June, 2012

Dancing on the Borders of Article 4. Human Trafficking and the European Court of Human Rights in the Rantsev case.

Vladislava Stoyanova, *Lund University*

DANCING ON THE BORDERS OF ARTICLE 4: HUMAN TRAFFICKING AND THE EUROPEAN COURT OF HUMAN RIGHTS IN THE *RANTSEV* CASE

Vladislava Stoyanova*

Abstract

This article points to four worrisome aspects of the Court's reasoning in Rantsev v. Cyprus and Russia. First, the Court takes on board the concept of human trafficking without offering any meaningful legal analysis as to the elements of the human trafficking definition. Second, the adoption of the human trafficking framework implicates the ECtHR in anti-immigration and anti-prostitution agenda. The heart of this article is the argument that the human trafficking framework should be discarded and the Court should focus and develop the prohibitions on slavery, servitude and forced labour. To advance this argument, the relation between, on the one hand, human trafficking and, on the other hand, slavery, servitude and forced labour is explained. The article suggests hints as to how the Court could have engaged and worked with the definition of slavery which requires exercise of 'powers attaching to the right of ownership', in relation to the particular facts in Rantsev v. Cyprus and Russia. Lastly, it is submitted that the legal analysis as to the state positive obligation to take protective operation measures is far from persuasive.

Keywords: Article 4 of the European Convention on Human Rights; European Court of Human Rights; forced labour; human trafficking; *Rantsev v. Cyprus and Russia*; servitude; slavery

* Doctoral Candidate, Lund University, Sweden; adv.LLM, Leiden University, the Netherlands. For more information: vladislava.stoyanova@gmail.com and vladislava.stoyanova@jur.lu.se. I would like to thank Prof. Gregor Noll and prof. Johanna Niemi for their support and comments. Responsibility for the views expressed is only mine. The title of this article was inspired by Prof. Audrey Macklin's article 'Dancing Across Borders: 'Exotic Dancers,' Trafficking, and Canadian Immigration Policy' which is cited below.

Netherlands Quarterly of Human Rights, Vol. 30/2, 163–194, 2012.

1. INTRODUCTION

With *Rantsev v. Cyprus and Russia*[1] the European Court of Human Rights (the ECtHR or the Court) joined the 'fight' and the legal debate as to how the 'fight' should be fought against human trafficking. The final pronouncements by the ECtHR in this case which condemned both Cyprus and Russia for human rights violations have been very positively endorsed.[2] The endorsement has been so positive that the road taken by the Court for reaching its conclusions has escaped a critical gaze. But for Jean Allain, no one has offered critical comments on the case.[3] The objective of this article is to point to four problems which permeate the ECtHR's legal analysis on Article 4 of the ECHR. The first question raised is on what basis the Court concluded that the case of Oxana Rantseva is one of human trafficking. In relation to this question, it is suggested that not only the analysis of the factual circumstances is contestable, but also the legal analysis on Article 4 is flawed. In the section "Dancing across Borders", an argument is developed that framing the case as one of human trafficking implicates the Court in anti-immigration and anti-prostitution agenda. Most importantly, the article submits that the Court should discard the human trafficking framework and should focus on the actual abuses prohibited under Article 4. For the purposes of the last submission, an examination of the relationship between, from the one hand, human trafficking and, from the other hand, slavery, servitude and forced labour, is necessary. It is advanced how Article 4 should be progressively interpreted without resort to the human trafficking framework and how the Court should have made use of the concept of slavery. Lastly, the article questions whether the ECtHR offered a persuasive legal analysis as to States' positive obligations under Article 4 of taking protective operation measures.

The critique of the ECtHR's legal reasoning should *not* be mistaken as a denial of the abuses and suffering which many migrant women and specifically women working as artistes and/or prostitutes in Cyprus go through. On the contrary, the issue which this article is intended to put forward is whether the adopted reasoning and the human trafficking framework are the right mechanism to address those abuses. It has to be also pre-emptively clarified that whereas the Court's reasoning on

1 ECtHR, *Rantsev v. Cyprus and Russia*, 7 January 2010 (Appl. no. 25965/04).

2 For commentaries and articles touching on the case see Farrior, S., 'Human Trafficking Violates Anti-Slavery Provision: Introductory Note to *Rantsev v. Cyprus and Russia*', *International Legal Materials*, Vol. 49, 2010, pp. 415–473; Pati, R., '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,* Vol. 29, 2011, pp. 79–142; McGeehan, N., 'Misunderstood and Neglected: the Marginalization of Slavery in International Law', *The International Journal of Human Rights,* Vol. 16, No. 3, 2011, pp. 1–25.

3 *See* Allain, L., '*Rantsev v. Cyprus and Russia:* The European Court of Human Rights and Trafficking as Slavery', *Human Rights Law Review,* Vol. 3, No. 10, 2010, pp. 546–557.

