vulnerabilities.[368] The lawsuit ended with a judicial agreement in which the owner of the farm consented not to subject workers to ’slave labour’, not to withhold

[360] Brazil Penal Code (n 344) articles 149; 197.1; 207 and 203 respectively. See S*pecial Special Rapporteur on contemporary forms of slavery, Mission in Brazil (*n 345) 16-20
[361] *Brasil Verde Workers v Brazil* (n 8) para. 161
[362] ibid 162
[363] ibid
[364] ibid 166
[365] ibid 165-173
[366] ibid 173
[367] ibid 177
[368] *Brasil Verde Workers v Brazil* (n 8) para. 179

documents, and to guarantee decent living and working conditions for his employees.[369] Moreover, the Federal Prosecutor's Office filed a criminal complaint in the federal courts.[370] The federal court declined jurisdiction and referred the complaint to the state's court. While the lawsuit was in the state's court, it disappeared.[371]

4.2. Definition of Slavery

4.2.1. Prohibition of Slavery in International Law

In *Brasil Verde Workers v Brazil*, IACtHR determined that the prohibition of slavery is a *jus cogens* norm that entails *erga omnes* obligations.[372] It explained that the 1926 Slavery Convention[373] was the first international treaty to prohibit slavery. The convention defines slavery as 'the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised'.[374] The 1956 Supplementary Convention on The Abolition of Slavery expanded the definition of slavery to encompass institutions and practices similar to slavery.[375]

The court explained that from 1926 onwards, slavery was prohibited by several international law and human rights treaties.[376] Moreover, statutes of international criminal tribunals also prohibited slavery as a crime against humanity.[377] The IACtHR also mentioned that the ICC Statute defines that 'enslavement means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children'.[378]

The court also explained the interpretation of slavery and practices similar to slavery by international tribunals and quasi-judicial bodies. The IACtHR referred to ICTY case of *Prosecutor v. Kunarac.*[379] The court explained that in the case, the ICTY Trial Chamber agreed with the 1926 Slavery Convention definition of slavery. Additionally. The Trial chamber clarified that *powers attaching to the right of ownership* can be indicated by:

> [T]he restriction or control of an individual's autonomy, freedom of choice or freedom of movement; and, often, the accruing of some gain to the perpetrator. The consent or free will of the victim is absent. It is

[369] ibid para. 179
[370] ibid 186
[371] ibid
[372] *Brasil Verde Workers v Brazil* (n 8) para. 249.
[373] 1926 Slavery Convention (n 1)
[374] Ibid article 1
[375] ECOSOC, Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (Adopted in 7 September 1956, entered into force 30 April 1957) 226 UNTS 3 (1956 Supplementary Convention) article 7.
[376] See *Brasil Verde Workers v Brazil* (n 8) para. 250-253; Among others ICCPR (n 2) article 8, ECHR (n 2) article 4, article 5 ACHRP (n 2).
[377] Brasil *Verde Workers v Brasil* (n 8), para. 257, United Nations, 'Charter of the International Miliary Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis (8 August 1945) 82 UNTS 279 ('London Agreement'); ICTY Statute (n 3), SCSL Statute (n 3), ICC Statute (n 3)
[378] ICC Statute (n 3) article 7(1)(c)
[379] *Brasil Verde Workers v Brasil* (n 8) para. 257; *Prosecutor v Kunarac* et al, IT-96-23-T and IT-96-23/1-T, Trial Chamber(22 February 2001) para. 539 and Prosecutor v Kunarac [AC] (n 5)

> often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim's position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions. Further indications of enslavement include exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and human trafficking.[380]

The court also explained that the ICTY Appeal Chamber decision on the case of *Prosecutor v. Kunarac* clarified that the concept of slavery encompasses 'various contemporary forms of slavery which are also based on the exercise of any or all of the powers attaching to the right of ownership'.[381] Moreover, the Appeal Chamber added to the definition of slavery that the exercise of powers attaching to the right of ownership must result in some destruction of the judicial personality.[382]

Therefore, the IACtHR concluded that the definition of slavery in International Law is *i.* the status or condition of an individual over which is 'exercised of any or all of the powers attaching to the right of ownership'[383]. Additionally, the court held that *ii.* since the 1926 Slavery Convention, slave trade corresponds to slavery for the purpose of prohibition and abolition; and that *iii*. the 1956 Supplementary Convention expanded the scope of the prohibition of slavery to cover practices similar to slavery, such as servitude, debt bondage as well as other practices.[384] At last, the court determined that *iv*. the ICC Statute includes in the definition of slavery the 'exercise of the powers attached to the right of ownership in the course of trafficking in persons'.[385]

4.2.2. The IACtHR Definition of Slavery

After describing the evolution of the definition of slavery in international law, the IACtHR confirms that slavery within article 6 of the ACHR should be understood according to 1926 Slavery Convention as the status or condition of a person over whom any or all powers attaching to the right of ownership are exercised. Additionally, the court considered that powers attaching to the right of ownership entail the destruction of the victim's personality.[386]

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[380] *Prosecutor v Kunarac* [TC] (n 5) para. 539
[381] Prosecutor v. Kuranac [AC] (n 379) para 117
[382] ibid; the court points out that in the case of *Krnojelac* the ICTY confirms the definition of slavery and its indicators as laid down in the *Kuranarac* decision (Prosecutor v. Milovard Krnojelac n IT-97-25, Trial Chamber (ICTY, 15 March 2002). Moreover, the Special Tribunal for Sierra Leone also agreed with the ICTY definition of slavery. See Prosecutor v. Birma (n 5) paras. 744-748. Additionally, the IACtHR also points out that the ECOWAS Court of Justice also agreed with the ICTY definition of slavery; see Hadijatou Mani Koraou v. The Republic of Niger (n 5). At last, the court points out that the Extraordinary Chambers in the courts of Cambodia also repeated the ICTY definition of slavery, see Judgment (Kaing Guek Eav alias Duch) N 001/18-07-2007/ECCC/SC (ECCC, 3 February 2012 paras. 117-167.
[383] *Brasil Verde v Brazil* (n 8) para. 268, *Prosecutor v. Kunarac* (n 5) para. 539.
[384] *Brasil Verde Workers v. Brazil* (n 1), para. 268
[385] International Criminal Court, Elements of Crime ISBN No 92-9227-232-3 (2011) article 7(1)(c)(1)
[386] *Brasil Verde Workers v Brazil* (n 8) para. 269.

Concerning the first part of the definition of slavery. corresponding to the 'status or condition of a person', the court explained that it means that both *de jure* and *de facto* situations of abuse can be characterized as slavery.[387] This means that it is not essential that slavery is sanctioned by a legal system or a document for a situation characterizes as such.[388] Regarding '*powers attaching to the right of ownership'*, the court clarifies that 'ownership' ought to be understood as 'possession' in cases involving slavery.[389] Possession is, by its turn, the exercise of control over a person by another. This means that in situations of slavery the perpetrator will exercise control over a person at a level that significantly deprives that person of his or her will or considerably diminishes the person's individual liberty.[390]

Hence, the court concludes that:

> The powers attaching to the right of ownership' should be understood as constituting control over a person in such a way as to significantly deprive that person of his or her individual liberty, with the intent of exploitation through the use, management, profit, transfer or disposal of that person. Usually, this exercise will be supported by and obtained through means such as violent force, deception and/or coercion.[391]

By referencing the ICTY findings in *Prosecutor v. Kunarac*, the IACtHR also determines that 'powers attaching to the right of ownership' can be indicated by the elements of:

> a. restriction or control of an individual's autonomy, b. restriction or loss of freedom of movement; c. the accruing of some gain to the perpetrator. d. the absence of consent or free will of the victim. Or its rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; e. the use of physical and psychological violence; f. the victim's position of vulnerability; g. detention or captivity, h. exploitation;[392]

At last, the court adds that slavery entails some destruction of the person's judicial personality.[393] Thus, a situation of slavery might also violate the right to humane treatment, the right to personal liberty, and human dignity.[394]

In *Brasil Verde Workers v. Brazil*, the IACtHR found that the factual circumstances of the case amounted to forced labour and debt bondage. However, the abuses through which the victims were subjected went beyond the elements of forced labour and debt bondage and reached the stricter elements of the above-mentioned definition of slavery.[395] Thereafter, the court concluded that the factual circumstances corresponded to slavery as

[387] ibid para. 270; 1926 Slavery Convention (n 1) article 1
[388] ibid
[389] ibid para. 271; 1926 Slavery Convention (n 1) article 1
[390] Ibid para. 271
[391] *Brasil Verde Workers v Brazil* (n 8) para 271; Bellagio-Harvard Guidelines on the Legal Parameters of Slavery, Guideline 2
[392] *Brasil Verde Workers v Brazil* (n 8) para 272, See also *Prosecutor v Kunarac* (TC) (n 379) para 542
[393] *Brasil Verde Workers v Brazil* (n 8) para 273, See also *Prosecutor v. Kunarac* (AC) (n 5) para. 117
[394] ibid
[395] ibid para. 304

the workers were subjected to control inherent in the 'powers attaching to the right of ownership'.[396]

As follows, the court identified the indicators of powers attaching to the right of ownership in the case. Thus, it established that *i.* the workers were under the effective control of the 'Gatos', the manager, the guards and the owner of the farm; ii. The worker's individual autonomy and free will were restricted; *iii*. there was an absence of consent and they suffered psychological and physical threats of use of force; *iv*. they were exploited for the purpose of forced labour which was performed under inhumane conditions. Moreover, the workers were in a *v.* position of vulnerability; *vi.* they were in a coercive environment that vii. precluded the possibility of the workers to alter their condition.[397]

4.3. Definition of Servitude

To define servitude enshrined in article 6 ACHR, the IACtHR also investigated the development of the prohibition of servitude in international law.[398] The court explained that servitude was first outlawed by the 1956 Supplementary Convention and that it was subsequently prohibited by other international treaties.[399] Accordingly, the 1956 Supplementary Convention considers servitude as well as debt bondage as practices similar to slavery and determines that they must be abolished and abandoned. The court also added that international tribunals have upheld this prohibition and considered servitude a practice similar to slavery.[400]

Therefore, the IACtHR explained that the traditional concept of slavery evolved in international law to *prohibit practices and institutions similar to slavery*.[401] The court explained that such practices and institutions, likewise slavery are based on 'the exercise of control over a person, through physical and psychological coercion, in such a way as to significantly deprive that person's autonomy, with the intent of exploitation against the person's will.'[402] Thereafter, the court concluded that servitude is a practice similar to slavery. Moreover, the IACtHR also arrived at the conclusion that the same protection

[396] Ibid; 1926 Slavery Convention (n 1) article 1
[397] ibid
[398] ibid para. 274
[399] See *Brasil Verde Workers v Brazil* (n 8) para 275. See also 1956 Supplementary Convention (n 375) article 1;
[400] ibid paras 275;259 and 268
[401] *Brasil Verde Workers v. Brazil* (n 8) para 276
[402] Ibid, para 276. The court agrees with the ICTY, that determines that " The Appeals Chamber accepts the chief thesis of the Trial Chamber that the traditional concept of slavery, as defined in the 1926 Slavery Convention and often referred to as "chattel slavery", 145 has evolved to encompass various contemporary forms of slavery which are also based on the exercise of any or all of the powers attaching to the right of ownership. In the case of these various contemporary forms of slavery, the victim is not subject to the exercise of the more extreme rights of ownership associated with "chattel slavery", but in all cases, as a result of the exercise of any or all of the powers attaching to the right of ownership, there is some destruction of the juridical personality;146 the destruction is greater in the case of "chattel slavery" but the difference is one of degree. The Appeals Chamber considers that, at the time relevant to the alleged crimes, these contemporary forms of slavery formed part of enslavement as a crime against humanity under customary international law ". *Prosecutor v. Kunarac* [AC] (n 5) para. 117

and obligations corresponding to the prohibition of slavery must also be afforded to the prohibition of servitude.[403]

From this passage, one can conclude that the court considered that servitude and slavery constitute the same concept in international law. This reasoning is confusing because, as I will show in the subsequent paragraphs, the court does not define servitude in the same way as slavery. Additionally, this passage needs some clarification as to whether the statement that the 'same protections and obligations of slavery extend to servitude' relates to international law or if simply the court determines what are the obligations relating to servitude before even defining the prohibition.

The court then turns to the realm of international human rights law, in particular to the ECtHR case law. It explained that in *Siliadin v. France* the ECtHR defined servitude as 'the obligation to perform a certain service to others,[404] which was imposed through coercion'[405] and 'the obligation for the "self" to live on another person's property and the impossibility of altering his condition'.[406] Later on, in the case of *CN and V. v. France,* the ECtHR considered servitude as an 'aggravated form of forced or compulsory labour,[407] which differs from the latter by the 'the victim's feeling that their condition is permanent and that the situation is unlikely to change'.[408] At last, the court observed that in *CN v. the United Kingdom,* the ECtHR held that servitude involves both overt and more subtle forms of coercion.[409] The IACtHR concluded by agreeing with ECtHR and defining the prohibition of servitude enshrined in the ACHR as: 'i. *the obligation to perform work to others, which was imposed through coercion* and ii. *the obligation to live on another person's property without the possibility of altering his condition."*[410]

In applying the definition of servitude to the factual circumstances of the case, the IACtHR held that the workers were subjected to debt bondage.[411] Debt bondage was evident because the worker received money to cover travel expenses; when at the farm acquired debts to buy food, medicine and other goods, as well as due to their extremely low salaries.[412] The court sustained that the situation of debt bondage was aggravated by the existence of a 'truck system', which correspond to long working hours, subtracted from threats and use of force, and that workers live in degrading conditions.[413]

Additionally, the court observed that the workers could not alter the condition as they were: *i.* surveilled by armed guards; prohibited from leaving the farm. Moreover, they

[403] *Brasil Verde Workers v Brazil* (n 8) 276.
[404] See *Siliadin v. France (n 27),* para 123
[405] The IACtHR argues that the ECtHR has held that servitude might involve overt and more subtle forms of coercion. See *CN v. the UK* (n 229) para 80
[406] *Siliadin v France* (n 27) para. 123
[407] *CN and V v France* (n 69) para 91
[408] ibid, para 91
[409] ibid.
[410] *Brasil Verde Workers v* Brazil (n 8) para. 280
[411] *Brasil Verde Workers v Brazil (n 8)* paras. 303-304
[412] ibid para 303
[413] ibid.

suffered physical and psychological coercion and feared reprisal and death in case they tried to escape.[414] All of which was aggravated by the victim's vulnerabilities as they were illiterate and isolated due to the location of the farm.[415] Hence, the court concluded that the workers were subjected to forced labour and debt bondage.[416]

Both the definitional and the application stage of the IACtHR's review of servitude have some puzzling aspects. The first problematic feature of the IACtHR's reasoning is that the definition of debt bondage and its relationship with servitude are unclear. In the definitional stage, the court only mentioned that the 1956 Supplementary Convention defines debt bondage, likewise servitude, as a practice similar to slavery. However, the court did not address if the prohibition of servitude of article 6 of the ACHR also covers debt bondage. Although not explicitly recognized, it can be argued that debt bondage is prohibited in the ACHR under the label of servitude.[417] This is evident from the application stage where the court used elements of the definition of servitude to conclude that the workers were subjected to debt bondage.[418]

Another aspect of the judgment that is unclear is whether if servitude requires forced labour. This is because the court did not explain if the element of the definition of servitude of *obligation to perform work to others imposed through coercion* is a synonym to forced labour. The IACtHR applied the elements of forced labour and servitude altogether to the factual circumstances of the case. Thus, it is difficult to understand which characteristics correspond to servitude or forced labour and in which ways the abuses relate to each other. I will address the court's reasoning on forced labour and the distinction between forced labour and servitude in *sections 4.4.* and *4.5.*

I advance the argument, however, that the IACtHR is faced with challenges concerning its review of servitude. Firstly, the IACtHR must be consistent with its own definition of the abuses and apply it to the factual circumstances in a clear and coherent manner. Moreover, the court should clarify the relationship between servitude and forced labour, identifying whether if the latter is a component of the former and if servitude constitutes an aggravated form of forced labour.

4.4. Definition of Forced Labour

The IACtHR turned to the ILO Forced Labour Convention to define forced labour.[419] Accordingly, *forced or compulsory labour* means all work or service which is exacted from any person under the menace of any penalty and for which the said person has not

[414] ibid.
[415] ibid.
[416] ibid.
[417] ibid.
[418] ibid 304
[419] The first time that the IACtHR restored to the ILO Forced Labour Convention (n 93) was in the case of *Ituango Massacres v. Colombia*. In that opportunity, the court justified the use of such definition with the general rules of interpretation of article 29 the ACHR as well as the rules of treaty interpretation of article 31 of the Vienna Convention on the Laws of Treaties. See Case of *Ituango Massacres v. Colombia*, Preliminary Objection, Merits, Reparations and Costs, Series C No. 148 (IACtHR, 1 July 2006) paras. 155-147.

offered himself voluntarily'.[420] Thus, the definition of forced and compulsory labour contains two elements, 'menace of penalty' and 'unwillingness to perform work of service'. Regarding the first element, the court explained that:

> Menace of penalty can consist in the real and actual presence of a threat, which can assume different forms and degrees, of which the most extreme are those that imply coercion, physical violence, isolation or confinement, or the threat to kill the victim or his next of kin.[421]

'Unwillingness to perform work or service' is 'the absence of consent or free choice when the situation of forced labour begins or continues. This can occur for different reasons, such as illegal deprivation of liberty, deception or psychological coercion'.[422]

Lastly, the court explained that in the case of *Ituango Massacre v. Colombia* it had held that forced and compulsory labour required a third element of 'connection to state's agents'.[423] In *Ituango Massacre v Colombia*, the IACtHR had concluded that a violation of article 6(2) demanded that the alleged violation was attributed to state's agents, either due to their direct participation or to their acquiescence to the facts.[424] In *Brasil Verde Workers v. Brazil*, the court clarified that the element of 'connection to states' agents' is only applicable to cases involving 'the obligation to respect the prohibition of forced and compulsory labour'.[425] As in *Brasil Verde Workers v. Brazil*, the alleged violation refers to the obligation to prevent, the attribution to state agents cannot constitute a requirement of forced labour.[426] I will clarify state's obligations under article 6 in the next chapter.

