Slavery

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Forced or compulsory labour

Article 4 § 2 provides that '[n]o one shall be required to performed forced or compulsory labour.' While the word 'forced' refers to 'the idea of physical or mental constraint', the word 'compulsory' refers to exercise of compulsion by laws [*Van der Mussele v. Belgium*, App. No. 8919/80, 23 November 1983, para. 34.]. Since only the State can adopt laws and regulations that can compel individuals, only state-sanctioned labour can be defined as 'compulsory labour'. When labour is demanded by private parties (i.e. employer), who might coerce individuals physically or physiologically, the concept of 'forced labour' is relevant. When the State coerces individuals to work through means other than laws and regulations, these circumstances might be also defined as 'forced labour'.

'Forced or compulsory labour' is not explicitly defined in the text of the Convention. In interpreting the meaning of 'forced or compulsory labour', the Court has taken the ILO Convention No. 29 (Forced Labour Convention) as 'a starting-point' [*Van der Mussele v. Belgium*, para 32 and *S.M. v. Croatia* [GC] no 60561/14, 25 June 2020, para 281, *Stummer v. Austria* [GC], no. 37452/02, para 117]. This ILO Convention contains the following definition of 'forced or compulsory labour': '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.' This definition has two elements that have to be cumulatively fulfilled: menace of penalty and involuntariness (i.e. absence of consent). As to the consent, the ECtHR has clarified that 'the validity of the consent has to be assessed in light of all the circumstances of the case' [*Chowdury and Others v Greece*, para 90]. This implies that the fact that a person has consented does not per se rule out the possibility that he or she has been subjected for forced or compulsory labour. A contextualization of this person's situation is necessary, which means that 'the nature and the volume of the activity in question' needs to be taken into account [*Chowdury and Others v Greece*, para 91 and 96]. To do this, the ECtHR has relied on the concept of 'disproportionate burden' [*Van der Mussele v. Belgium*, para 39). For example, in *C.N. and V. v. France*, no. 67724/09, 11 October 2012, para 74, a case about two sisters from Burundi who were kept as household servants, the Court held that 'the first applicant was forced to work so hard that without her aid Mr and Mrs M. would have had to employ and pay a professional housemaid. The second applicant, on the other hand, has not adduced sufficient proof that she contributed in any *excessive measure* to the upkeep of Mr and Mrs M.'s household [emphasis added].' The reasoning of the Court in *Chowdury and Others v Greece,* a case about undocumented Bangladeshi migrants who worked in strawberry fields in Greece under very bad working conditions and were never paid, is also illustrative of how the Court applies a contextual approach to consent. In particular, the Court noted that 'where an employer abuses his power or takes advantage of the vulnerability of his workers in order to exploit them, they do not offer themselves voluntarily.' In sum, although consent is invoked as a necessary requirement for defining circumstances as forced or compulsory labour, the Court does not examine the subjective state of mind of the alleged victim; it rather examines the objective factual circumstances and asks whether they show excessiveness and abuses. Similarly, the Court has interpreted the requirement for 'menace of any penalty' widely. It has noted that the concept of 'penalty' 'had to be understood in a broader sense as "any" or "a" penalty' [*S.M. v. Croatia* [GC] para 282].

To understand the definitional scope of Article 4 and, in particular, the meaning of 'forced or compulsory labour', it is necessary to also understand the role of Article 4(3). This paragraph exhaustively enumerates four situations when the State can demands labour and services and when this demand cannot be classified as 'forced or compulsory labour' and cannot therefore be in breach of Article 4(2). The enumerations of these four situations, that relate to labour in

the course of detention, services of military character, services in case of emergencies and work as part of normal civil obligations, can be understood to the effect that Article 4(3) contains permissible exceptions to forced or compulsory labour. On this basis, forced and compulsory labour can be arguably distinguished from slavery and servitude since Article 4(3) does not apply to Article 4(1). There is, however, an alternative way for understanding the role of Article 4(3). More specifically, the four situations mentioned in Article 4(3) need to be taken into account in the determination whether the factual circumstances actually amount to forced or compulsory labour. As the Court has noted in *Stummer v Austria* [GC] no 37452/02, 7 July 2011, para 120, 'paragraph 3 [in Article 4] serves as an aid to the interpretation of paragraph 2. The four sub-paragraphs 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.' This means that, for example, if a person is required to do work during his or her detention, his or her claim that his or her rights under Article 4(2) have been violated, cannot be outright excluded. Such an exclusion would have been the consequence if Article 4(3) is understood as containing exceptions. If Article 4(3) is, however, understood as aid in the interpretation of the meaning of forced or compulsory labour, the Court will apply the above-mentioned contextualized approach that includes the consideration that work during detention, might be in the general interests. Crucially, if the work implies a disproportionate burden on the person who performs it, it will lead to a violation of Article 4(2).