The application of the definition of forced labour to the factual circumstances, which I explain in *section 4.3.*, is perhaps the most confusing aspect of the judgment. Firstly, the definition of forced labour as explained in the above paragraph is not applied to the factual circumstances of the case. Differently than in the case *of Ituango Massacre v. Colombia*, in *Brasil Verde Workers v Brazil* the IACtHR did not examine whether work was extracted under the 'menace of penalty' for which the said person 'had not offered himself voluntarily'.[427] Conversely, the court assessed servitude and forced labour at the same time.[428] Thus, the elements of forced labour and servitude were conflated, and it becomes difficult to understand how the court concluded that the situation constituted forced labour.

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[420] ILO Forced Labour Convention (n 93) article 2(1)
[421] *Brasil Verde Workers v Brazil* (n 8) para 293; *Ituango Massacre v. Colombia* (n 419) para. 161; See also Global report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, "A Global Alliance against Forced Labour," International Labour Conference, 93rd session, 2005.
[422] *Brasil Verde Workers v Brazil* (n 8) para. 293; *Ituango Massacre v. Colombia* (n 345), para. 164
[423] *Brasil Verde Workers v. Brazil* (n 8) paras. 292-293
[424] ibid 292; *Ituango Massacre v. Colombia* (n 345) para. 160
[425] ibid 292
[426] *Brasil Verde Workers v Brasil* (n 8) para 293.
[427] ibid; See *Ituango Massacre v Colombia* (n 419) para.160-165
[428] See *sections 4.3.* and *4.4.*

It can be argued that the court relied on the existence of truck systems to determine that the circumstances of the case amounted to forced labour.[429] Thus, it appears that the court considered that *working under the threat and use of force* corresponded to the court's definition of 'menace of penalty' and 'involuntariness', the two elements of the definition of forced labour. However, truck systems were only mentioned in the application stage and they were not connected to the IACtHR's definition of forced labour.

Adding the assessment of truck systems in the circumstances of the case also corresponds to another puzzling aspect of the judgment. Truck systems included the elements *long working hours* and *living in degrading conditions* into the assessment of forced labour. It appears that by doing so, the court intended to include *exploitative and abusive working conditions* into the definitional scope of forced labour. However, these aspects are not mentioned in the court's definition of forced labour and therefore, it is difficult to understand how they connect with the definition.

4.5. The Relationship Between Slavery, Servitude and Forced Labour

It is not clear from the case of *Brasil Verde Workers v Brazil* what is the relationship between forced labour and servitude in the IACtHR case law.[430] It is not evident in the judgment if the court considers servitude is an aggravated form of forced labour.[431] Thus, one cannot conclude that the court interprets the abuses of article 6 in a gradational *model.*[432] Namely, that they are a 'continuum from the least abusive, forced and compulsory labour, servitude more so and slavery the greatest abuse'.[433]

Firstly, as explained in *sections 4.3.* and *4.4.* it is unclear in the judgment if the court considered work subtracted under coercion, which are constitutive elements of servitude, a synonym for forced labour.[434] Therefore, it is not clear if servitude requires the existence of forced labour. Additionally, the court did not mention the necessity of an *aggravated* relationship between forced labour or work subtracted under coercion and servitude. Instead, the court only determined that the situation of debt bondage was aggravated by the existence of truck systems.[435] Thereafter, the IACtHR added that the workers were under the obligation to live on another person's property without the possibility of altering his condition.

The IACtHR also did not explain the relationship between slavery and servitude. The court held very generally that the characteristics of the abuses in the case went *beyond* the elements of debt bondage and forced labour to reach the *stricter* elements of

[429] ibid
[430] See *section 4.2.*
[431] See *section 4.2.*
[432] See *section 2.4.*
[433] Stoyanova (n 15) 285
[434] ibid
[435] See *section 4.2.*

slavery.[436] Hence, the court did not explain if it understands these two abuses in a gradational model (i.e. if servitude is understood as human exploitation falling short on slavery).[437]

4.6. Human Trafficking under Article 6 ACHR

Article 6(1) of the ACHR prohibits slave trade and traffic in women.[438] In *Brasil Verde Workers v. Brazil,* the IACtHR first determined the evolution of the prohibition of slave trade and traffic in women in international law to then identify the meaning of this prohibition in the ACHR.[439] Accordingly, the court explained that the prohibition of slave trade is related to the prohibition of slavery. Since the 1926 Slavery Convention, states have an obligation to abolish the slave trade.[440] Moreover, the court explained that the prohibition of traffic in women can be found in several treaties adopted in the twentieth century.[441]

Furthermore, the court held that the Palermo Protocol[442] prohibits trafficking in persons.[443] Moreover, it adds that many UN organs have held that trafficking in persons is a contemporary form of slavery.[444] The court then referred to the ECtHR jurisprudence on trafficking in persons.[445] It highlights that, even though the ECHR is silent regarding the prohibition of trafficking in persons, the ECtHR understands that trafficking within the meaning of article 3(a) of the Palermo Protocol and article 4(a) of the CoE Anti Trafficking Convention falls within the scope of article 4 of the ECHR.[446]

Thus, the IACtHR concluded that both slave trade and traffic in women are based on the control exercised over the victims during the transport or transfer for the purpose of exploitation.[447] Additionally, the court determined that both slave trade and traffic in women include the elements of: control of a person's movement or physical environment of the person; psychological control; adoption of measures to prevent or deter scape; forced and compulsory labour, including prostitution.[448] Thus, the IACtHR considered that slave trade and traffic in women enshrined in article 6 of the ACHR should be interpreted as trafficking in persons and that it's definition corresponds to article 3(a) of the Palermo Protocol, as follows:[449]

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[436] *Brasil Verde Workers v Brazil* (n 8) para. 303
[437] See Stoyanova (n 15) 286; Jean Allain, On the curious disappearance of Human Servitude from General International Law [2009] 11(2) Journal of the History of International Law 303-304
[438] ACHR (n) article 6(1)
[439] *Brasil Verde Workers v Brazil* (n 8) para 281
[440] Ibid
[441] ibid
[442] Palermo Protocol (n 160)
[443] See Palermo Protocol (n 160) articles 3 and 4. See *Brasil Verde Workers v Brazil* (n 8) para. 286.
[444] *Brasil Verde Workers v. Brazil* (n 8) para. 286
[445] *Brasil Verde Workers v Brazil* (n 8) paras. 287-288
[446] See *Rantsev v. Cyprus and Russia* (n 36), paras. 280-282; See *section 2.5*.
[447] *Brasil Verde Workers v Brazil* (n 8) para 288
[448] *Brasil Verde Workers v Brazil* (n 8) para 289; See also *Rantsev v. Cyprus and Russia* (n 38) paras. 281 and 143
[449] *Brasil Verde Workers v Brazil* (n 8) para. 289. See Palermo Protocol (n 160) article 3.

> i. "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of person, ii. by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person. These requirements are not necessary conditions for minors; ii. for the purpose of exploitation. *450*

In the application stage of the judgment *Brasil Verde Workers v. Brazil*, the court explained that the recruitment of workers through fraud, deception and false promises is a common practice in the poorest states of Brazil.[451] Certain persons with common characteristics are often recruited in these states for the purpose of work exploitation.[452] The court argued that this general context of trafficking in persons in Brazil was confirmed by proof annexed to the case, namely the interviews conducted with the applicants as well as police reports that led to the 2000's inspection in the farm.[453] Hence, the court concluded that the circumstances of the case demonstrated the workers were subjected to trafficking in persons.[454]

[450] The court also added that 'exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.' *Brasil Verde Workers v Brazil* (n 8) para. 290
[451] *Brasil Verde Workers v Brazil* (n 8) para. 305
[452] ibid
[453] ibid
[454] ibid

5 Positive Obligations under article 6 ACHR

In this chapter, I will explain positive obligations under article 6 of the ACHR identified by the IACtHR in the case of *Brasil Verde Workers v. Brazil*. To do so, I will first explain the IACtHR general approach on positive obligation. Subsequently, I will explain the obligations identified by the court under article 6 ACHR. To do so, first I will explain the general obligation prevent and specific obligations derive from the obligation to prevent. Secondly, I will analyze the procedural obligations under article 6 ACHR.

5.1. State's Obligations under the ACHR

Since the case of *Velazquez-Rodriguez v. Honduras,* the IACtHR considers that articles 1(1) and 2 ACHR read in conjunction with the Convention's substantive rights give rise to state's negative and positive obligations.[455] In the judgment, the court held that to guarantee the effective protection of human rights, 'state must comply with both negative and positive obligations, thereby principally placing positive obligations on the same footing as negative ones'.[456]

Article 1(1) of the ACHR compel states parties 'to respect the rights and freedoms recognized herein and to ensure to all person's subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination (…)'.[457] Accordingly, states parties are under two general obligations in relation to article 1(1). The first one is the obligation to *respect* the ACHR rights. The obligation to respect corresponds to the 'classical negative obligation on the state to refrain from acting in such a way that violates the ACHR rights'.[458]

The second obligation enshrined in article 1(1) ACHR is the obligation to *ensure* the exercise of the ACHR rights to persons within state's jurisdiction and without any discrimination.[459] In *Velazquez-Rodriguez v. Honduras,* the court dwelt with this obligation clarifying that it consists on 'the duty to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights'.[460] Moreover, the court also added that the obligation to ensure is not fulfilled solely 'by the existence of a legal system designed to make it possible to comply with this obligation - it also requires the government to conduct itself so as to effectively ensure the free and full exercise of human rights.'[461]

[455] Ferrer Mac-Gregor (n 18) 165
[456] Lavrysen, Positive Obligations in the Jurisprudence of the Inter-American Court of Human Rights (n 19) 95
[457] ACHR (n 2) article 1(1)
[458] Lavrysen, Positive Obligations in the Jurisprudence of the Inter-American Court of Human Rights (n 19) 96; See Case of *Velásquez Rodríguez v. Honduras*, Merits Series C No. 4 (IACtHR, 29 July 1988) para .165, See *section 3.2.*
[459] Article 1(1) ACHR (n 2).
[460] *Velásquez Rodríguez v. Honduras* (n 458), para. 166
[461] ibid

The obligations to *ensure* and *respect* considered in conjunction with the convention's substantive rights give rise to specific obligations. The IACtHR does not enumerate such positive obligation, it determines them in accordance with the substantive right assesses in light of the circumstances of the case.[462] Notwithstanding that, the court has held in several occasions that the obligation to *ensure* and *respect* require the specific positive obligation to *prevent, investigate* and *punish* 'any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and *provide compensation* as warranted for damages resulting from the violation'.[463]

Furthermore, article 2 ACHR also bring about state's positive obligations. The article determines that:

> Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedom.***[464]***

Accordingly, article 2 entail two obligations. States must eliminate norms and practices that violate the ACHR and adopt norms and other measures to effectively guarantee the convention's rights.[465] The first obligation corresponds to the 'negative obligation to refrain from enacting or upholding norms or practices that in themselves violate human rights'.[466] The second obligation is the positive obligation to 'adopt all measures so that the provisions of the Convention are effectively fulfilled in its domestic legal system.'[467]

5.2. Positive Obligations under Article 6 ACHR

In *Brasil Verde Workers v. Brazil,* after determining that the workers were subjected to slavery the court determined state's responsibility in relation to article 6(1) ACHR. The court explained that article 6 ACHR in conjunction with article 1(1) ACHR, imposes obligations upon state parties to ensure and respect the rights enshrined in article 6 ACHR. Accordingly, the obligation to respect prohibits states from subjecting individuals to slavery, servitude, forced labour and trafficking in person. The obligation to ensure, by its turn, requires from states to adopt all necessary measures to eradicate such practices and to prevent that individuals are subjected to them by private parties.[468]

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[462] Lavrysen, Positive Obligations in the Jurisprudence of the Inter-American Court of Human Rights (n 19) 96
[463] See *Velasquez-Rodriguez v. Honduras* (n 458)
[464] ACHR (n 2) article 2
[465] Lavrysen, Positive Obligations in the Jurisprudence of the Inter-American Court of Human Rights (n 19) 96; See also *Santo Domingo Massacre v. Colombia*, Preliminary Objections, Merits and Reparations Series No. 25 (IACtHR, 30 November 2012) para. 162.
[466] Lavrysen, Positive Obligations in the Jurisprudence of the Inter-American Court of Human Rights (n 19) p. 97
[467] ibid 97; from this provision emerges the principle of effectiveness (effet utile), according to which the domestic legal system must guarantee the ACHR's rights effectively. See *'The Last Temptation of Christ' (Olmedo-Bustos et al.) v. Chile,* Merits, Reparations and Costs, Series C No. 73. (IACtHR, 5 February 2001) para. 87.
[468] *Brasil Verde Workers v. Brazil* (n 8) para. 316

Thereafter the court clarifies that the obligation to *ensure* the rights enshrined in article 6 ACHR encompasses a general obligations to *prevent* and a obligation to *investigate* situations of slavery, servitude, forced labour and trafficking in persons.[469] Moreover, the court recognized that both these obligations in the contexts of article 6 ACHR give rise to specific obligations of: *i.* Conduct effective investigations and punishment; ii. eliminate any norm that legalizes or permits[470] slavery and servitude; *iii.* the obligation to criminalize*; iv.* The obligation to inspect and take other measures to identify practices that violate article 6 *v.* obligation to provide protective measures and assistance to victims.[471]

5.3. The General Obligation to Prevent

In the IACtHR case law the obligation to prevent corresponds to the duty to adopt of an *adequate legal and administrative framework* to prevent human rights violations.[472] This obligation derives from the obligation to *ensure* the exercise of the ACHR rights stipulated by article 1(1) of the same Convention. The obligation to prevent, however, is also closely related to article 2 ACHR what requires from states to adopt measures so that the provisions of the Convention are effectively fulfilled.[473]

In *Brasil Verde Workers v. Brazil,* the IACtHR determined that the *obligation to prevent* requires the i. *adoption of a legal framework for protection* against abuses of article 6, with effective implementation; which must include the enactment of policies and measures that allow state's authorities to respond effectively when one of these abuses is reported to them. Moreover, this obligation entails an i. '*integral strategy'* that prevents risk factors and strengthen institutions to provide an effective response to situations of modern slavery.[474] The obligation to prevent also requires the iii. *adoption of specific preventive measures tailored to protect certain groups that have a greater risk of being victims* of trafficking in persons or slavery.[475] Additionally to an adequate administrative and legal framework, the obligation to prevent also includes all measures of political, legal, administrative and cultural nature that safeguard the rights enshrined in article 6.[476]

The IACtHR case law demonstrates that the obligation to prevent must guarantee the prevention of abuses caused by both state's authorities and private parties.[477] In cases concerning violations committed by state's authorities the obligation to prevent can be considered 'as an extension of the negative obligation to respect'.[478] When the violation is caused by a private party, as in the case of *Brasil Verde Workers v. Brazil*, states must have failed to *prevent* human rights violations for international responsibility to be

[469] ibid para. 319
[470] A legislations that not explicitly prohibit or allow slavery.
[471] *Brasil Verde Workers v. Brazil* (n 8) para. 319
[472] Lavrysen, Positive Obligations in the Jurisprudence of the Inter-American Court of Human Rights (n 19) 98
[473] ibid
[474] *Brasil Verde Workers v. Brazil* (n 8) para. 320; See Lavrysen, Positive Obligations in the Jurisprudence of the Inter-American Court of Human Rights (n 19) 99
[475] ibid
[476] *Brasil Verde Workers v. Brazil* (n 8) para. 322
[477] ibid
[478] Lavrysen, Positive Obligations in the Jurisprudence of the Inter-American Court of Human Rights (n 19) 99

triggered. The failure can be either in relation to the general obligation to prevent or to a specific obligation that emerges from the obligation to prevent identified in a specific case.[479]

5.3.1. The Obligation to Take Operational Measures

In the IACtHR case law, the obligation to prevent often encompasses the specific obligation to provide operational preventive measure.[480] This obligation will arise when there is a specific risk of a human rights violation. States will fail to guarantee this obligation if:

> [A]t the moment of the occurrence of the events, the authorities knew or should have known about the existence of a situation posing an immediate and certain risk to the life of an individual or of a group of individuals, and that the necessary measures were not adopted within the scope of their authority which could be reasonably expected to prevent or avoid such risk.[481]

This obligation is one of means and not results. This means that it 'must be interpreted so that an impossible or disproportionate burden is not imposed upon the authorities'.[482] When the court assesses state's compliance to this obligation it takes 'into account the difficulties involved in the planning and adoption of public policies and the operative choices that have to be made in view of the priorities and the resources available.'[483]

In *Brasil Verde Farm v. Brazil*, the court found that the state was *aware of the risk* of workers being subjected to slavery and forced labour in the Brazilian state of Pará as well as that it was aware of the specific situation at Brasil Verde.[484] State's knowledge of the risk was evident in the case due to several reports filed with the federal police since 1988.[485] The court sustained that the state did not *adopt necessary measures to prevent the abuses.*[486] That is because the public policies and inspections undertaken by the state were not sufficient to prevent that the workers were subjected to slavery.[487]

Additionally, the court sustained that the *state's authorities did not act with due diligence* when workers that had recently escaped from Brasil Verde filed reports to the police.[488] The court explained that the special character of the obligation to prevent the abuses of article 6 ACHR compels the state 'to use all its available resources' to address such violations.[489] For all these reasons the court concluded that the state violated article 6(1)

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[479] ibid
[480] Lavrysen, Positive Obligations in the Jurisprudence of the Inter-American Court of Human Rights (n 19) 105
[481] *Sawhoyamaxa Indigenous Community v. Paraguay*. Merits, Reparations and Costs, Series C No. 146 (IACtHR, 29 March 2006) para. 155.
[482] Ibid; See Lavrysen, Positive Obligations in the Jurisprudence of the Inter-American Court of Human Rights (n 19) 105
[483] Lavrysen, Positive Obligations in the Jurisprudence of the Inter-American Court of Human Rights (n 19) 105
[484] *Brasil Verde Workers v Brazil* (n 8) para. 325
[485] See *sections 4.2.1 and 4.2.2*.
[486] B*rasil Verde Workers v Brazil (*n 8) para. 328
[487] ibid
[488] *Brasil Verde Workers v Brazil* (n 8) para. 327; See section 4.2.1. and 4.2.2.
[489] ibid para. 328

in connection with article 1(1), 3, 5, 7, 11 and 22 of the ACHR.[490] Additionally, the court also found other two violation in relation to article 6(1) ACHR which I will discuss in the subsequent sections.

5.4. Other Specific Obligations under Article 6 ACHR

In *Brasil Verde Workers v. Brazil*, the IACtHR determineD that the obligation to prevent and investigate (ensure) the rights enshrined in article 6 entails specific obligations.[491] The first obligation identified by the court is the obligation to investigate and when necessary punish the alleged violations of article 6 ACHR. I will discuss this obligation in *sections 5.6.1* and *5.6.2*. The remaining specific obligations are not reviewed nor explained by the court. That is because the court found more generally that the state failed to prevent a violation of article 6(1) ACHR and therefore, it did not access these specific obligations.

In the present section, I will explain two of these obligations. I will highlight the court's general approach on two of these obligations, the obligation to criminalize and the obligation to eliminate any norm that legalizes or permits slavery and servitude. Additionally, I will point out the other two obligations, the obligation to inspect and take other measures to identify practices that violate article 6 ACHR; and obligation to provide protective measures and assistance to victims.

5.4.1 Obligation to Criminalize

In *Brasil Verde Workers v Brazil* the IACtHR sustained that states are under the specific obligation to criminalize abuses of article 6 ACHR. The obligation to criminalize human rights abuses is a specific obligation that derives from the general obligation to prevent enshrined in article 1(1) ACHR. In *Brasil Verde Workers v. Brazil*, the court recognized that states are under the obligation to criminalize the practices prohibited under article 6(1) and 6(2) ACHR and that they must prescribe severe punishment.[492] The IACtHR has 'emphasized that effective prevention of human rights violations may require recourse to criminal law'.[493] The court has recognized this obligation in relation to the right to life of article 4 ACHR, right to humane treatment of article 5 ACHR among others.[494] Although never explicitly stated by the IACtHR, the case law demonstrates that the court requires criminalization only of the most serious human rights violations.[495]

Criminalization under specific labels and definition of crimes

As the court did explain the obligation to criminalize abuses under article 6 ACHR, as it did not find a violation relating on this aspect, it is not clear from judgment if states are under the obligation to enact specific criminal offences of slavery, servitude, forced

[490] ibid 342-343
[491] See section 5.3.
[492] *Brasil Verde Workers v. Brazil* (n 8) para 319
[493] Lavrysen, Positive Obligations in the Jurisprudence of the Inter-American Court of Human Rights (n 19) 102
[494] See *Velásquez-Rodríguez v. Honduras* (n 458) para. 175
[495] Lavrysen, Positive Obligations in the Jurisprudence of the Inter-American Court of Human Rights (n 19) 102

labour and trafficking in persons. It appears, however, that the court's main concern is if national criminal laws and its correspondent judicial interpretation can afford effective protection against abuses of article 6, regardless of the national criminal labels.[496]

From the judgment is clear, however, that the court does not instruct how the criminal offences should be defined in the national system. This conclusion can be drawn from the court´s assessment of the definition of trafficking in persons as well the proportionality of penalties in the reparation section of the judgment.[497] Although the reparations section of the judgment is outside the scope of the present analysis, the court's reasoning in it is valuable to understand the positive obligation to criminalize abuses under article 6. Concerning the definition of trafficking, the court held that the fact that the worker recruiter was prosecuted under the crime of 'recruiting workers' and not under the crime of trafficking in persons in the terms of the Palermo Protocol did not influence negatively national procedures nor violated the ACHR.[498] Additionally, in accessing proportionality of the penalties, the court explains that states have the prerogative to determine the adequate penalty for a criminal offence within their national criminal laws.[499]

5.4.2. The Obligation to Remove Norms

In *Brasil Verde Workers v Brazil*, the court determined that states are under the specific obligation eliminate any norm that legalizes or permits slavery and servitude. In the judgment the court considered that this obligation arises from the obligation to ensure of article 1(1) ACHR. However, it can be argued that this obligation is directly related to the negative obligation stipulated article 2 ACHR. Article 2 determines that state must undertake to adopt legislative and other measures to give effect to the ACHR.[500] As explained in *section 5.1.*, article 2 encompasses a negative obligation to eliminate norms and practices that violate the ACHR. Accordingly, slavery, servitude, forced or compulsory labour or trafficking in persons cannot be sanctioned by the national legal regime. Moreover, any laws that permit or allows the existence of such practices are contrary to the ACHR.

5.4.3 The Obligations to Inspect and to Provide Assistance to Victims

In *Brasil Verde Workers v Brazil*, the IACtHR also determined that states must inspect and take other measures to identify practices of slavery, servitude, forced labour and trafficking in persons as well as provide protective measures and assistance to victims.[501] The court did not explain the content of these obligations thoroughly and how they relate to the obligations to the general obligation to prevent and the obligation to investigate. As

[496] See *section 5.4.1.*
[497] *Brasil Verde Workers v Brazil* (n 8) para. 456-458
[498] ibid para. 458
[499] ibid para. 462
[500] ACHR (n 2) article 2
[501] *Brasil Verde Workers v Brazil* (n 8) para. 319

these obligations are specific to the prohibitions of article 6 ACHR, it is not possible to explain its content in accordance with the IACtHR case law.

5.5. Enhanced Positive Obligations

Under the IACtHR case law, when a person or a group are in a situation of vulnerability states are under the obligation to provide special protection.[502] Special protection entails that besides adopting positive measures to ensure the rights of the ACHR, states must adopt special measures to guarantee that the same protection is afforded to vulnerable groups and persons. Therefore, states are under enhanced positive obligations when vulnerable groups or persons are involved.[503] In *Brasil Verde Workers v. Brazil,* the court identified enhanced positive obligations in relation to the rights of the child and because the workers were discriminated on the grounds of their economic position.[504] Enhanced positive obligations were translated in the case as state's positive obligations specifically tailored to these two vulnerable groups.

5.5.1. The Obligation to Eliminate Child Labour

One of the applicants in the case of Brasil *Verde Worker v. Brazil* was a child at the time that the abuses occurred.[505] In the judgment, the court determined that according to article 19 ACHR, children are entitled to special protection.[506] Accordingly, states have the obligation to adopt measures of a special character for the protection of children in relation to all ACHR substantive rights.[507] Such measures vary in accordance with the factual circumstances of a case.[508] To determine which obligations article 6 ACHR might impose to state parties in a situation where a child is involved the court considered obligations enshrined in the ILO Minimum Age Convention[509] and the ILO Worst Forms of Child Labour Convention.[510]

According to these conventions, the IACtHR concluded that states have the *general obligation to eliminate the worst forms of child labour.*[511] This general obligation encompasses the specific obligations of:

> i. [P]revent the engagement of children in the worst forms of child labour; ii. provide the necessary and appropriate direct assistance for the removal of children from the worst forms of child labour and for their rehabilitation and social integration; iii. ensure access to free basic education, and, wherever possible and appropriate, vocational

[502] Lavrysen, Positive Obligations in the Jurisprudence of the Inter-American Court of Human Rights (n 19)113
[503] ibid 113
[504] *Brasil Verde Workers v Brazil* (n 8) paras. 329-341
[505] ibid paras. 174;175;229
[506] *Brasil Verde Workers v Brazil* (n 8) para. 329
[507] Ibid 330
[508] Ibid
[509] Minimum Age Convention (ILO No. 138) (adopted 26 June 1973, entered into force 19 June 1976) 1015 UNTS 287 (Minimum Age Convention)
[510] Worst Forms of Child Labour Convention (ILO No. 182) (adopted 17 June 1999, entered into force 19 November 2000) 2133 UNTS 161preamble and article 3
[511] *Brasil Verde Workers v Brazil* (n 8), para. 332

> training, for all children removed from the worst forms of child labour; iv. identify and reach out to children at special risk; v. and take account of the special situation of girls.[512]

From the circumstances of the case, the court concluded that a child was subjected to slavery and that the state *was aware* of that specific situation as well as of the fact that other children might also have been subjected to slavery. Despite the knowledge of the situation, the state *did not adopt measures* to eliminate child labour. Moreover, the IACtHR sustained that the state also failed to provide rehabilitation, social integration and access to education to the victim. Therefore, the court concluded that the state breached article 6(1) in conjunction with article 19 of the ACHR in relation to the applicant that was a child.[513]

5.5.2. The Special Obligation to Protect

Article 1(1) ACHR determines that states must respect and ensure all rights enshrined in the convention without discrimination for reasons of 'race, colour, sex, language, religion, political or other opinions, national or social origin economic status, birth, or any other social condition.'[514] Thus, the general obligations to respect and ensure all ACHR rights must be carried out without any discriminatory treatment. The failure to do so can deem states internationally responsible for violating the ACHR.[515]

To comply with this obligation, 'states must abstain from carrying out any action that, in any way, directly or indirectly, is aimed at creating *de jure* or *de facto* discrimination'. [516] The court has considered that certain situations of *de facto* discrimination correspond to *structural discriminations*.[517] As judge Ferrer McGregor explains in its concurring opinion to the case, 'structural discriminations consist of structural factors that directly or indirectly interfere with the enjoyment and exercise of the ACHR rights.'[518] Additionally, states must:

> '[T]ake affirmative action to reverse or change discriminatory situations that exist in their societies to the detriment of a specific group of persons. This implies the special obligation to protect that the State must exercise with regard to acts and practices of third parties who, with its tolerance or acquiescence, create, maintain or promote discriminatory situations'.[519]

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[512] Ibid; ILO Worst Forms of Child Labour Convention (n 510) article 7
[513] *Brasil Verde Workers v Brazil* (n 8) para. 343
[514] ACHR (n 2) 1(1). This prohibition to discriminate is different than the autonomous right to equal protection enshrined in article 24 of the ACHR.
[515] *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03, Series A No.18. (IACtHR, 17 September 2003) para.85
[516] ibid para. 103
[517] See *'Street Children' (Villagrán Morales and others) v. Guatemala, Merits Serie C No. 63, (IACtHR, 19 November 1999)* para. 450; *Xákmok Kásek Indigenous Community. v. Paraguay*, Merits, Reparations and Costs Series C No. 214 (IACtHR, 24 August 2010) paras. 273-274; *Atala Riffo and daughters v. Chile*, Merits, Reparations and Costs Series C No. 239 (IACtHR, 24 February 2012) para. 92
[518] Concurring Opinion of Judge Eduardo Ferrer Mac-Gregor Poisot *Hacienda Brasil Verde Workers v. Brazil*, Preliminary Objections, Merits, Reparations and Costs, Series C No. 318. (IACtHR, 20 October 2016) para. 79
[519] Advisory Opinion Undocumented Migrants (n 515) para. 104

In *Brasil Verde Workers v. Brazil,* the court held that the workers at Brasil Verde possessed common characteristics. They were poor, were originally from underdeveloped regions of the country and were illiterate.[520] Therefore, the court sustained that the workers were subjected to a historical structural discrimination on the grounds of their economic status.[521]

The court recalled that states are under the general obligation to ensure and respect the ACHR rights without discrimination.[522] Moreover, it explained states are under the *special obligation to protect* vulnerable groups, such as those subjected to extreme poverty and marginalization, from 'acts and practices of third parties who with tolerance or acquiescence, create, maintain or promote discriminatory situations'[523]

The court thus concluded that the workers were subjected to a structural discrimination and that their common characteristics (i.e. poverty, lack of education and exclusion) subjected them to an immediate risk of being enslaved and trafficked.[524] It further considered that the imminent risk for this determinate group had historical origins and the state was aware of such risk at least since 1995 when it recognized the existence of 'slave labour' in the country.[525] Therefore, the court concluded that the state did not take special preventive measures required due to the workers' vulnerability originated by their economic status and, consequently, breached article 6(1) in conjunction with 1(1) of the ACHR.[526]

5.6. The IACtHR Procedural Positive Obligation

As explained in *section 5.3.,* the obligations to ensure and prevent enshrined in article 1(1) achr in conjunction with substantive rights of the ACHR imposes the specific positive obligations to investigate, punish and provide reparations to every violation of the ACHR.[527] The IACtHR usually examines the content of these obligations under the *access to justice* section of the judgment, where it evaluates alleged violations to the right to a fair trial (judicial guarantees) of article 8 ACHR and judicial protection (effective remedies) of article 25 achr.[528] In *Brasil Verde Workers v. Brazil*, the court recognized that the state was under the positive obligation to investigate and if necessary punish alleged violations of article 6 ACHR. The court held that states authorities should '*immediately start, ex officio an effective investigation that allows to identify, prosecute and punish those responsible for the violation, in cases where the situation is reported or*

[520] See *section 4.1.1.*
[521] *Brasil Verde Workers v. Brazil* (n 8), para. 339
[522] ibid para. 341-343
[523] ibid para. 104
[524] ibid para. 339
[525] ibid
[526] *Brasil Verde Workers v Brazil* (n 8) para 338 -343
[527] *Velásquez Rodriguez v Honduras* (n 8) para. 166
[528] Lavrysen, Positive Obligations in the Jurisprudence of the Inter-American Court of Human Rights (n 19) 107

there is reason to believe that individuals within state's jurisdictions are subjected to one of the abuses of article 6(1) and 6(2) of the ACHR'.[529]

The court accessed these two procedural positive obligations in the access to justice section of the judgment. Accordingly, I will first elucidate what is the IACtHR general approach regarding the procedural positive obligations to investigate, punish and provide reparations. Subsequently, I will review the access to justice section of *Brazil Verde Workers v. Brazil* and, therefore, explain how the court assessed these obligations. Moreover, I will access if, by reviewing the procedural aspects of article 6 ACHR under the access to justice section of the judgment, there are additional positive obligations and enhanced protection granted to victims of abuses of article 6 ACHR.

5.6.1. Obligation to Investigate

In the IACtHR case law '[t]he duty to investigate, like the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result. Nevertheless, investigations must be undertaken in a serious manner and not as a mere formality preordained to be ineffective.'[530] Moreover, in cases involving serious human rights violations investigations must be initiated *ex officio* and immediately.[531] They also must be a 'genuine, impartial and effective investigation, which is not undertaken as a mere formality predestined to be ineffective.'[532]

Consequently, investigations must be *effective.* In the court's case law, effective investigations entail the 'removal of all obstacles, both factual and legal, that hinder the effective investigation into the facts and the development of the corresponding legal proceedings.'[533] Therefore, all measures that intend to 'prevent the investigation and punishment of those responsible for serious human rights violations are inadmissible, including amnesty provisions and statutes of limitations.'[534] Additionally, they require *independent and impartial investigative authorities*.[535] Lastly, effective investigations require *due diligence*.[536] This means that 'the investigative authorities must, within a reasonable time, take all necessary measures to try and obtain results'.[537] States also have the duty to coordinate between the different state's organs and institutions with investigative powers and 'all state authorities are under an obligation to collaborate with

[529] *Brasil Verde Workers v. Brazil* (n 8) para 319
[530] *Velásquez-Rodríguez v. Honduras* (n 458) para. 177; See Lavrysen, Positive Obligations in the Jurisprudence of the Inter-American Court of Human Rights (n 19) 107
[531] *Pueblo Bello Massacre v. Colombia*, Merits, Reparations and Costs Serie C No. 140 (IACtHR, 31 January 2006) para. 143; See Lavrysen, Positive Obligations in the Jurisprudence of the Inter-American Court of Human Rights (n 19) 107
[532] Ibid, para. 143; See Lavrysen, Positive Obligations in the Jurisprudence of the Inter-American Court of Human Rights (n 19) 107
[533] See Lavrysen, Positive Obligations in the Jurisprudence of the Inter-American Court of Human Rights (n 19) 107
[534] Lavrysen, Positive Obligations in the Jurisprudence of the Inter-American Court of Human Rights (n 19) 107; See *Barrios Altos v. Peru*, Merits Series C No. 75 (IACtHR, 14 March 2001) para. 41
[535] Lavrysen, Positive Obligations in the Jurisprudence of the Inter-American Court of Human Rights (n 19) 107
[536] ibid
[537] ibid; See IACtHR (Judgment) 1 March 2005, *Serrano Cruz Sisters v. El Salvador*, Merits, Reparations and Costs Series C No. 120 (IACtHR, 1 March 2005) para. 65

the investigative authorities including supplying them with access to all relevant information'.[538]

5.6.2. Obligation to Punish and Provide Reparations for Victims

In *Brasil Verde Workers v Brazil*, the IACtHR determined that the victims had the right 'where appropriate, […] to have the proper punishment applied to the responsible parties.'[539] Under the IACtHR jurisprudence, serious human rights violations require criminal punishment.[540] Additionally, the obligation to punish must follow the *principle of proportionality of punishment.*[541] This means that 'the punishment which the State assigns to the perpetrator of illicit conduct should be proportional to the rights recognized by law and the culpability with which the [perpetrator] acted, which in turn should be established as a function of the nature and gravity of the events.'[542]

Additionally, in its case law, the IACtHR affirms that 'one of the affirmative measures that States Parties are required to take to fulfil their [obligation to ensure] consists in providing effective judicial remedies in line with the rules of due process, and seeking the restoration of the violated right, if possible, and reparation of any damage caused'.[543] Therefore, article 1(1) ACHR in conjunction with the convention substantive rights requires that states provide reparation for victims.[544]