The concept of 'forced or compulsory labour' is related to the other concepts of slavery and servitude that Article 4 contains **[see slavery, servitude]**. This makes it important to clarify how abuses that can be qualified as forced or compulsory labour differ from servitude and from slavery. The Court has never explicitly addressed the distinction between forced or compulsory labour, on the one hand, and slavery, on the other. The distinction between servitude and forced or compulsory labour, has been clarified in the following way: '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 his or her condition is permanent and that the situation is unlikely to change' [*Chowdury and Others v Greece* para 99].

Having clarified the definitions of the concepts contained in Article 4, it is now necessary to explain the obligations that this provision triggers. Importantly, these obligations are not limited to demanding from the State and its agents not to force or coerce individuals to do labour. The scope of the obligations is not 'confined merely to the direct actions of the State authorities. [*Chowdury and Others v Greece* para 86].' This implies that Article 4 imposes positive obligations upon States **[see positive obligations].** These obligations have been further specified by the Court as including the obligation (i) to criminalize forced labour [*Siliadin v France* para 89], (ii) to put in place a legislative and administrative framework providing real and effective protection [*Chowdury and Others v Greece* para 86], (iii) to take protective operational measures [*L.E. v. Greece*, no. 71545/12, 21 January 2016, para 66] (iv) and the obligation to conduct effective criminal investigation [*S.M. v. Croatia* [GC] para 89]. To develop these positive obligations under Article 4 the Court has drawn from developments in the case law under Article 2 and Article 3, provisions that have given rise to much more cases and respectively judgments in comparison to Article 4. The judgments delivered by the Court under Article 4 are still relatively limited.

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Servitude

Article 4(1) ECHR provides that 'No one shall be held is slavery and servitude.' Servitude is not defined in the text of the Convention. In *Siliadin v. France* [para 123-4], the ECtHR clarified that '[w]ith regard to the concept of 'servitude', what is prohibited is a 'particularly serious form of denial of freedom'. It includes, 'in addition to the obligation to perform certain services for others . . . the obligation for the "serf " to live on another person's property and the impossibility of altering his condition. ' In the same judgment, it was also added that ' for Convention purposes 'servitude' means an obligation to provide one's services that is imposed by the use of coercion, and is to be linked with the concept of 'slavery' described above.' **[see slavery]**. The Court, however, has not so far explicitly addressed the linkage between slavery and servitude and, in particularly, how servitude is different from slavery. *C.N. and V. v. France* [para 91] further clarifies the meaning of servitude '[. . .] 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 labour 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 be based on the above mentioned objective criteria or brought about or kept alive by those responsible for the situation [emphasis added].' The same basis for making the distinction between forced labour and servitude was repeated in *Chowdury and Others v Greece* para 99. In this judgment, the Court followed the gradation model built within Article 4 by observing that, in contrast to servitude, the qualification of abuses as forced labour does not require such a high threshold as demonstrating that the victim lived in a state of exclusion from the outside world and was deprived of freedom of movement (para.99).

Having clarified the way in which the Court has defined servitude, it is necessary to now explain the obligations corresponding to the right not to be held in servitude. While the State and its agents might engage in practices that might reach the severity threshold of servitude given the above described gradation model, in the contemporary circumstances individuals are likely to be held in servitude by private actors (other individuals, groups or companies). This makes states positive obligations relevant **[see positive obligations].** Article 4 imposes positive obligations upon states to prevent and remedy abuses that amount to servitude [*Chowdury and Others v Greece* para 86]. These obligations have been further specified by the Court as including the obligation (i) to criminalize servitude [*Siliadin v France* para 89], (ii) to put in place a legislative and administrative framework providing real and effective protection [*Chowdury and Others v Greece* para 86], (iii) to take protective operational measures [*L.E. v. Greece*, no. 71545/12, 21 January 2016, para 66] (iv) and the obligation to conduct effective criminal investigation [*S.M. v. Croatia* [GC] para 89]. To develop these positive obligations under Article 4 the Court has drawn from developments in the case law under Article 2 and Article 3, provisions that have given rise to much more cases and respectively judgments in comparison to Article 4. The judgments delivered by the Court under Article 4 are still relatively limited.