This obligation is different than reparations ordered by the court in accordance with article 63 ACHR. Article 63 allows the IACtHR to require reparations if it finds that the state violated the ACHR.[545] The positive obligation to provide reparation, however, 'requires the state make reparations at the domestic level before and regardless of whether the case ends up in the Inter-American system'.[546] Notwithstanding that, the court relies on its jurisprudence under article 63 to determine the content of this obligation. Accordingly, 'reparations must be comprehensive, which requires measures of rehabilitation, satisfaction and guarantees of non-repetition'.[547]

5.7. Procedural Obligation in *Brasil Verde Workers v. Brazil*

5.7.1. Right to a Fair Trial

The court's review of the right to a fair trial in the case concentrated on two elements of article 8(1): the judicial guarantee of *due diligence* and of *reasonable time*. The court

[538] ibid; See IACtHR (Judgment) 4 September 2012, *Río Negro Massacres v. Guatemala*, Preliminary Objection, Merits, Reparations, and Costs, Series C No. 250 (IACtHR, 4 September 2012) para. 209
[539] Lavrysen, Positive Obligations in the Jurisprudence of the Inter-American Court of Human Rights (n 19) 108 ;See *Las Palmeras v. Colombia, Merits*, Judgment Series C No. 90 (IACtHR, 6 December 2001) para. 65
[540] Lavrysen 108
[541] ibid
[542] *Rochela Massacre v. Colombia*, Merits, Reparations and Costs Series C No. 163 (IACtHR, 11 May 2007) para. 196
[543] *Albán Cornejo et al. v. Ecuador*, Merits, Reparations and Costs Series C No. 171 (IACtHR, 22 November 2007) para. 61; Lavrysen, Positive Obligations in the Jurisprudence of the Inter-American Court of Human Rights (n 19)109
[544] Lavrysen, Positive Obligations in the Jurisprudence of the Inter-American Court of Human Rights (n 19) 109
[545] ACHR (n 2)
[546] Lavrysen, Positive Obligations in the Jurisprudence of the Inter-American Court of Human Rights (n 19) 109
[547] ibid; see Ituango Massacres v. Colombia (n 419) para. 341

first determined that the protection against slavery and practices and institutions like slavery is an *erga omnes* obligation and therefore, states must start investigations *ex officio* when aware of a situation of slavery, servitude, forced labour or trafficking in person.[548]

In *Brasil Verde Workers v. Brazil,* the IACtHR held that the state was under the duty to act with *due diligence* to prevent impunity. The court concluded that delays, conflicts of jurisdiction and lack of diligent action from judicial authorities caused unjustified delays in the 1997 criminal proceedings. Moreover, the court determined that the state was under *special obligation to act in due diligence* due to *i.* the workers vulnerability,[549] *ii.* the urgency of the situation, and *iii.* the need of criminal proceeding to provide reparation to the victims and to deter the situation of slavery at Brasil Verde.[550] Thus, the court concluded that the judicial authorities did not act with the *special due diligence* required by the situation and, therefore breached the judicial guarantee of due diligence enshrined in article 8(1) in relation to article 1(1) ACHR.[551]

The court also assessed if the 1997 criminal process was conducted within a *reasonable time*. In its case law, the IACtHR recognizes that right of access to justice 'means that the settlement of the dispute must take place within a reasonable time since a prolonged delay can constitute a violation of judicial guarantees'.[552] By considering the complexity of the matter; the procedural activity of the interested party, the conduct of the judicial authorities; the adverse effect of the duration of the proceedings on the judicial situation of the person involved, the court arrived at the conclusion that the duration of the process was unreasonable. Therefore, due to unjustifiable delays the court held that the state violated the judicial guarantee of article 8(1) ACHR.[553]

5.7.2. Right to Effective Remedies

The right to judicial protection (effective remedies) of article 25 ACHR entails two obligations in the IACtHR case law: to design and embody within national frameworks, effective remedies to human rights violation. Additionally, this right requires the obligation to ensure the due application of the said remedies by its judicial authorities.[554] Therefore, the obligation to ensure the application of effective remedies means that judicial remedies must be *effective*. Effective remedies are those adequate and efficient in determining *the individual criminal responsibility* of human rights violation and when necessary guarantee *punishment* and that *guarantee reparations* for the victims.[555]

[548] *Brasil Verde Workers v Brazil* (n 8) para. 362
[549] The IACtHR considers that vulnerabilities increase risks to personal integrity and therefore, states are under the obligation to adopt special measures; *Brasil Verde Workers v Brazil* (n 8) paras. 364;368
[550] *Brasil Verde Workers v Brazil* (n 8) para. 368
[551] ibid
[552] ibid para. 369
[553] ibidpara 382
[554] Ibid para 393; See also *Street Children* (n 517) para. 237
[555] *Brasil Verde Workers v Brazil* (n 8) para. 395

In *Brasil Verde Workers v Brazil*, the court first found that the state complied with the first obligation enshrined in article 25 ACHR. It was equipped with a legal framework that guarantees judicial protection for victims of the abuses of article 6.[556] In particular, the state criminalized the act of 'reducing someone to practices like slavery'.[557] Subsequently, the court analyzed if the judicial remedies afforded by the state were effective. In doing so the court scrutinized two criminal processes, one initiated in 1997 and another in 2001, a civil law process and a labour law process.[558]

Accordingly, the court determined that the 1997 criminal process was ineffective to establish individual criminal responsibility and provide reparations for the victims.[559] That is because state's authorities lacked *due diligence* in conducting the criminal proceedings.[560] The lack of due diligence was evident as 1997 criminal process was extinguished because the crime of slavery and practices similar to slavery reached its *statutory limitation*. Moreover, the IACtHR also identified lack of due diligence on the fact that the judicial authorities did not conduct a *proper analysis* of the factual circumstances of the case.[561] The IACtHR was not able to scrutinize the 2001 criminal process as it disappeared and therefore, it could not determine if it was an effective remedy.[562] Additionally, the court held that the labour law process did not respond effectively to the labour law irregularities, but solely recommended minor changes.[563] Lastly, the court sustained that the civil law process only resulted in a judicial agreement that did not consider the seriousness of the abuses and the need for reparation for the victims.[564]

The IACtHR concluded that the judicial remedies afforded by the state did not thoroughly review the merits of the situation; did not determine responsibility for the violation nor punish the perpetrators; did not guarantee reparation to the victims and; where not able to stop the abuses.[565] For all these reasons, the state was found internationally responsible for violating article 25 in relation to article 1(1) and 2 of the ACHR.[566]

5.7.3. The Non-Applicability of Statutory Limitation

In *Brasil Verde Workers v. Brazil*, the court assesses if the application of statutory limitation (i.e. time limitation on prosecution) to the national crimes of 'subjecting someone to a practice similar to slavery', 'use of violence or serious threats to constrain someone to work' and 'fraudulent recruitment of workers'[567] violated article 2 ACHR.[568]

[556] ibid
[557] ibid; see Brazil Penal Code (n 344) article 149
[558] ibid paras. 385-389
[559] ibid para 398
[560] ibid para. 398
[561] ibid paras. 398-400
[562] See section 4.1.2. and 4.1.3.
[563] *Brasil Verde Workers v. Brazil* (n 8) para 401
[564] ibid 402
[565] ibid 407
[566] ibid 420
[567] Brazil Penal Code (n 344) articles 149; 197.1; 207 and 203 respectively
[568] Brazil Penal Code (n 344) Article 149; 197(1); 207 and 203 respecitively

The court recalled that article 2 ACHR requires states to introduce into its domestic laws whatever changes are needed to ensure compliance with international obligations.[569] Therefore, in accordance with article 2, states must eliminate norms and practices that violate the ACHR and adopt norms and other measures to effectively guarantee the convention's rights.[570]

In *Brasil Verde Workers v Brazil*, the IACtHR first explained that statutory limitation is inadmissible when prohibited by international law. The IACtHR held that slavery is an international crime and its prohibition in international law is a *jus cogens* norm.[571] Additionally, the court held in accordance with its *jurisprudence constant*, statutory limitation is inadmissible when it hinders the obligation to investigate and punish.[572] Therefore, 'amnesty provisions, provisions on prescription [statute of limitation] and other measures that intend to prevent the investigation and punishment of those responsible for serious human rights violations'[573] are inadmissible.

The IACtHR concludes that statutory limitation of national crimes of slavery and practices and institutions similar to slavery are incompatible with state's obligations under article 2 ACHR.[574] In *Brasil Verde Workers v. Brazil*, the court concluded that statutory limitation under the national crimes corresponding to abuses of article 6 ACHR were an obstacle to conduct investigations, to determine individual criminal responsibility, to punish the perpetrator and to provide reparations for the victims.[575]

Thus, the court held that the state violated article 25 in relation to article 2 ACHR.[576]. The court relies on two arguments to arrive in this conclusion: its *jurisprudence constant* that determines that statutory limitation does not apply to crimes corresponding to serious human rights violations.[577] Moreover, the court also sustained that slavery and practices similar to slavery are an international crime and therefore statutory limitation should not apply.[578]

5.7.4. Discrimination and Access to Justice

In Brasil Verde Workers, the IACtHR determined that article 1(1) ACHR in connection with article 25 ACHR guarantee that access to justice must be ensured without discrimination.[579] In the judgment, the court recalled that the workers had common characteristics and were in a vulnerable position due to their situation of poverty, exclusion and lack of education.[580] The vulnerability of this specific group had an impact

[569] *Brasil Verde Workers v Brazil* (n 8) para. 409.
[570] Lavrysen, Positive Obligations in the Jurisprudence of the Inter-American Court of Human Rights (n 19) 96
[571] *Brasil Verde Workers v Brazil* (n 8) para 412
[572] ibid
[573] ibid para. 412
[574] ibid
[575] ibid para. 413
[576] ibid
[577] ibid 455; See, inter alia, *Barrios Altos v Peru* (n 534) para. 41
[578] ibid 413
[579] *Brasil Verde Workers v Brazil* (n 8) para. 415
[580] ibid para. 417

on the conduct of state's authorities while granting judicial remedies to them. The court explained that the *lack of due diligence* of state's authorities in affording judicial remedies[581] and the *impunity* of the perpetrator of the abuses[582] could be explained by the normalization of the conditions (poverty, exclusion and lack of education) to which workers of farms in the north and northeast of Brazil are continuously submitted.[583]

Therefore, the situation which the workers were subjected corresponded in the case to a discriminatory treatment which had an impact on how state's authorities had granted effective remedies. They acted with lack of due diligence and did not punish perpetrators of the crimes of slavery and practices similar to slavery.[584] Therefore, the court concluded that violation of the right to judicial protection of article 25 occurred also in relation to article 1(1) ACHR.[585]

5.7.5 Final Remarks

While reviewing articles 25 and 8(1) ACHR, the IACtHR scrutinized the positive obligations to investigate and punish identified under article 6 in connection with article 1(1) ACHR. Under article 8(1) the court analysed if the 1997 criminal investigation were effective, accessing *due diligence* of state's authorities and *reasonable time of the procedure.* Additionally, in determining of the state was able to afford *effective judicial remedies* in accordance with article 25 ACHR, the court reviewed the *obligation to punish* and *provide reparations for victims*. From the court's viewpoint, an effective remedy is the one that allows state's authorities to identify facts, determine criminal responsibility when appropriate punish perpetrators of human rights abuses and provide reparations for victim's.

While reviewing access to justice, IACtHR thoroughly reviewed the obligation to investigate and punish under article 6 in connection with article 1(1) ACHR. By accessing the procedural aspects of article 6 in connection to access to justice the court was able to enhance the protection of victims of slavery, servitude, forced labour and human trafficking. Firstly, because the court included the assessment of an additional obligation: the duty to provide reparations for victims. Secondly, the court's review was not only focused on criminal investigations nor in criminal processes, but the court also scrutinized all available judicial remedies within the national legal system. Therefore, the court accessed if remedies of different legal nature were able to afford appropriate and effective relief to victims of abuses of article 6 ACHR.

[581] ibid paras. 398; 368
[582] ibid para. 413
[583] ibid paras. 418-419
[584] ibid para. 418
[585] ibid para. 420

6 On Novelties and Challenges

In *chapters 2* and *3*, I explained the ECtHR definitions and positive obligations under article 4 ECHR as well as critics that were made to the court by human rights scholarship. Subsequently, in *chapters 4* and *5* I clarified the IACtHR'S definitions and positive obligations under article 6 ACHR given by the court in the case of *Brasil Verde Workers v. Brazil*. In the present chapter, I will compare the jurisprudence of the two courts concerning definitions and positive obligations under the prohibition of slavery, servitude, forced labour and trafficking in person. Firstly, I will compare the similarities and differences of the two court's case law. Additionally, I will identify weather if problematic features of the ECtHR judgment elaborated on in chapters 2 and 3 are also present in the IACtHR case. Through the comparison, I will demonstrate what are the positive innovations of the IACtHR judgment. At the same time, I will also identify challenges to the IACtHR protection of the above-mentioned abuses. While accessing challenges, I identify problematic features of the IACtHR judgment as well as point out for the need of clarification of certain concepts;

I divide the analysis into two parts. First, I will access the definitions of slavery, servitude, forced labour and trafficking in persons. Each abuse corresponds to one section of the first part. Following this explanation, I will compare how the two courts understand the relationship between slavery, servitude and forced labour in an additional section. In each section, I will explain the similarities and differences between the jurisprudence of the two courts. Subsequently, I will present novelties of the IACtHR as well as demonstrate if there are future challenges to the IACtHR for the protection against the abuses.

The second stage of the analysis refers to positive obligations under the prohibition of slavery, servitude, forced labour and trafficking in persons. This stage will be divided into two central parts: the comparison of substantive positive obligations and procedural positive obligations. I will follow the same logic of assessment of the definitional scope.

6.1. Definition of Slavery

The ECtHR and the IACtHR adopt the same definition of slavery as laid down on the 1926 Slavery Convention. Accordingly, slavery under article 4 ECHR and article 6 ACHR means 'the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised'.[586]

Even though both courts adopt the 1926 Slavery Convention definition, their engagement with it is very different. The ECtHR has never significantly engaged with the content of 1926 Slavery Convention definition nor it has found a violation of the prohibition of slavery. S*ection 2.1.* explains that Allain's criticizes the ECtHR, as well as other international courts, for not explaining the content of the 1926 Slavery Convention

[586] Slavery Convention (n 1)

definition. The author argues that international courts focus on the 'indicators of slavery as determined by the ICTY judgment *Kunarac* as opposed to what might constitute slavery'.[587] In doing so, international courts either assess the enslavement process, which is the process by which a person is brought into the condition of slavery[588] or 'what transpires from the enslavement process, which corresponds to the manner in which the individual is exploited'.[589] Thus, the author argues that international jurisprudence has not yet explained what is the essence of slavery.

The IACtHR in the other hand, explained the content of the 1926 Slavery Convention definition in the case of *Brasil Verde Workers v. Brazil* and found a violation of the prohibition of slavery enshrined in article 6(1) of the ACHR. In doing so, the IACtHR first explained that *'status or condition of a person'* implies that both *de jure* and *de facto* situations of abuse can be characterized as slavery.[590] This means that the IACtHR explicitly recognized that a situation does not need to be sanctioned by a legal system to be characterized as slavery. Therefore, various contemporary forms of slavery that are not sanctioned by a legal regime can fall within the scope of the prohibition of slavery of article 6(1) ACHR.[591]

Regarding the *'powers attaching to the right of ownership',* the IACtHR sustains that it should be read as:

> [C]ontrol over a person in such a way as to significantly deprive that person of his or her individual liberty, with the intent of exploitation through the use, management, profit, transfer or disposal of that person. Usually, this exercise will be supported by and obtained through means such as violent force, deception and/or coercion.[592]

This means that in the context of slavery, ownership should be understood as possession. Possession is the expression of control over a person by another at a level that deprives the said person of her individual liberty.[593] Additionally, in *Brasil Verde Workers v. Brazil*, IACtHR clarified that slavery can occur with the intent of exploitation through the *use, management, profit, transfer or disposal of a person*. Moreover, the IACtHR also added that slavery can be indicated by the *indicia* of slavery as determined by the ICTY.[594] At last, the court considers that powers attaching to the right of ownership entail

[587] Allain, *Slavery in International Law* (n 4) 119
[588] ibid 142
[589] ibid
[590] ibid, para. 270
[591] In *section 2.1*.; I explain that the ECtHR has implicitly recognized that slavery cover de facto abuses. However, the ECtHR has never explicitly held so in the same way as the IACtHR does.
[592] *Brasil Verde Workers v. Brazil* (n 8), para 271; Bellagio-Harvard Guidelines on the Legal Parameters of Slavery, Guideline 2
[593] See *sections 2.1.* and *4.2.2.*
[594] The indicators of slavery are: 'restriction or control of an individual's autonomy; restriction or loss of freedom of movement; the accruing of some gain to the perpetrator; the absence of consent or free will of the victim. Or its rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; the use of physical and psychological violence; the victim's position of vulnerability; detention or captivity, exploitation. *Brasil Verde Workers v. Brazil* (n 8) para 272, See also *Prosecutor v. Kunarac* (TC) (n 379) para. 542

that the exercises of power or control over the enslaved person are such that *it destroys the victim's personality*.[595]

Therefore, in *Brasil Verde Workers v. Brazil*, the IACtHR went into opposite directions of international courts and explained what constitutes slavery. In fact, the court agreed with the doctrinal definition of slavery defended by Allain and reproduced the wording of the legal definition set out by the Bellagio Harvard Guidelines on the Legal Parameters of Slavery.[596]

Determining what constitutes the powers attaching to the right of ownership might be the biggest novelty brought by the judgment of *Brasil Verde Workers v. Brazil*. The court inaugurates a jurisprudential definition of slavery that captures its essence, which is, as Allain points out, that slavery is ultimately about control.[597] Additionally, the judgment is original as it clarifies that slavery can occur in situations that exploitation through the usage of labour capacity does not take place. That is because usage of labour capacity implies the power attaching to the right of ownership of *use*. Slavery can occur, however, in cases where a person is subjected to control at a level that it is deprived of its liberty, which she or he is exploited not through the power of *use* but the power of *transfer*, such as many cases corresponding to abuses against migrants.[598]

Notwithstanding the leading role of the judgment to determine the content of the definition of slavery, I argue that there are two remaining challenged for the court. To define *denial of freedom* and *destruction of juridical personality* in the context of slavery and relate it to the other elements of the definition. In the judgment, the court concludes that possession entails control at a level that significantly deprives that person of his or her will or considerably diminishes the person's individual liberty.[599] The court, however, does not explains what denial of freedom is and in which situations relating to slavery denial of freedom will occur. Moreover, despite determining that 'the exercises of power of control over the enslaved person are such that *it destroys the victim's juridical personality,*[600] the IACtHR also does not explain what judicial personality is and how it relates to the other elements of the definition.

6.2. Definition of Servitude

The ECtHR definition of servitude encompasses three characteristics that should be cumulative fulfilled: usage of labour capacity, serious forms of denial of freedom and the 'victim's feeling that their condition is permanent and that the situation is unlikely to change.'[601] In *Brazil Verde Workers v. Brazil*, the IACtHR held that it agreed with the ECtHR definition of servitude. Thereafter, the IACtHR reproduces the definition given by the ECtHR in the case of *Siliadin v. France*, that servitude constitutes 'the obligation to perform work to others, which was imposed through coercion and the obligation to live

[595] *Brasil Verde Workers v Brazil* (n 8) para. 269.
[596] See *Section 2.1.*
[597] See *section 2.1.* Allain, *Slavery in International Law* (n 14) 122
[598] See *sections 2.1.*, 4.2.2. and 4.5.; See Stoyanova (n 15) 287-288
[599] ibid
[600] *Brasil Verde Workers v Brazil* (n 8) para. 269.
[601] *CN and V.* v *France* (n 69), para. 91; See *section 2.2.*

on another person's property without the possibility of altering his condition.'[602]After close scrutinizing the IACtHR definition of servitude, it is evident that it encompasses the same characteristics of the ECtHR definition. Despite that, the IACtHR present different features which I will discuss in the following paragraphs

Both the IACtHR and the ECtHR definition of servitude require *usage of labour capacity*. The ECtHR determines that servitude is an aggravated form of forced labour and therefore, it requires the usage of labour capacity amounting to forced labour.[603] The IACtHR differs from the ECtHR, and determines servitude requires work that is subtracted through coercion and it is silent whether if the said work must amount to forced labour. Unlike the ECtHR, the IACtHR does not first assess if the applicants were subjected to forced labour to then determine if the situation was aggravated into servitude.[604] Conversely, the IACtHR accesses the abuses altogether and it is difficult to understand from the court's reasoning if the requirement of usage of labour capacity must correspond to forced labour.[605]

Moreover, both the ECtHR and the IACtHR require *serious forms of denial of freedom* for a situation to be considered servitude. Denial of freedom in the ECtHR case law is understood as exercises 'control over aspects of the victim's life other than the provision of labour, which will entail isolation and the loss of a certain level of autonomy of the victim'.[606] On the cases of the ECtHR involving servitude,[607] the court recognized the existence of denial of freedom because the victims were subjected to a considerable degree of control and isolation by living in the house of their abusers.[608]

In *Brasil Verde Workers v. Brazil*, the IACtHR also considers serious forms of denial of freedom as a constitutive element of servitude. The court, however, did not explicitly recognized it as an element of the definition. Instead, serious forms of denial of freedom were introduced in the court's assessment, by examining the victims' possibility of altering their condition, which is the third element of both court's definition of servitude that I will discuss below.

Accordingly, the IACtHR observes in the case that the workers could not alter their conditions as they were: scouted my armed guards; prohibited from leaving the farm unless they paid their debts; suffered physical and psychological coercion; and feared reprisal and death if they tried to escape.[609] Moreover, the court considers that the workers were in a vulnerable situation because they were illiterate and isolated due to the location of the farm.[610] From this passage of the judgment, it is evident that the court considered *the restriction of freedom of movement, isolation and vulnerability* of the victims' central

[602] Ibid
[603] See *section 2.2.*
[604] *Siliadin v. France* (n 27) para 129
[605] See *section 4.3.*
[606] Stoyanova (n 15) 257; See *section 2.2.*
[607] See *section 2.2.*
[608] See *section 2.2.*
[609] ibid
[610] ibid

elements to determine if they were subjected to servitude. Therefore, even if not explicitly stated, the IACtHR weights to serious forms of denial of freedom to determine if the circumstances corresponded to servitude.

Additionally, another aspect concerning serious forms of denial of freedom relates to the *obligation to live on another person's property*. This element is central in the ECtHR cases of *Siliadin, CN and V. v. France* and *CN v. the United Kingdom t*o determine *denial of freedom,* as explained above. In *Brasil Verde Workers v. Brazil,* the IACtHR recognizes the obligation to live on another person's property as a constitutive element of the definition of servitude.

Section 2.2. explains that Stoyanova argues that this obligation should not be interpreted as a component of the definition of servitude. Conversely, it should be considered an expression of serious forms of denial of freedom. This means that servitude can, but not necessarily will require the obligation to live in someone's property. That is because other forms of denial of freedom that does not correspond to the restriction of freedom of movement might take place in a situation of servitude.[611] Therefore, Stoyanova's line of reasoning can serve as a critic to the IACtHR's inclusion of the obligation to live on another person's property on the definitional scope of servitude, rather than interpreting it as one of the various forms of denial of freedom.

Lastly, both the ECtHR and the IACtHR rely on '*victims' feeling that their condition is permanent and that the situation is unlikely to change'*[612] to define servitude. It is worth noting that the IACtHR uses a different wording and considers that servitude requires the obligation to live on another person's property *without the possibility of altering his or her condition.* Despite the different choice of works, both courts attempt to analyse if the victims had the feeling that their situation was permanent.

Section 2.2. also points out Stoyanova's critic of the ECtHR use of this criterion. The author argues that it can lead to a flawed understanding of servitude and it is 'unconvincing to structure the distinction between servitude and forced labour on the subjective feelings of the victim'.[613] Moreover, Stoyanova sustains that the ECtHR case law on servitude demonstrates that the court does not truly assess the permanence of the situation or if the victim has the feeling that the situation is permanent. Instead, the ECtHR analyses if the victims were subjected to '*serious forms of denial of freedom'*.[614] Thus, Stoyanova argues that the element of the definition of servitude of the '*victims' feeling that their condition is permanent and that the situation is unlikely to change'*[615] should be abandoned. She explains that what distinguishes servitude from forced labour is the person's isolation due to the control exercised over different aspects of the person's life

[611] See Stoyanova (n 15) 276
[612] *CN and V.* v *France* (n 69), para. 91
[613] Stoyanova (n 15) 257
[614] *CN and V.* v *France* (n 69), para. 91
[615] ibid

and that therefore, this must be the criteria used to assess if a situation of forced labour is aggravated into servitude.[616]

Stoyanova's critic can also be transported to the IACtHR's use of the same criteria. As explained above, when the IACtHR's analyses the possibility of the victims to alter their condition, the court is, in fact, is accessing if the victims were subjected to serious forms of denial of freedom. Thus, the criteria are not only unconvincing but useless to access if the situation constitutes servitude.

Despite certain differences, the ECtHR and the IACtHR define servitude in very similar ways. Therefore, the IACtHR judgment does not present any innovative features to the definition of servitude. The contrast between the definition of the two courts, however, demonstrate that IACtHR reproduces two features of the ECtHR definition that have been previously subject of criticism. They are the requirements of *obligation to live in another person's property* and the *victim's feelings that the situation is permanent*. Thus, a remaining challenge for the IACtHR is to abandon these criteria, as they have been demonstrated as inadequate to capture the essence of servitude and instead, structure its definition in a way that it captures the two essential elements of servitude: serious forms of denial of freedom and usage of labour capacity.

6.3. Forced Labour

Both the IACtHR and the ECtHR adopt the ILO Forced Labour Convention definition on forced labour. Accordingly, forced labour means work or service subtracted under the *menace of penalty* and for which a person *has not offered himself voluntarily.*[617]

The ECtHR and the IACtHR define *menace of penalty* in similar ways. Despite that, it is worth mentioning that the ECtHR not give a clear-cut definition of menace of penalty while the IACtHR explicitly defining it as 'the existence of the actual presence of a threat, which can assume different forms as degrees, and that the most serious cases involve coercion, physical violence, isolation or confinement, or the threat to kill the victim or his next of kin'.[618] In both court's case law however, menace of penalty substantially means the existence of a threat which can occur in various forms.[619]

The definition of *involuntariness* also resembles each other in both courts' case law. In short, involuntariness consists on the absence of consent to perform work or service. Here again, while the ECtHR does explicitly define involuntariness,[620] the IACtHR holds that it is 'the absence of consent or free choice when the situation of forced labour begins or continues. This can occur for different reasons, such as illegal deprivation of liberty, deception or psychological coercion'.[621]

[616] See Stoyanova (n 15) 255 -257.
[617] ILO Forced Labour Convention (n 93)
[618] *Brasil Verde Workers v. Brazil* (n 1), para 293; *Ituango Massacre v. Colombia* (n 86), para. 161
[619] See sections 2.3 and 4.4., See also CN and V v. France (n 69) para. 77-78
[620] See section 2.3.; See also Van der Mussel v Belgium (n 23) para. 37
[621] *Brasil Verde Workers v. Brazil* (n 8) para. 293; *Ituango Massacre v. Colombia* (n 419) para. 164

Despite such similarities, the ECtHR and the IACtHR have disparities on how they engage with the previously mentioned ILO Forced Labour Convention definition. Firstly, while the ECtHR considers the ILO definition only a starting point to define forced labour, the IACtHR is silent to which extent it must follow the ILO definition. Secondly, the ECtHR acknowledges that the absence of consent implied in the element of *involuntariness* is insufficient to determine if the situation constitutes forced labour. In contrast with the ECtHR, the IACtHR does not recognize that *consent* implicit in *involuntariness* is insufficient to determine whether if a situation characterizes as forced labour.

Section 2.3. mentions Stoyanova's criticizes of the ILO Forced Labour Convention definition. The author reveals that the elements of the definition of *menace of penalty* and *involuntariness* can be conflated because working under the threat of a penalty logically involves involuntariness.[622] The conflation of the two constitutive elements of the definition, combined with the fact that the element of menace of penalty can be understood very broadly, leads to an 'indeterminate expansion to the meaning of forced labour'.[623]

Additionally, Stoyanova sustains that the binary between voluntary and involuntariness is inoperative and unhelpful to determine if a situation amounts to forced labour. The author demonstrates, for instance, that the voluntary-involuntary relationship does not capture exploitative working conditions, as a person can labour in acceptable working conditions but involuntarily.

The third way in which both courts differ in their engagement with the definition concerns the adoption of the *disproportionate burden test*. The ECtHR, faced with the unhelpfulness of the ILO Forced Labour Convention definition, restores to the *disproportionate burden test*. *Section 2.3.* highlights that this test constitutes a proportionality assessment and contextualization, throughout which the court examines if the working conditions presented in a given case were too excessive that deemed the situation forced labour.[624] What constitutes *excessiveness* vary in the ECtHR case law. For instance, the court has considered factors such as the applicants' interests, public interests, rights of others[625] as well as vulnerability and working conditions, such as nature and volume of the work.[626] Thus, the test enabled the court to move away from the inoperative voluntary-involuntary relationship and include into the definitional scope of forced labour concrete elements, such as exploitative working conditions and vulnerabilities, that enabled the ECtHR to answer to the empirical reality of forced labour.

Conversely, The IACtHR does not apply the disproportional burden test nor any similar interpretative exercise to aid the ILO Forced Labour definition and therefore, overcome

[622] See *section 2.3.;* Stoyanova (n 15) 268
[623] ibid
[624] See *section 2.3*.
[625] See *Van der Musselle v. Belgium* (n 23) para. 37
[626] See *Chowdury and Others v. Greece* (n 105) paras. 94-97

the flawed aspects of this definition. Instead, in *Brasil Verde Workers v. Brazil*, the court engages with the ILO Forced Labour Convention definition in a confusing and inoperative manner. As explained in *section 4.4.*, it is difficult to understand how the IACtHR concludes that the abuses in *Brasil Verde Workers v. Brazil* corresponded to forced labour. Despite defining forced labour as work subtracted under the menace of penalty and involuntarily, the court does not apply these elements to the circumstances of the case.

Instead, while applying the definition of servitude to the circumstances of the case, the court identified that debt bondage was aggravated by *truck systems*. As pointed out in *section 4.4.*, truck systems correspond to long working hours, subtracted from the threat and use of force and subjection of workers to degrading living conditions.[627] Without mentioning the relationship between truck systems and the elements of the definition of servitude or forced labour, the court concluded that the workers were subjected to forced labour as well as debt bondage.

Section 4.4. presents the argument that truck systems encompass the elements of the IACtHR definition of forced labour, which correspond to *working under threat of violence and coercion*. However, truck systems are only mentioned in the application stage of the judgment, what is done without any connections to the elements of the definition. Moreover, *section 4.4.* also demonstrates that the assessment of truck systems implies an evaluation by the court of exploitative working and living conditions. Elements not covered by in the IACtHR definition of forced labour.

The confusing manner in which the IACtHR approaches forced labour could be attributed to the flaws of the ILO Forced Labour definition identified by Stoyanova. It is evident in *Brasil Verde Workers v. Brazil* that the definition is unhelpful to define forced labour. First, considering that the court classified the situation as forced labour based on the existence of *truck systems*, the elements of menace of penalty and involuntariness both correspond to *threats of violence and coercion* inherent in truck systems. Therefore, as Stoyanova explains, the elements of menace of penalty and involuntariness collapse into each other as the IACtHR examines primarily the same thing: the subjection to threats while performing work. Additionally, it is evident that the ILO Forced Labour Convention definition was unable to capture exploitative working conditions in the case. Thus, the court felt compelled to add such elements in the application stage through the uses of the concept of truck systems. It does it, however, in a very confusing way as it does not connect truck systems with the ILO Forced Labour Convention definition of forced labour whatsoever.

After comparing the IACtHR reasoning on forced labour to the ECtHR jurisprudence, it is noticeable that IACtHR does not bring any innovative features for the definition of this abuse. Conversely, the comparison points out to remaining challenges regarding the IACtHR engagement with the ILO Forced Labour Convention definition. First, the

[627] See *sections 4.3.* and *4.4.*

IACtHR must revisit its definition of forced labour in order to overcome the broad and indeterminate ILO Forced Labour Convention definition. Secondly, the court must also articulate the definition as to capture elements that not covered by the ILO Forced Labour Convention definition. Elements that have been demonstrated by both court's case law as essential to answer to the empirical reality of forced labour, such as exploitative working condition and vulnerabilities.

One alternative to respond to such challenges might be to adopt the ECtHR's disproportionate burden test or a similar sort of proportionality and contextualization assessment. In doing so, the IACtHR will be able to analyze excessiveness of working conditions and thus, include elements such as exploitative working conditions into the definitional scope of forced labour. The court must be attentive, however, for the fact that the ECtHR still does not have a clear standard to what might constitute excessiveness. It is also worth mentioning that once armed with a definition more prompt to capture the empirical reality of forced labour it is important for the IACtHR to apply it to the circumstances of the case accordingly.

6.4. The Relationship between Slavery, Servitude and Forced Labour

The relationship between slavery, servitude and forced labour in the ECtHR case law was discussed in *section 2.4*. The same relationship in relation to the IACtHR case of *Brasil Verde Workers v. Brazil* was addressed in *section 4.5*. In the present section, I will compare how the two courts access the relationship between this three abuses. I divide my analysis into two. Firstly, I will access the relationship between forced labour and servitude and secondly, the relationship between slavery and the other two abuses. The segmented analysis is necessary as the abuses have different characteristics which entail different relations amongst them.

Section 2.4. explains that the ECtHR adopts a gradational model to understand the relationship between forced labour and servitude. Accordingly, the court considers that servitude is an aggravated form of forced labour.[628] *Section 4.5.* reveals that it is not clear from the case *Brasil Verde Workers v. Brazil* how the IACtHR understands the relationship between forced labour and servitude. That is because the court is not precise as to whether if the definition of servitude requires usage of labour capacity that amount to forced labour.[629] Moreover, the court does not mention the necessity of an *aggravated* relationship between forced labour and servitude.[630] Thus, one cannot conclude whether if the IACtHR adopts the gradational model to understand the relationship between these two abuses.

Concerning the relationship between slavery and the other two abuses, *section 2.4.* explains that the ECtHR does not address these relationships. Additionally, the section

[628] *CN and V. v. France* (n 69) para. 91.
[629] ibid.
[630] See *section 4.3.*

demonstrates that Stoyanova adverts that the gradational model is inapt to cover distinguishing features of slavery, namely, that unlike servitude and forced labour, slavery might not require usage of labour capacity and therefore, slavery do not necessarily constitute an aggravated form of servitude or forced labour. Thus, from the author's point of view, the gradational model should not be adapted to access the relationship between slavery and the other two abuses.

In *Brasil Verde Workers v. Brazil*, the IACtHR also does not address the relationship of slavery with servitude and forced labour. Moreover, the IACtHR does not refer to a gradual understanding of the abuses. *Section 4.5*. demonstrates that the IACtHR only determines that the circumstances of the case went *beyond* the elements of debt bondage and forced labour to reach the *stricter* elements of slavery.[631]

Stoyanova's above-mentioned critic clarifies, however, that gradational model might be unsuitable to understand the relationship between slavery and the other two abuses in the IACtHR case law. That is because according to the IACtHR definition, slavery does not necessarily require usage of labour capacity, which is an element of the other two abuses.[632] Therefore, slavery can happen even if a situation does not characterize as servitude or forced labour and a gradation relationship would be, thus, inconceivable.