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Slavery

Article 4(1) ECHR provides that 'No one shall be held is slavery and servitude.' Slavery is not defined in the text of the Convention. The first time when the Court engaged with the meaning of slavery was in the case of *Siliadin v France*, no 73316/01, 26 July 2005, para 122, where the Court referred to the 1926 Slavery Convention. This treaty defines slavery in the following way: '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.' In *Siliadin v France*, the Court quoted this definition, but then it observed that '[…] this definition corresponds to the 'classic' meaning of slavery as it was practiced for centuries. Although the applicant was, in the instant case, clearly 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.' The reference to 'genuine right of legal ownership' seems to suggest that for slavery to be constituted ownership sanction by the legal system is a necessary requirement. This will make the concept irrelevant in light of the contemporary circumstances since no State Party to the ECHR has laws that allow one person to own another. The reference to 'genuine right of legal ownership' seems to exclude situations where persons are held in *de facto* slavery. The reasoning of the Court in *Rantsev v Cyprus and Russia* no 25965/04, 7 January 2010 para 181, has led to further confusion as to the meaning of slavery and its relationship with human trafficking. In this 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*. 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. [emphasis added]' The text of this paragraph suggests that the Court used the definition of slavery to define human trafficking. Importantly, however, the quotation does not refer to 'legal ownership', the term used in *Siliadin v France.* The Court has also avoided references to 'legal ownership' in subsequent judgments, such as *M. and Others v Italy and Bulgaria* no. 40020/03, 31 July 2012, para 149 and 161 and *S.M. v. Croatia* [GC] no 60561/14, 25 June 2020, para 280. Yet, at the time of writing, the Court has never delivered a judgment where it has found that the victim has been kept in slavery. Neither has the relationship between the concept of slavery, on the one hand, and the concepts of servitude, forced labour and human trafficking, been further clarified **[see servitude, forced labour].**

Despite the absence of judgments where the concept of slavery was found applicable, the Court has more generally clarified the content of states obligations corresponding to Article 4. While it cannot be excluded that State agents might engage in practices that might qualify as slavery, in the contemporary circumstances individuals are likely to be held in slavery by private actors (other individuals, groups or companies). This makes states positive obligations relevant **[see positive obligations].** Article 4 imposes positive obligations upon states to prevent and remedy abuses that amount to slavery [*Chowdury and Others v Greece* para 86]. These obligations have been further specified by the Court as including the obligation (i) to criminalize slavery [*Siliadin v France* para 89], (ii) to put in place a legislative and administrative framework providing real

and effective protection [*Chowdury and Others v Greece* para 86], (iii) to take protective operational measures [*L.E. v. Greece*, no. 71545/12, 21 January 2016, para 66] (iv) and the obligation to conduct effective criminal investigation [*S.M. v. Croatia* [GC] para 89]. To develop these positive obligations under Article 4 the Court has drawn from developments in the case law under Article 2 and Article 3, provisions that have given rise to much more cases and respectively judgments in comparison to Article 4. The judgments delivered by the Court under Article 4 are still relatively limited.

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Positive obligations

Article 1 of the Convention imposes an obligation upon the State Parties not only to respect, but also to secure the rights in the ECHR. This implies that States have to proactively take measures to ensure the interests protected by the rights enshrined in the Convention. As a result, States have not only negative obligations to refrain from taking measures that might interfere with these interests, but also positive obligations. These obligations imply that under certain circumstances States have to intervene by taking measures to prevent harm or to remedy harm. The interpretation of the Convention as a 'living instrument', which implies a 'dynamic and evolutive' interpretation, has been used as a tool to justify the development of positive obligation [*Christine Goodwin v United Kingdom* [GC] App no 28957/95, 11 July 2002, para 74.]. When examining whether a State has ensured the rights protected in the ECHR, the Court has also noted that 'the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective.' [*Tyrer v United Kingdom* App no 5856/72, 25 April 1978] The principle of effectiveness therefore has a crucial role for justifying positive obligations and determining their content and scope.

Although the imposition of positive obligations by the ECHR is not contentious, the Court still presents them in some situations as an addition to negative obligations. For example, in the context of Article 8, the Court has noted that 'the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities,' which implies negative obligations. However, then the Court adds that '[t]here may in addition be positive obligation inherent in effective "respect" for private and family life.' [*Osman v Denmark* App no 38058/09, 14 June 2011, para 53]. This can be contrasted with the approach under Article 2 (the right to life) and Article 3 (the right not to be subjected to torture, inhuman or degrading treatment or punishment), where the starting point in the Court's reasoning is that States as a matter of principle have positive obligations to prevent and remedy abuses that fall within the definitional scope of Articles 2 and 3. For example, the Court has observed that '[t]he first sentence of Article 2(1) enjoins the State not only to refrain from the international and unlawful taking of life, but also to take appropriate steps to safeguards the lives of those within its jurisdiction. [*Kurt v Austria* [GC] App no 62903/15, 15 June 2021, para 157]'