Therefore, establishing that the gradational model is unsuitable to understand the relationship of slavery with servitude and forced labour can be considered a novelty of the judgment of *Brasil Verde Workers v. Brazil*. However, such conclusion is still speculative and therefore, the first challenge to be pointed out for the IACtHR is to clarify the relationship of slavery and the other two abuses and, therefore, confirm if indeed slavery does not constitute an aggravated form of servitude and consequently, forced labour as well. Additionally, the court is also faced with the challenge of clarifying the relationship between forced labour and servitude. In doing so, two aspects need to be addressed: if forced labour is a component of the definition servitude and if the latter is an aggravated form of the former.

6.5. Trafficking in Persons

Before comparing the court's reasoning on trafficking in persons, it is important to acknowledge that while article 4 ECHR is silent as regard to the prohibition of trafficking in any forms, article 6(1) ACHR prohibits slave trade and trafficking in women.

Since the case of *Rantsev v. Cyprus and Russia*, the ECtHR held that the 'traditional concept of slavery has evolved to encompass various forms of slavery based on the exercise of any or all the powers attaching to the right of ownership'.[633] In *Rantsev*, the ECtHR concluded that trafficking in human beings is based on the powers attaching to the right of ownership. Therefore, even if not mentioned in article 4 ECHR, the ECtHR

[631] *Brasil Verde Workers v Brazil* (n 8) para. 303
[632] See *section 6.1.*
[633] *Prosecutor v. Kunarac* [AC] (n 5) paras. 117-118

determines that trafficking within the meaning of article 3(a) of the Palermo Protocol and 4(a) of the CoE Anti-Trafficking Convention falls within the scope of article 4.[634]

On a different token, the IACtHR determines that slave trade and traffic in women are both *based on the control exercised over the victims during the transport or transfer for the purpose of exploitation*.[635] The court also adds that both practices encompass the elements of control of a person's movement; psychological control; adoption of measures to prevent or deter scape; forced and compulsory labour, including prostitution.[636] Therefore, the IACtHR concludes that the prohibitions of the slave trade and traffic in women or article 6(1) has evolved and should be interpreted as trafficking in persons within the meaning of article 3(a) of the Palermo Protocol.[637]

Notwithstanding the different wording of articles 4 ECHR and 6 ACHR and distinctive reasoning's, both the ECtHR and the IACtHR arrive at the same conclusion: that trafficking within the meaning of article 3(a) of the Palermo Protocol falls within the scope of their corresponding articles.

Section 2.5 mentions that the inclusion of the prohibition of trafficking in persons within article 4 ECHR has been criticized by Allain on two aspects. The first one is that the ECtHR holds that trafficking is based on slavery.[638] The author sustains that this is problematic because slavery is only one of the exploitative aims of trafficking according to the Palermo Protocol.[639]

Allain explains that the Palermo Protocol definition of trafficking in persons encompasses *methods, means and aims* of trafficking. The *methods* are 'recruitment, transportation, transfer, harbouring or receipt of persons'.[640] *Means* of trafficking can be 'threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person'.[641] At last, the *aims* of trafficking are exploited for the purposes of prostitution, other forms of sexual exploitation, forced labour or service, slavery or practices similar to slavery, servitude or removal of organs.[642] Thus, Allain sustains that the ECtHR excludes from its understanding the *methods* and *means* of trafficking as laid down by the Palermo Protocol.[643] Moreover, the court also excludes other types of exploitation which could be

[634] See *section 2.5*.; *Rantsev v Cyprus and Russia* (n 36) para. 272
[635] *Brasil Verde Workers v Brazil* (n 8) para. 281
[636] See *section 4.6*.; *Brasil Verde Workers v Brazil* (n 8) para. 289
[637] ibid.
[638] See *section 2.5.;* Allain, *Rantsev v Cyprus and Russia* (n 14) 553
[639] ibid.
[640] Allain, *Ransev v Cyprus and Russia* (n 14) 552
[641] Ibid; see *section 2.5*.
[642] See *section 2.5*.; Palermo Protocol (n 160) article 3(a)
[643] Allain, *Ransev v Cyprus and Russia* (n 14) 553

at play in cases of trafficking, such as exploitation for the removal of organs or forced labour.[644]

Almost contradictory to the first feature criticizes by Allain is the second. Allain points out that the ECtHR expanded the scope of article 4 ECHR to cover forms of exploitation that go beyond slavery, servitude and forced labour.[645] Accordingly, the ECtHR expands the prohibitions of article 4 ECHR to cover trafficking for the exploitative purpose of removal of organs, sexual exploitation and prostitution, which are not covered by the prohibited practices under article 4 ECHR.[646] Stoyanova furthers this critic by revealing that in the case of *Rantsev v. Cyprus and Russia*, the ECtHR held that the victim was subjected to trafficking for the purpose of exploitation.[647] The court does not determine what constitutes exploitation nor relate it to any of the exploitation types enumerated by the Palermo Protocol. Therefore, Stoyanova adverts that 'the material scope of article 4 was enlarged to such an e extent as to cover any exploitation.'[648]

Differently, than the ECtHR, the IACtHR does not equate trafficking to slavery. The IACtHR includes trafficking in persons as defined by the Palermo Protocol within the scope of article 6 ACHR by interpreting the prohibition of the *slave trade* and *traffic in women* enshrined in article 6 ACHR.[649] Accordingly, the IACtHR single out that both slave trade and traffic in women entail the trafficking *methods* of transportation and transfer; the *aims* of exploitation for the purpose of forced and compulsory labour, including prostitution and the *means* of control of movement and psychological control as well as measures to prevent or deter escape.

In doing so, the court excluded from its understanding other methods of trafficking such as 'recruitment, harboring or receipt of persons as well as other means of trafficking can be abduction, fraud, deception, abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person'.[650]

Additionally, concerning the aims of trafficking, the IACtHR's reasoning is confusing and can lead to two interpretations. Either the court considers that slave trade and traffic in women have the aim of *any* exploitation or it considers that both practices aim exploitation for the purpose of forced or compulsory labour, including prostitution. Thus, the court either interpreted exploitation too narrow, and therefore, excluded other types of exploitation listed on article 3(a) of the Palermo Protocol, or to broadly going beyond the Palermo Protocol definition.

[644] Allain, *Ransev v Cyprus and Russia* (n 14) 553
[645] Allain, *Ransev v Cyprus and Russia* (n 14) 555; see *section 2.5*.
[646] ibid.
[647] See *section 2.5.;* Stoyanova (n 15) 300-301
[648] See *section 2.5*; Stoyanova (n 15) 301
[649] *Brasil Verde Workers v Brazil* (n 8) para. 289
[650] Allain, *Ransev v Cyprus and Russia* (n 14) 552

Even though the IACtHR does not equate trafficking to slavery, it engages in a similar process as the ECtHR while recognizing that the Palermo Protocol definition falls within the scope of article 6 ACHR. The IACtHR identifies that *slave trade* and traffic in women correspond to trafficking in persons as determined by the Palermo Protocol. As explained above, the Palermo Protocol definition is very broad. It encompasses different *aims* of exploitation. Therefore, the IACtHR also expanded the scope of article 6 ACHR to cover forms of exploitation that go beyond slavery, servitude and forced labour.

As mentioned above, the ECtHR was criticized expanding the definitional scope of article 4 ECHR to cover aims of exploitation that go beyond the wording of the article. This critic cannot, however, be automatically reproduced to the IACtHR reasoning. Differently than article 4 ECHR, article 6 ACHR does not only prohibit slavery, servitude, forced or compulsory labour. The ACHR adds to article 6(1) the prohibition of the slave trade and trafficking in women. Thus, the critic made to the ECtHR indicate not a problem to the IACtHR judgment, but rather a remaining challenge. The court must determine if slave trade and trafficking in women, in fact, cover all aspects of the Palermo Protocol definition of trafficking in person. There is to say, the IACtHR must thoroughly access if, in accordance with its object and purpose, article 6(1) ACHR aims to prohibit trafficking for purpose of exploitation for the removal of organs, prostitution and sexual exploitation. This assessment is of paramount importance because different types of exploitation might require different actions by the state, thus directly affecting state's obligations under the article.

Despite substantial differences in both courts reasoning, their results are ultimately the same. The ECtHR and the IACtHR include into the definitional scope of their corresponding articles trafficking in persons as dictated by the Palermo Protocol. Therefore, the IACtHR does not add any new features to the definition of trafficking in persons but arrives at a result that is substantially equal to the ECtHR. The ECtHR has been heavily criticized for going beyond the scope of slavery, servitude, forced and compulsory labour. However, if the same critic can be exported to the IACtHR is a challenge that remains.

6.6. State's Positive Obligations

The IACtHR, likewise the ECtHR, recognizes that human rights entail both positive and negative obligations.[651] The ECtHR interprets that the obligation to *secure* ECHR rights envisaged in article 1 ECHR in conjunction with other conventions rights, to give rise to negative and positive obligations. Similarly, The IACtHR considers that both article 1(1) and 2 ACHR read in conjunction with other ACHR rights entail negative and positive obligations.

An initial difference relating to both human rights conventions is that while article 1 ECHR determines that states must *secure* human rights, articles 1(1) and 2 ACHR

[651] ibid 22

requires that states *ensure human rights without discrimination* and *adopt norms and other measures to effectively guarantee the convention's rights*, respectively.[652] The ECHR's obligation to secure and ACHR's obligation to ensure both correspond to positive obligations that states must undertake to ensure the effective enjoyment of human rights.[653] Positive obligations deriving from the ACHR, however, possess two differential characteristics elements: firstly, states must *adopt norms and other measures to effectively guarantee the convention's rights*.[654] Secondly, positive obligations must be ensured *without discrimination.*

Additionally, both courts do not have a classification of positive obligation. The ECtHR only differentiates between substantive and procedural obligations. *Section 3.2*. presented Stoyanova typology for the ECtHR positive obligations. The author identifies the following positive obligation in the ECtHR case law: 'the obligation to criminalize; obligation to adopt substantive criminal law of a certain quality; obligation to investigate and potentially apply the relevant criminal law framework by prosecuting and punishing; obligation to put in place effective regulatory framework; obligation to take protective operational measures; obligation to provide an effective remedy'.[655]

The IACtHR also refrains from classifying state's obligation under the ACHR and it determines the corresponding obligations in accordance with the factual circumstances of a case. Lavrysen identifies, however, that the two broad obligations to ensure and prevent generates at least the specific positive obligations to ´prevent, investigate and punish any violation of the rights (...) and provide compensation as warranted for damages resulting from the violation.'[656]

6.7. Concurrent Substantive Positive Obligations

6.7.1. The Obligations to Adopt Regulatory Framework and Prevent

The ECtHR recognizes in its jurisprudence that states are under the positive obligation to adopt an effective regulatory framework to prevent abuses of article 4 ECHR.[657] The ECtHR does not specify what legislation and regulations states must adopt in order to prevent abuses of article 4. It only requires that the regulatory framework is effective to protect individuals against abuses.[658] For instance, the court has held that states were under the obligation to adopt of criminal laws as well as to the obligation to adopt a comprehensive approach with measures to prevent trafficking, protect victims and punish traffickers.[659]

[652] Lavrysen, Positive Obligations in the Jurisprudence of the Inter-American Court of Human Rights (n 19) 96; See *Santo Domingo Massacre v. Colombia* (n 165) para. 162.
[653] *Velásquez Rodríguez v. Honduras* (n 458), para. 166
[654] Lavrysen, Positive Obligations in the Jurisprudence of the Inter-American Court of Human Rights (n 19) 96; See also Case of the *Santo Domingo Massacre v. Colombia* (n 165)para. 162.
[655] ibid
[656] Lavrysen, Positive Obligations in the Jurisprudence of the Inter-American Court of Human Rights (n 19) 96
[657] Stoyanova (n 15) 365; See section 3.4.
[658] See section 3.4.
[659] See *section 3.4.; Rantsev v. Cyprus and Russia* (n 36) para 284

The IACtHR's *obligation to prevent corresponds* to the ECtHR *obligation to adopt effective regulatory framework. Section 5.4.* explains that in *Brasil Verde Workers v. Brazil*, the IACtHR determined that the *obligation to prevent* requires the adoption of a legal framework for protection against abuses of article 6 ACHR.[660] This obligation was characterized in the judgment as requiring states to adopt legal and administrative frameworks that include policies and measures that allow state's authorities to *respond effectively when an abuse is reported*.[661]

Additionally, the obligation to prevent also entails an *integral strategy* that prevents risk factors and strengthens institutions to provide an effective response to situations of modern slavery.[662] Moreover, the obligation to prevent requires states to *adopt specific preventive measures tailored to protect certain groups that have a greater risk of being victims* of abuses of article 6 ACHR.[663] Lastly, the court also held more generally that the obligation to prevent also includes all measures of political, legal, administrative and cultural nature that safeguard the rights enshrined in article 6.[664]

Before addressing the similarities and differences between the obligation to prevent and the obligation to adopt an effective regulatory framework, some aspects of the IACtHR reasoning on the obligation to prevent must be clarified. I argue that the comparison of the IACtHR case with the ECtHR case law reveals that the IACtHR conflates the general obligation to prevent the obligation to take operational measures. This is evident as the IACtHR explains the obligation to prevent in principle, however, when it applied it to the case, the court accessed if there was a violation of the obligation to take operational measures. That is because the IACtHR accessed if the violation occurred in relation to a specific group under an immediate threat. I will analyse this issue more carefully in *section 6.7.2*., however, what is relevant now is that the comparison in the present section can only be done in relation to the previously explained obligations in principle.

It is evident that both the ECtHR and the IACtHR require that states adopt a regulatory framework to prevent slavery, servitude, forced labour and trafficking in persons. There are however, substantial differences between these two obligations. While the ECtHR does not enumerate which regulatory frameworks states must adopt, the IACtHR was specific to which sort of measures states must provide.[665] Accordingly, states must afford effective measures to respond to abuses; adopt integral strategies to prevent risk factors and adopt specific protective measures for groups at greater risk.[666] Moreover, the IACtHR also held that the obligation to prevent includes all measures of political, legal,

[660] See section 5.3.; Brasil Verde Workers v Brazil (n 8) para 320
[661] Ibid
[662] *Brasil Verde Workers v. Brazil* (n 8) para. 320, See Lavrysen, Positive Obligations in the Jurisprudence of the Inter-American Court of Human Rights (n 19) 99
[663] ibid.
[664] *Brasil Verde Workers v Brazil* (n 8) para. 322
[665] ibid 320; see Stoyanova (n 15) 394
[666] Brasil Verde Workers v Brazil (n 8) para 320

administrative and cultural nature to safeguard article 6 ACHR. This broad requirement is not mentioned in the ECtHR case law under article 4 ECHR.[667]

The IACtHR's *obligation to prevent* thus, brings innovations to the positive obligations under slavery, servitude, forced labour and trafficking in persons. Firstly, the IACtHR enumerated specific measures to effectively respond to abuses and prevent risk factors. Secondly, the court inaugurated a special obligation to prevent vulnerable groups, which positive outcomes I will discuss in *section 6.8.1.* Thirdly, the court explicitly recognized that preventive measures should cover a diverse array of measures, of not only legal and administrative nature but also political and cultural. Despite such novelties, the previously mentioned conflation of the two obligations entail challenges to the court. However, I will discuss it in *section 6.7.2.*

6.7.2. The Obligation to Take Operational Measures

The obligation to take operational measures concerning the prohibition of slavery, servitude, forced labour and human trafficking is present in both the ECtHR case law and in Brasil Verde Workers v Brazil.[668] According to the ECtHR case law, states must adopt the appropriate measures when there is a *real* and *immediate* risk for an *identified* individual or individuals.[669] *Section 3.5.* explains that for state's responsibility to be triggered in relation to this obligation two elements need to be met: knowledge and reasonableness.[670] The knowledge element requires that 'authorities are aware of circumstances given rise to credible suspicion that an identifiable individual or individuals had been or are at real and immediate risk of being subjected to abuses',[671] or, conversely, that authorities 'should have been aware of the risk'.[672] Reasonableness, in turns, entails that the duty to take appropriate operational measures cannot 'impose an impossible or disproportionate burden on the authorities'.[673] Thus, the last criterium of reasonableness guarantees a degree of discretion for the state to decide on which operational measures to choose.[674]

In *Brasil Verde Workers v. Brazil,* the IACtHR recognized that states are under the obligation to take the necessary measures, under the scope of their authority, which could be reasonably expected to prevent or avoid a real and immediate risk of abuses of article 6 ACHR to an identifiable individual or group of individuals.[675] Additionally, the court considered that this obligation cannot impose an impossible or disproportionate burden upon the state.[676] Furthermore, the court recognized that the obligation to prevent slavery

[667] ibid.
[668] See *section 3.6.* and *section 5.3.1.*
[669] See Stoyanova (n 15) 400
[670] *Osman v. the United Kingdom* (n 303) para 116
[671] Stoyanova (n 15) 402
[672] Ibid 493
[673] *Osman v the United Kingdom* (n 303) para. 116
[674] See *section 3.5*.
[675] *Sawhoyamaxa Indigenous Community v. Paraguay* (n 481) para. 155; See also *Brasil Verde Workers v Brazil* (n 8) 325-388
[676] ibid.

has a special character due to the gravity of the facts and the vulnerability of the victims that compels the state 'to use all its available resources' to address such violations.[677]

Therefore, the IACtHR obligation to adopt operational measures is very similar to the corresponding ECtHR obligation. The above-mentioned ECtHR's elements of knowledge and reasonableness are also a requirement to find states in breach of the IACtHR obligation. Accordingly, in both court's case law, states are under the obligation to adopt operational measures when there is a *real* and *immediate* risk for an *identified* individual or individuals.

While applying the obligation into the circumstances of the case, the IACtHR found that the state failed to comply with it for two reasons.[678] First, the public policies and labour inspection were not sufficient to prevent slavery from happening at Brasil Verde.[679] Secondly, the court concluded that *state's authorities did not act with due diligence* when workers that had recently escaped from Brasil Verde filed reports to the police.[680]

Concerning the above-mentioned application stage, it appears that the IACtHR conflated the *obligation to take operational measures* with the *obligation to prevent.* The conflation is evident as the court identified and describes *the obligation to prevent* abuses of article 6 ACHR which I explained in *section 6.7.1.*[681] However, when applying the definition to the case, the court evaluated the elements of *knowledge* and *reasonableness* corresponding to the obligation to take operational measures. Thus, it appears that the court requires the knowledge and reasonableness test when evaluating the elements of the general obligation to prevent. Accordingly, elements such as the adoption of strategies to prevent risk factors or public policies to prevent slavery could only be breached if identifiable individuals were at risk.[682]

Conflations as such do not find a place in the ECtHR case law. As explained in *section 3.5.*, the ECtHR considers that *obligation to take operational measures* different from the obligations *to adopt the effective regulatory framework.* While the former 'afford general protection to society',[683] the latter only triggered when there is a *real* and *immediate* risk for an *identified* individual or individuals.

The IACtHR conflation of positive obligations is problematic because it entails that the court will only find a violation of the obligation to prevent in relation to identifiable groups or persons. Thus, this violation cannot occur due to a failure of affording protection to society in general. Therefore, it can be argued that to unfold the two obligations is a remaining challenge to the IACtHR. The court should separate its review of the general obligation to prevent from the obligation to take operational measures. The

[677] *Brasil Verde Workers v Brazil* (n 8) para. 328
[678] ibid paras. 325-328
[679] ibid.
[680] *ibid* (n 8) para. 327; See *section 4.3.1.*
[681] See *section 5.3.*
[682] See *section 5.3.1.*.
[683] Stoyanova (n 15) 400

ECtHR case law and in particular the different reviews adopted by the court might be of great value in this exercise.[684] Moreover, as mentioned above, the court's approaches are substantially similar and the IACtHR does not present any additional feature to the obligation to take operational measures.

6.7.3. The Obligation to Criminalize

Both the ECtHR and the IACtHR determine that states are under the positive obligation criminalize slavery, servitude, forced and compulsory labour and human trafficking. Both courts understand this obligation as guaranteeing effective deterrence to serious human rights violations. The IACtHR however, differently than the ECtHR adds an obligation to adopt severe punishment to such abuses.[685]

Section 3.3.1. explained that even though the ECtHR has never categorically held that states are under the obligation to enact specific criminal offences for the above-mentioned abuses,[686] there is an implicit requirement for such labels.[687] Stoyanova argues that specific criminal offences for abuses under article 4 ECHR are necessary as they impact on how these abuses are interpreted within national systems.[688] Additionally, she sustains that it allows for interpretations of the criminal offences that consider developments in human rights law.[689] The same section also highlighted that the ECtHR does not instruct on how criminal offences should be defined in national laws.[690] In general, the ECtHR evaluates if national criminal laws are 'armed with sufficient clear definition to ensure effective investigation and prosecution of abuses falling within the material scope of article 4'.[691]

Section 5.4.1. explained that in Brasil Verde Workers v. Brazil, the IACtHR did not reviewed the obligation to criminalize. Therefore, the section pointed out that from the judgment it was not possible to concluded if the IACtHR requires criminalization under the specific labels of article 6 ACHR. What was evident from the judgment was that likewise the ECtHR, the IACtHR did not prescribe how criminal offences should be defined in national laws. Similarly than the ECtHR, the IACtHR was concerned if the criminal offences could afford effective protection against abuses of article 6 ACHR.[692]

Hence, it is possible to conclude the assessment of the obligation to criminalize in both court's is similar and that the IACtHR does not bring any novelties to this obligation. Additionally, the comparison between the two jurisprudences bring about a challenge to the IACtHR: to clarify whether if the obligation to criminalize require specific labels. The jurisprudence of the ECtHR as well as scholarship work on this obligation under article

[684] On the review of the obligation to adopt operational measures under article 4 see *section 3.5.;* on the general review of positive obligations under article 4 see *section 3.2.1.*
[685] *Brasil Verde Workers v Brazil* (n 8), para 319
[686] Stoyanova (n 15) 340
[687] ibid
[688] ibid
[689] ibid 341
[690] Stoyanova (n 15) 345
[691] Stoyanova (n 15) 345; See *Siliadin v. France* (n 27); *CN and V v. France* (n 69); *CN v. the United Kingdom* (n 229)
[692] See *section 5.4.1.*

4 ECHR, might serve as a valuable lesson for the court while addressing this challenge. The court should consider the importance of adopting specific labels for a clear interpretation of the abuses within national systems. Moreover, specific label can enable national laws to grasp developments in international human rights law.[693]

6.8. Distinguishing Features of Substantive Positive Obligations

6.8.1. Additional Positive Obligations

In the case of *Brasil Verde Workers v. Brazil*, the IACtHR enumerated substantive positive obligations concerning the prohibition of slavery, servitude, forced labour and trafficking in persons, that have not been identified by the ECtHR. These obligations were recognized as specific obligations arising from the positive obligation to prevent and the negative obligation to respect.[694] They are the *i.* the obligation to remove any norm that legalizes or permits slavery and servitude; *ii.* the obligation of inspecting and take other measures to identify practices that violate article 6 ACHR and *iii.* the obligation to provide protective measures and assistance to victims.[695]

In the case, the IACtHR did not engage with the content of such obligations. In *section 5.6.* I argue that the first obligation, although identified under article 6 read in conjunction with article 1(1) ACHR, corresponds to the negative obligation enshrined in article 2 ACHR of *eliminating norms and practices that violate the ACHR*.[696] The former two obligations are specifically related to the abuses of article 6 ACHR and are not identified in relation to any other ACHR right.

Thus, it is a remaining challenge for the court to explain the content of these obligations and, therefore, to further clarify which measures states are compelled to undertake to ensure the prevention of slavery, servitude, forced labour, and trafficking in persons or how they can be properly repaired. Notwithstanding that, the recognition of such obligations ought to be seen as a positive outcome of the case. If further clarified, such obligations have the potential to enhance the protection against abuses of article 6 ACHR, by requiring states to carry inspections to identify such abuses and guaranteeing assistance to the victims, to say the least.

6.8.1. Enhanced Positive Obligations

Another feature of the case of *Brasil Verde Workers v. Brazil* that is singular to the IACtHR was the requirement of adoption enhanced positive obligations under article 6 ACHR. The IACtHR recognizes in its case law that states must guarantee special protection to a group or persons in a situation of vulnerability.[697] Thus, besides adopting positive measures to ensure the ACHR rights to all individual within their jurisdiction,

[693] See *section 3.3.*
[694] *Brasil Verde Workers v Brazil* (n 8) para 319
[695] ibid.
[696] See *section 5.1*.
[697] Lavrysen, Positive Obligation in the Jurisprudence of the Inter-American Court of Human Rights (n 19) 113

states must adopt special measures to guarantee the same protection to vulnerable groups and persons. Therefore, states are under enhanced positive obligations when vulnerable groups or persons are involved.[698] In *Brasil Verde Workers v. Brazil,* the court identified enhanced positive obligations in relation to the rights of the child, and due to discrimination of the workers on the grounds of their economic position.[699] Enhanced positive obligations were translated in the case as state's positive obligations specifically tailored to these two vulnerable groups.

Concerning the rights of the child,[700] the IACtHR recognized that the state was under this obligation as one of the applicants was a child when the situation of slavery happened.[701] The IACtHR concluded that the prohibition of slavery in relation to the rights of the child entails an enhanced general obligation to *eliminate the worst forms of child labour*.[702] As well as the specific obligations to:

> *i.* [P]revent the engagement of children in the worst forms of child labour; *ii.* provide the necessary and appropriate direct assistance for the removal of children from the worst forms of child labour and for their rehabilitation and social integration; *iii.* ensure access to free basic education, and, wherever possible and appropriate, vocational training, for all children removed from the worst forms of child labour; *iv.* identify and reach out to children at special risk; *v.* and take account of the special situation of girls.[703]

Concerning enhanced positive obligation due to discrimination, the IACtHR has long affirmed in its case law that article 1(1) ACHR requires states to ensure and protect rights without discrimination.[704] In *section 5.5.2.*, I explained that article 1(1) ACHR requires among other obligations, that states undertake a '*special obligation to protect* with regard to acts and practices of third parties who, with its tolerance or acquiescence, create, maintain or promote discriminatory situations'.[705] Moreover, the IACtHR also recognizes in its case law that *de facto* discriminations can correspond to a *structural discrimination,*[706] which are structural factors that directly or indirectly interfere with the enjoyment and exercise of the ACHR rights.[707]

In *Brasil Verde Workers v. Brazil,* the IACtHR held that the common characteristics of the workers of Brasil Verde, of being poor, originally from underdeveloped regions of the country and illiterate,[708] corresponded to a historical structural discrimination on the

[698] Lavrysen, Positive Obligations in the Jurisprudence of the Inter-American Court of Human Rights (n 19) 113
[699] *Brasil Verde Workers v Brazil* (n 8) paras. 329-341
[700] ACHR (n 2) article 19
[701] *Brasil Verde Workers v Brazil* (n 8) paras. 329-341
[702] *Brasil Verde Workers v Brazil* (n 8) para. 332
[703] ibid, to determine such obligations the court considers the ILO Minimum Wage Convention 1976 (n 509) and the ILO Worst Forms of Child Labour Convention (n 510) article 7
[704] ACHR (n 2) article 19
[705] Advisory Opinion Undocumented Migrants (n 515) para. 104
[706] See *"Street Children"* (n 517) para. 450; *Xákmok Kásek v Paraguay* (n 517) paras. 273-274; *Atala Riffo v Chile* (n 517) para. 92
[707] Concurring Opinion of Judge Ferrer Mac-Gregor (n 518) para. 79
[708] See section 4.1.1.

grounds of their economic status.[709] This discriminatory position entailed an *immediate risk* of them being enslaved and trafficked.[710] The court also considered that the imminent risk for the determinate group had historical origins and the state was aware of such risk at least since 1995 when it recognized the existence of 'slave labour' in the country.[711]

The IACtHR jurisprudence on vulnerable groups and discrimination brings a great innovation to positive obligations under the prohibitions of slavery, servitude, forced labour and trafficking in persons. By applying a vulnerability assessment to its review of these abuses, the court sustained opinion that victims of such abuses might require special measures, either because some of them carry a specific characteristic such as being a child or simply because certain vulnerable groups are more prompt to be subjected to slavery and the other abuses.

It is worth pausing to reflect on the recognition of a special obligation to prevent based on the vulnerabilities due to economic status. This obligation beyond any doubt constitutes an advancement for the protection against slavery, servitude, forced labour and trafficking in persons. That is because the IACtHR recognizes a causal relationship between the abuses with vulnerable situations. In the in the case of Brazil, this relationship corresponded to a historical situation of poverty and exclusion that enhanced workers risk of being subject to these abuses. The recognition of this causal relationship is important as it requires states, when complying with positive obligations under article 6 ACHR, to tackle existing situations which enable certain groups to be subjected to slavery and the other abuses.

6.9. Procedural Positive Obligations

Both the ECtHR and the IACtHR determine that states must undertake procedural positive obligations under the prohibition of slavery, servitude, forced labour and trafficking in persons. In ECtHR case law, procedural positive obligation corresponds to the obligation to 'conduct effective investigations into allegations that individuals have been subjected to criminal forms of abuses'.[712] In the case of *Brasil Verde Workers v. Brazil*, the procedural positive obligation under article 6 ACHR corresponded to the duty to '*immediately start, ex officio an effective investigation that allows to identify, prosecute and punish those responsible for the violation, in cases where the situation is reported or there is reason to believe that individuals within state's jurisdictions are subjected to one of the abuses of article 6(1) and 6(2) of the ACHR'*.[713]

The IACtHR and the ECtHR have substantial differences regarding procedural positive obligations. I will discuss such differences, as well as similarities in the forthcoming sections. I advance, however, that the IACtHR has distinguishing features to procedural obligation related to the prohibition of slavery, servitude, forced labour and trafficking in

[709] *Brasil Verde Workers v Brazil* (n 8) para. 339
[710] ibid para. 339
[711] ibid.
[712] Stoyanova (n 15) 351
[713] *Brasil Verde Workers v Brazil* (n 8) para 319

persons. They are mainly, a result of the court's approach of examining procedural positive obligation under the access to justice section of the judgment, namely, the court's assessment of right to a fair trial of article 8(1) and effective remedies of article 25(1) ACHR.

The comparative analysis of procedural obligations developed in this section will be subdivided into two parts. First, I will access the obligation to investigate and secondly, I will analyze distinguishing features and obligations identified by the IACtHR. After comparing both court's approaches, I will conclude whether if the IACtHR case of *Brasil Verde Workers v. Brazil* brings new positive features or if challenges can be identified.

6.9.1. Obligation to Investigate

Section 3.4. explained that the ECtHR's obligation to investigate requires states '*to conduct effective investigations into allegations that individuals have been subjected to criminal forms of abuses'.*[714] This obligation requires the identification of those that have committed abuses. Moreover, it intends to allow the state to prosecute those responsible for the abuses.[715] Additionally, the obligation is an autonomous investigation and can be triggered without a violation of the substantive aspects of article 4 ECHR.

Sections 3.4.1 and *2.4.2.* revealed that there are two central aspects to this obligation. The first one is that the obligation will be triggered with 'arguable and raise a reasonable suspicious' of abuses relating to article 4 ECHR.[716] *Section 3.4.3.* further explained that states will be in breach of this obligation if national authorities were confronted with an arguable claim that someone was subjected to one of the abuses of article 4 ECHR and did not start criminal investigations. The second aspect pertaining to investigations is that they must be *effective*. Correspondingly, if national authorities have initiated an investigation but failed to conduct it effectively, they will also fail to comply with this obligation.[717]

Concerning effectiveness, the ECtHR often determines it on a case-by-case basis and what constitutes effective investigations vary.[718] However, in cases concerning article 4 ECHR, the ECtHR has recognized that effectiveness depends upon the general requirements of *independenc*e, which means that the authorities investigating 'must be independent of those involved in the event'.[719] Additionally, it requires *promptness* and thus, investigations must be'prompt, speedy and through, which means that it should be carried without unreasonable delays'.[720] An effective investigation must also be *thorough.* In other words, 'authorities must always make a serious attempt to find out what happened'.[721] Lastly, investigations must be *capable of leading to the establishment of*

[714] Stoyanova (n 15) 351
[715] *CN and V v France* (n 69) para. 109
[716] Stoyanova (n 15) 352; See *MC v. Bulgaria* (n 245)
[717] Stoyanova (n 15) 352
[718] Stoyanova (n 15) 360
[719] *L.E. v. Greece* (n 181) para. 68
[720] ibid.
[721] Stoyanova (n 15) 360

the facts and identification of those responsible'.[722] This means that authorities should not 'rely on a hasty or ill-founded conclusion to close their investigations.'[723]

Section 3.4.2. also highlighted that cases involving article 4 ECHR, the ECtHR also has considers specific requirements of the *involvement of victims in the investigations* and *the duty to cooperate effectively with authorities of other states*. The first requirement entails that 'victims or the next-of-kin must be involved in the procedure to the extent necessary to safeguard their legitimate interest.'[724] The second requirement might arise in cases of cross-border trafficking, where states will have the 'duty to cooperate effectively with relevant authorities of other states concerned in the investigation of events which occurred outside their territories'.[725]

The IACtHR obligation to investigate encompass the same two central aspects as corresponding ECtHR obligation. However, these aspects bare substantial differences that ought to be addressed. Before turning to the parallels and disparities between the two courts, it is worth mentioning that the IACtHR defines in its case law the obligation to investigate as 'genuine, impartial and effective investigation, which is not undertaken as a mere formality predestined to be ineffective.'[726] Moreover, the court's case law points out that '[t]he duty to investigate, like the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result. Nevertheless, investigations must be undertaken in a serious manner and not as a mere formality preordained to be ineffective.'[727]

In *Brasil Verde Workers v. Brazil*, the IACtHR held that slavery is an *erga omnes* obligation and thus, states are required to start investigations *ex officio* when aware of a situation of slavery, servitude or trafficking in person.[728] This requirement is similar to the above-mentioned aspect promptness of the ECtHR obligation to investigate. Thus, in both courts authorities must act in their own motion when faced with a situation of slavery, servitude, forced labour or trafficking in persons.[729]

There is, however, a difference between the two courts: investigations are triggered in the ECtHR case law due to an *'arguable and raise a reasonable suspicious'*.[730] In the IACtHR case law, however, they will be triggered when authorities are *aware* of abuses of article 6 ACHR. Therefore, the IACtHR appears to have a higher threshold of concrete awareness of an abuse to start an investigation compared to the ECtHR's approach.

[722] Stoyanova (n 15) 360
[723] ibid.
[724] *CN v. the United Kingdom* (n 229) 69
[725] *Rantsev v. Cyprus and Russia* (n 36) 289
[726] ibid para. 143; See Lavrysen, Positive Obligations in the Jurisprudence of the Inter-American Court of Human Rights (n 19) 107
[727] *Velásquez-Rodríguez v. Honduras* (n 448) para. 177; See Lavrysen, Positive Obligations in the Jurisprudence of the Inter-American Court of Human Rights (n 19) 107
[728] *Brasil Verde Workers v Brazil* para. 362
[729] ibid; *L.E. v. Greece* (n 181) para. 68
[730] Stoyanova (n 15) 352; See *MC v. Bulgaria* (n 245)

Effectiveness

Additionally, likewise in the ECtHR case law, the IACtHR requires effective investigations. The IACtHR case law shows that similar to the ECtHR, investigations must be *independent and carried out by impartial investigative authorities*.[731] Effectiveness in the IACtHR also requires *due diligence*,[732] which means that 'investigative authorities must, within a reasonable time, take all necessary measures to try and obtain results'.[733] It can be argued that the IACtHR criterium of due diligence corresponds to the ECtHR criteria of promptness, thorough investigations that are 'capable of leading to the establishment of the facts and identification of those responsible'.[734]

Despite such similarities, both courts have differences regarding the obligation to investigate in relation to the abuses of article 4 ECHR and 6 ACHR. Firstly, in *Brasil Verde Workers v Brazil*, the IACtHR recognized that the state was under a special obligation to act in due diligence.[735] This emerged from both the *erga omnes* nature of the obligation and the gravity of the facts.[736] In the case, the court explained that special due diligence required the state to act immediately, as the victim's vulnerabilities and the urgency of the situation entailed a risk to the personal integrity of the victim's.[737] It is important to highlight that special due diligence did not relate only to the obligation to investigate, but also to the entire assessment of the court under the access to justice section of the judgment.