Various issues have been reviewed in the case law as involving possible breaches of positive obligations. Examples include domestic violence [*Kurt v Austria* [GC] no 62903/15, 15 June 2021], medical negligence [*Lopes de Sousa Fernandes v Portugal* [GC] App no 56080/13, 19 December 2017], natural disasters or industrial activities [*Öneryildiz v Turkey* [GC] App no 48939/99, 30 November 2004]. These are mere illustrations as to the variety of circumstances that can be framed as possibly involving failures by the State to fulfil its positive obligations. Besides the subject matter, positive obligations as developed by the Court can be systematised with reference to the nature of the measures that the State is required to undertaken. Some positive obligations, therefore, can be classified as procedural obligations that require from the State to undertake effective criminal investigation upon reasonable allegation that harm has materialised. Other positive obligations can be classified as substantive obligations. These include the obligation to criminalise abuses [*M.C. v Bulgaria* no 39272/98, 4 December 2003], to have effective regulatory framework so that harm can be prevented [*O'Keefe v Ireland* no 35810/09, 28 January 2014] and the obligation to take preventive operational measures that may be triggered when a specific individual is at 'real and immediate' risk of harm [*Osman v. United Kingdom* [GC] no 23452/94, 28 October 1998].

What characterises positive obligations is that the applicant formulates omissions and argues that the State ought to be found responsible for these omissions that have arguably led to harm that falls within the definitional scope of one of the Convention articles. Since omissions are at the basis of state responsibility, this leads to a number of analytical challenges. At least three can be identified. First, the omissions should have contributed to the harm, which raises the question of causation. The Court has not articled a specific standard of causation so that positive obligations are found breached. It has rather applied a flexible approach to causation. The Court also uses different terms to express the notion of causation. For example, it has noted that '[a] failure to take reasonably available measures which could have had a *real prospect* of altering the outcome *or* mitigating the harm is sufficient to engage the responsibility of the State [emphasis added]. [*O'Keefee v Ireland* [GC] para 149; *Opuz v Turkey* no 33401/02, 9 June 2009, para 136]'. The terms 'real prospect' expresses the notion of causation. In other judgments, however, the Court has used other terms, such as 'direct causal link', 'direct and immediate link' and 'strong enough link'. The Court, has, however, explicitly rejected a 'but for' test as a causation standard [*E. and Others v The United Kingdom* No 33218/96, 26 November 2002, para 99]. This means that there is no requirement that but for the state omission, the harm would not have happened.

The second analytical challenge relates to the requirement for knowledge. For a positive obligation to arise, it is required that the State knew or ought to have known about the risk of harm. This implies foreseeability of the harm. In relation to the requirements for foreseeability and knowledge, variations can be observed depending on the type of positive obligation that is relevant. For instance, there must be a particular identified individual exposed to a foreseeable harm, so that the State is found to have failed to discharge its obligation of taking protective operational measures. In the case of failure to incorporate and apply an effective legislative framework, knowledge that a particular identifiable individual could be harmed is not required. What is required is that the state is aware or should have been aware of the existence of a general problem [*Mastromatteo v. Italy*, [GC] no 37703/97, 24 October 2002, paras. 69–73].

Besides causation and knowledge, another analytical challenge that arises when positive obligations are invoked, relates to the standard of reasonableness. The Court has consistently noted that positive obligations are 'to be interpreted in such a way as not to impose an excessive burden on the authorities [*O'Keefee v. Ireland*, [GC] no 35810/09, 28 January 2014, para. 144]'.

The Court has also added that measures applied by the State in fulfillment of positive obligations 'should be effective and include reasonable steps to prevent ill-treatment of which the authorities had, or ought to have had, knowledge and effective deterrence against such serious breaches of personal integrity'[*Söderman v. Sweden*, [GC] no 5786/08, 12 November 2013, para. 81]. Besides reasonableness, the Court has invoked the fair balance test to determine whether the State has failed to fulfill its positive obligations. The fair balance test has been invoked, for example, in the context of Article 8 [*López Ribalda and Others v Spain* [GC] no 1874/13 and 8567/13, 17 October 2019, para 111]. These different standards of excessiveness, disproportionate burden, reasonableness and 'fair balance' are intended to limit the scope of the positive obligations. Such a limitation is necessary since there might be interests that compete with the protection interests of the particular applicant who invoked positive obligations. These competing interests might include general public interests [see, for example, *R.L. and Others v Denmark* App no 52629/11, 7 March 2017, para 40, where the Court referred to the general interest of 'legal certainty and finality in family relations.'], budgetary concerns and management of limited resources [*R.R. v Poland* App no 27617/04, 26 May 2011, para 155, where it is suggested that lack of medical equipment or financial resources are relevant consideration in the determination of the scope of the positive obligations], practical concerns [*Dodov v Bulgaria*, App No 59548/00, 17 January 2008, para 102] or competing individual interest [*Odiévre v France* [GC] no 42326/98, 13 February 2033].

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