Another requirement for effective investigation unique to the IACtHR is the obligation to remove '*all obstacles, both factual and legal, that hinder the effective investigation into the facts and the development of the corresponding legal proceedings*.'[738] In *Brasil Verde Workers v. Brazil*, the court considered the statutory limitation of national criminal offences an *obstacle* to conducting an effective investigation, to determine responsibility and punishment of the perpetrator of abuses of article 6 ACHR, and to provide reparations for the victims.[739]

Regarding these elements, it is important to understand that under the IACtHR case law, the statute of limitations is inadmissible in cases of serious human rights violations.[740] Another important aspect is that the inadmissibility of statutory limitation relates not only to the obligation to investigate but also to the obligation to punish human rights violations

[731] Lavrysen, Positive Obligations in the Jurisprudence of the Inter-American Court of Human Rights (n 19) 107
[732] ibid
[733] ibid; See *Serrano-Cruz Sisters v El Salvador* (n 537) para. 65.
[734] Stoyanova (n 15) 360
[735] *Brasil Verde Workers v Brazil* (n 15) para. 368
[736] ibid.
[737] The IACtHR considers that vulnerabilities increase risks to personal integrity and therefore, states are under the obligation to adopt special measures; *Brasil Verde Workers v Brazil* (n 8) para. 364;368
[738] Lavrysen, Positive Obligations in the Jurisprudence of the Inter-American Court of Human Rights (n 19) 107
[739] Brasil Verde Workers v Brazil (n 8) para. 413
[740] See *section 5.7.3.*

and the obligation to introduce into its domestic laws whatever changes are needed to ensure execution of international obligations enshrined in article 2 ACHR.[741]

Specific ECtHR obligations for cases under article 4

At last, in *Brasil Verde Workers v. Brazil*, the IACtHR did not recognize the two specific elements of effective investigations that are required in the ECtHR case law under article 4 ECHR: *involvement of victims in the investigations* and *the duty to cooperate effectively with authorities of other states*.

Final remarks on the obligation to investigate

Therefore, the ECtHR's and the IACtHR's obligations to investigate encompass two common aspects: firstly, that authorities must act in their own motion when faced with a situation of slavery, servitude, forced labour and trafficking in persons. Secondly, that once investigations are initiated they must be carried out effectively. The contrast between both courts shows that the IACtHR brings two new features concerning the elements of effectiveness. The first one is that effective investigations entail the inadmissibility of all measures intended to prevent the investigation (and punishment) of those responsible for serious human rights violations.[742] This feature represents a novelty brought by the judgment of Brasil Verde Workers v Brazil to the obligation to investigate violations of the prohibition of slavery and the other abuses. To argue that, however, does not mean that the incompatibility of statutory limitation certainly constitutes a gain to enhance protection against such abuses. Examining this figure is beyond the scope of this analysis. It appears evident, however, that upholding procedural, legal or de facto obstacles to investigations are a positive feature introduced by the IACtHR. The second novelty brought by the judgment corresponds to the special due diligence that arises due to the existence of vulnerabilities.

Notwithstanding that, compared with the ECtHR the IACtHR required a higher standard of *knowledge* instead of *reasonable suspicion* to start an investigation. Additionally, differently, than the ECtHR, the IACtHR was silent concerning the involvement of victims and the duty to cooperate with other states in cases of cross-border trafficking in persons. Thus, the comparative assessment points out for a future challenge for the IACtHR: it might be fruitful for the court to engage with the latter two obligations and review its standards of *knowledge* of the situation to start an investigation.

6.9.2. Distinguishing Features of Procedural Positive Obligations

6.9.2.1. Beyond Criminal Investigations

Section 3.6. explained that the ECtHR has never assessed the right to effective remedy enshrined in article 13 in relation to article 4 ECHR. That is because some cases do not

[741] ibid 409.
[742] Lavrysen, Positive Obligations in the Jurisprudence of the Inter-American Court of Human Rights (n 19) 107

have a claim under this article[743] while in others, the court dismissed this claim for being 'manifestly ill-founded' or 'unnecessary' as it was subsumed by the assessment of the procedural obligation to investigate under article 4.[744]

Moreover, *section 3.6.1.* demonstrated that the inclusion of a review of effective remedies in relation to article 4 ECHR would enhance the protection against the abuses of the said article. That is because Article 13 ECHR encompasses the assessment of the *obligation to investigate criminal abuses,* but not only. Article 13 ECHR gives rise to the duty to investigate abuses 'for affording remedies is a broader sense'.[745] Thus, differently, than the procedural obligation to investigate under article 4 ECHR, which only relates to criminal procedures, article 13 offers a broader protection and might require states to carry out effective investigations in relation to other remedies, such as civil and administrative law remedies.

The positive outcomes of including a claim under effective remedies in cases involving slavery, servitude, forced labour and trafficking in persons are indeed confirmed by the IACtHR in the case of *Brasil Verde Workers v. Brazil.* In the case, the IACtHR reviewed the obligation to investigate abuses of article 6 ACHR under the section of the judgment on access to justice (*effective remedies* and *right to a fair trial).* Thus, as shown by *section 5.6.1.*, the IACtHR does not limit its review to an investigation into criminal abuses of article 6 ACHR. To determine the effectiveness of remedies,[746] the court scrutinized criminal as well as labour law and civil law remedies. In doing so, the court analyses if the state complied with the duty to investigate not only criminal abuses but labour law infractions that relating to all three above referenced remedies. Accordingly, the court scrutinizes several labour law inspections and corresponding reports from the Ministry of Labour.[747]

It can be added that the positive outcomes of the IACtHR's review of effective remedies go even beyond expanding the legal nature investigations scrutinized. It also allowed the court to access not only the effectiveness of the entire juridical procedures afforded by the state in the form of remedies. For instance, the court evaluates due diligence of judiciary authorities in relation to the criminal proceeding and the existence of obstacles to punishing perpetrators.[748]

6.9.2.2. Distinguishing Obligations under Access to Justice

Moreover, under the access to justice section of the judgment, the IACtHR also recognized three additional positive obligations not referenced in the ECtHR case law. As mentioned in *section 5.7.2.*, article 25(1) in relation to article 1(1) compel states to

[743] the applicants in *Siliadin v. France* (n 27), *Chowdury and Others v. Greece* (n 105) and *Rantsev v. Cyprus and Russia* (n 36) do not bring a claim under article 13.
[744] *CN v the United Kingdom* (n 69) paras. 112-113
[745] Stoyanova (n 15) 413
[746] *Section 5.7.2.* explains the criteria for effectiveness
[747] *Brasil Verde Workers v Brazil* (n 8) paras. 385-390
[748] See *section 5.7.2.*

design and embody in their legislation effective remedies to human rights violation.[749] Therefore, the positive aspects of the assessment of effective remedies go beyond enhancing the procedural positive obligation under this article. It also allowed the court to expand the substantive obligation of adoption of a legal framework to grant remedies for victim's of abuses under article 6 ACHR.

6.9.2.3. The Obligation to Punish and Provide Reparations for Victims

The IACtHR case law recognizee that serious human rights violations require criminal punishment.[750]Accordingly, the court considered that victims have the right 'where appropriate, […] to have the proper punishment applied to the responsible parties.'[751] Moreover, the obligation to punish must also follow the principle of proportionality of punishment.[752]

In the case of *Brasil Verde Workers v. Brazil,* the court confirmed that abuses of article 6 ACHR require punishment. The court addressed this obligation while accessing the right to effective remedies of article 25 ACHR. Effective remedies, according to the court, encompass a substantive obligation to adopt laws that guarantee effective remedies to human rights violation.[753] Moreover, this right also entails the procedural obligation to ensure that the said remedies are effective.[754] Effective remedies are, in turns, those adequate and efficient in determining individual criminal responsibility in relation to human rights violation and when necessary punishment and that guarantee reparations for the victims.[755] In the case, the fact that national remedies were not able to establish criminal responsibility for the abuses of article 6 ACHR and punish the perpetrators amounted to a violation of article 25 in relation to article 1(1) and 2 ACHR.

It is worth mentioning that the ECtHR differently than the IACtHR has not explicitly recognized an obligation to prosecute or punish. Nor has it considered that the obligation to investigate necessarily entails prosecution or conviction. The ECtHR focus on whether if state's authorities undertook *reasonable measures* to establish criminal responsibility and identify the perpetrators. In the ECtHR case law, what the court factors in as reasonable measures vary. For instance, the court has considered the 'gravity of the offence, any systematic failure or a distinguishing characteristic of victims, such as their vulnerability.'[756]

The positive *obligation to provide reparations for victims* is another positive outcome evident in the case of *Brasil Verde Workers v Brazil.* This positive obligation is not mentioned in the jurisprudence of the ECtHR. According to the IACtHR's case law 'one

[749] *Brasil Verde Workers v Brazil* (n 8) para. 393; See also 'Street Children' (n 517) para. 237
[750] Lavrysen, Positive Obligations in the Jurisprudence of the Inter-American Court of Human Rights (n 19) 108
[751] ibid 108; *Las Palmeras v. Colombia* (n 539) para. 65
[752] Brasil Verde Workers v. Brazil (n 8) para. 393
[753] Ibid
[754] ibid para. 393; See also 'Street Children' (n 517) para. 237
[755] Ibid 395
[756] Stoyanova (n 4) 365

of the affirmative measures that States Parties are required to take to fulfil their [obligation to ensure] consists in providing effective judicial remedies in line with the rules of due process, and seeking the restoration of the violated right, if possible, and reparation of any damage caused'.[757] This obligation is different from the court's entitlement to request reparations under article 63. It compels states to provide reparations at the domestic level before and regardless of whether the case ends up in the Inter-American system.[758] In *Brasil Verde Workers v. Brazil*, the IACtHR recognizes this positive obligation under the right to effective remedies.

6.9.2.4. The Obligation to Ensure Access to Justice Without Discrimination

The final novelty introduced by the IACtHR is to the obligation to ensure effective remedies without discrimination. In *Brasil Verde Workers v. Brazil*, the court explained that the vulnerability of the victims had an impact on the conduct of state's authorities while granting judicial remedies. The court concluded that the *lack of due diligence* of state's authorities in affording judicial remedies[759] and the *impunity* of the perpetrator[760] could explain by the normalization of the conditions (poverty, exclusion and lack of education) to which workers of farms in the north and northeast of Brazil are continuously submitted.[761] Therefore, the court concluded that the workers at Brasil Verde were subjected to a discriminatory treatment that had an impact on how state's authorities granted effective remedies.

6.9.2.5. Final Remarks on the Access to Justice

Therefore, the IACtHR's review of access to justice brings crucial new features to positive procedural obligations under the prohibition of slavery, servitude, forced labour and trafficking in persons. Firstly, the assessment of the *obligation to investigate* abuses of article 6 ACHR under the right to *effective remedies* and *right to fair trial* allowed the IACtHR to evaluate investigations beyond the realm of criminal law. Thus, the IACtHR scrutinized investigations of different legal natures. For instance, it reviewed investigations such as labour law inspections, that are crucial to prevent and redress abuses of article 6 ACHR.

Moreover, the IACtHR reviewed the effectiveness of the entire judicial procedures, from investigations to decision making. Additionally, the evaluation was made in relation to remedies of criminal, labour and civil law natures. The review of remedies in such way is not done by the ECtHR in cases involving article 4 ECHR. At last, the IACtHR also included the review of other positive obligations not identified by the ECtHR, namely: *the obligation of adoption of a legal framework to grant remedies for victims of abuses of article 6 ACHR* as well as the *obligation to punish* the perpetrator and *provide*

[757] Albán-Cornejo et al. v. Ecuador (n 543) para. 61; Lavrysen, Positive Obligations in the Jurisprudence of the Inter-American Court of Human Rights (n 19) 109
[758] *Brasil Verde Workers v Brazil* (n 8) para. 418-419
[759] ibid para. 398; 368
[760] ibid para 413
[761] ibid para 418-419

reparation for the victim of the said abuses. Therefore, the IACtHR goes beyond the mere assessment of criminal investigations and requires that states guarantee an effective access to justice for victims of slavery, servitude, forced labour and trafficking in persons.

7 Conclusive Remarks

7.1. The Novelties of *Brasil Verde Workers v. Brazil*

The IACtHR has long recognized its leading role in the development of international human rights law and therefore, being in the forefront of adopting progressive interpretations of human rights. The court's understanding of the prohibition of slavery and forced labour of article 6 ACHR in *Brasil Verde Workers v Brazil* followed the same pattern. The judgment is unique as it gave a comprehensive definition of what constitutes slavery. By unfolding the 1926 Slavery convention definition, the court explicitly recognized that slavery covers *de facto* abuses and defined what constitutes *powers attaching to the right of ownership*. In doing so, the IACtHR defined slavery in a way that understands the essence of the abuse, which is that slavery is 'ultimately about control.'[762] Thus, the IACtHR inaugurated a human rights law definition of slavery able to capture contemporary forms of the abuse.

The IACtHR definition of slavery also outstands for clarifying that the abuse can occur in a situation that does not implicate any form of work or service, but where a person is exploited through other power attaching to the right of ownership, such as *transfer*. This novelty implies that in the IACtHR case law it is incorrect to understand slavery as an aggravated form of servitude, as it is done by the ECtHR. That is because both forced labour and servitude implicate exploitation through work or service which is not a necessary requirement for slavery.

The case of *Brasil Verde Workers v. Brazil* also brought novelties relating positive obligations under the prohibition of slavery, servitude, forced labour and trafficking in persons. Regarding substantive obligations, if compared with the ECtHR, the IACtHR spelt out more carefully *specific measures* that states must adopt to ensure and protect the rights enshrined in article 6 ACHR. Additionally, the court also introduced new positive obligation. Such as, the obligation to carry out inspections to prevent or redress the abuses, guarantee assistance to victims and to eliminate worst forms of child labour.

Concerning procedural positive obligation, the IACtHR went beyond the ECtHR standards of guaranteeing effective investigations. The IACtHR required from states to provide *access to justice* for victims of slavery, servitude, forced labour and trafficking in persons. Therefore, states must not only afford effective investigations for victims of the above-mentioned abuses but *effective remedies.* Moreover, the IACtHR required states to guarantee procedural obligation not identified in the ECtHR case law. They are the procedural obligations punish perpetrators of abuses and the obligation to provide reparations for the victims. The last innovation related to the obligation to investigate was

[762] See *section 2.1.* Allain, *Slavery in International Law* (n 14) 122

the recognition that all measures intended to prevent investigation and punishment of those responsible for abuses of article 6 ACHR, such as statutory limitations, are inadmissible.

Lastly, the IACtHR determined that states must carry out positive obligations without discrimination, which is not a demand in the ECtHR case law. This obligation permeates the court's assessment of both substantive and procedural obligation. The IACtHR recognized that states are under special obligations to prevent vulnerable groups from being subjected to the abuses of article 6 ACHR. Special obligations as such are of pivotal importance for the protection against slavery and the other abuses. That is because the IACtHR acknowledged a causal relationship between vulnerabilities and the abuses. Therefore, the IACtHR requires states to tackle situations which enables that certain groups are subjected to slavery and the other abuses of article 6 ACHR.

7.2. Remaining Challenges

The comparison of *Brasil Verde Workers v. Brazil* with the ECtHR case law reveals problematic features of the IACtHR approach to the prohibition of slavery, servitude, forced labour and trafficking in persons. These problematic features were presented in *chapter 6* as remaining challenges for the protection against abuses of article 6 ACHR in the IACtHR jurisprudence.

Concerning the *definitions* of article 6, problematic features were identified in relation to the definitional scope of servitude and forced labour. The court is faced with a pressing challenge to revisit the definitions of these two abuses. The IACtHR should structure the definition of *servitude* in a way that it captures its two essential elements: serious forms of denial of freedom and usage of labour capacity. The court is also faced with the challenge of adapting its definition of *forced labour* to overcomes the broad and indeterminacy of the ILO Forced Labour Convention definition and thus, capture elements not covered by the ILO Forced Labour Convention definition, such as exploitative working condition and vulnerabilities.

Moreover, the explanation of the definition of slavery is missing crucial elements: denial of freedom and destruction of the juridical personality. The court is faced with the challenge to determine what constitutes these elements and explain how they relate to the other elements of the definition. Additionally, there is also a need for clarification if the broad definition of trafficking in persons of the Palermo Protocol is actually in accordance with the object and purpose of article 6 ACHR. Overall, it is important that the court does not conflate the four definitions and apply them to the circumstances of the case in a coherent manner.

The court's review of *positive obligations* under article 6 ACHR has demonstrated to be less challenging than the definitional scope of the article. However, the court still faces the challenge of unfolding the *general obligation to prevent* and the *obligation to take*

operational measures. There is to say, that the court should revisit its assessment of the positive obligation to prevent and therefore, acknowledge that states will be in violation of article 6 ACHR not only when there is an immediate risk to an identifiable individual, but also when they fail to provide effective regulatory frameworks for the protection of society in general. Moreover, another challenge is to access whether the states, should cooperate with other states in cross-border investigations of trafficking in persons and if states should guarantee the involvement of victim's in investigations relating to article 6 ACHR. At last, the IACtHR is faced with the need to clarify the content of additional positive obligations identified in *Brasil Verde Workers v. Brazil* that are unique to article 6 ACHR, such as the obligation to guarantee assistance to victims.

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