Article 4 is challenged, the ultimate reaffirmation of States' positive obligations under Article 4 of the ECtHR is viewed as favourable.[4]

Before immersing into detailed formal legal analysis, the factual circumstances in *Rantsev v. Cyprus and Russia* have to be briefly described. Miss Oxana Rantseva left Russia and entered Cyprus on an artiste visa to work as an artiste in a cabaret. Under the Cypriot legislation an artiste is 'any alien who wishes to enter Cyprus in order to work in a cabaret, musical-dancing place or other night entertainment place and has attained the age of 18 years'.[5] She left her place of employment three days after starting. The manager of the cabaret found her in a discotheque and took her to the police asking the police to declare her as illegal in the country, supposedly in view of her being deported.[6] The police concluded that Rantseva was not illegal. Instead of releasing her, the police called the manager and asked him to come and collect her from the police station. Rantseva was taken by the cabaret manager to the apartment of another employee, where she was taken to a room on the sixth floor. In the morning of the following day, Rantseva was found dead in the street below the apartment's balcony. A bedspread was found looped through the railing of the apartment's balcony. Based on a complaint by Rantseva's father to the ECtHR, the Court found violations of Article 2 (right to life), Article 4 (prohibition on slavery, servitude and forced labour) and Article 5 (right to liberty and security) of the ECHR. Under Article 2, Cyprus was found responsible for its failure to fulfil its positive obligation to carry on an effective investigation into Rantseva's death.[7] The ECtHR found that Rantseva's detention at the police station and her subsequent confinement to the private apartment to which confinement the state authorities acquiesced, amounted to deprivation of liberty. Cyprus was declared to be in violation of Article 5 since the deprivation of liberty had no basis in the domestic law.[8] As already mentioned, it is the factual and legal analysis concerning Article 4 which is henceforth an object of detailed investigation.

2. A CASE OF HUMAN TRAFFICKING?

The ECtHR has developed a methodology that it follows when there is an allegation of a violation of a Convention right. It discusses the general material scope of the right

4 However, even the endorsement of the affirmation of states' positive obligations under Article 4 has to be qualified due to the ECtHR's pronouncements on the artiste visa regime. The section 'Dancing across Borders' clarifies this position in more detail.

5 *Rantsev v. Cyprus and Russia*, at para. 113.

6 Pursuant to the artiste regime established in Cyprus, the number of artistes who could be employed in a single cabaret is limited (*Rantsev v. Cyprus and Russia*, at para. 116). If an artiste failed to come to work or breached her contract, she would be deported and the expenses would be covered by the bank guarantee which the cabaret manager was required to deposit in advance (*Rantsev v. Cyprus and Russia*, at para. 117).

7 *Rantsev v. Cyprus and Russia*, at paras. 234–242.

8 *Rantsev v. Cyprus and Russia*, at paras. 322–325.

invoked and it asks the question whether the particular circumstances of the case fall within the already delineated material scope. If they do, the ECtHR proceeds by indicating the human rights obligations impinged upon the State in connection with the particular provision from the ECHR invoked. For the purpose of achieving more clarity, concrete examples touching upon different articles enshrining different human rights protected under the ECHR, will be provided. In *M.S.S. v. Belgium and France*,[9] the Court faced the question whether the scope of Article 3 was engaged by a situation of extreme material poverty. More specifically, the issue was whether the material scope of Article 3, which prohibits torture or inhuman or degrading treatment, covers extreme material poverty. After an answer in the affirmative, the ECtHR diligently reviewed the factual circumstances in the particular case related to extreme material poverty and concluded that the applicant's situation of material deprivation 'has attained the level of severity required to fall within the scope of Article 3 of the Convention'.[10] In *Siliadin v. France*, it was necessary for the ECtHR to determine whether Article 4's material scope covers harm inflicted by private parties and, thus, whether States have any positive obligations flowing from Article 4.[11] The Court gave a positive answer to that question and then examined whether, in particular, the harm inflicted by private parties on Siliadin qualified as slavery, servitude or forced labour. In *Storck v. Germany*, the Court first asked the question whether there had been a deprivation of liberty under Article 5; in other words, whether the factual situation of the applicant could be assessed as one of deprivation of liberty in order to fall within the material scope of Article 5.[12] The approach to Article 8, which protects private and family life, is similar. The Court first asks the question of what is 'private life' and/or what is 'family life'. For instance, when examining whether there was interference with Article 8's rights in deportation cases, the Court had to consider whether 'family life' extended to include dependence between parents and adult children.[13]

The relevant issue here is whether the ECtHR applied an identical approach in the *Rantsev* case. More specifically, the following questions are of interest: did the Court explain the material scope of Article 4? Once having determined Article 4's material scope, did the Court actually explain how the particular factual circumstances of the case correlated to and/or fitted into the already delineated scope? As will

9 ECtHR, *M.S.S. v. Belgium and Greece*, 21 January 2011 (App. no. 30696/09), at para. 252 and the following.

10 *MSS v. Belgium and Greece*, at para.263.

11 ECtHR, *Siliadin v. France*, 26 July 2005 (App. no.73316/01), at para. 89.

12 ECtHR, *Storck v. Germany*, 16 June 2005 (App. no. 61603/00), at para. 69 and the following. The ECtHR has repeated stated that 'The Court reiterates that, in order to determine whether there has been a deprivation of liberty, the starting-point must be the specific situation of the individual concerned and account must be taken of a whole range of factors arising in a particular case, such as the type, duration, effects and manner of implementation of the measure in question'. See also ECtHR, *Amuur v. France*, 25 June 1996 (App. no. 19776/92).

13 ECtHR, *A.W. Khan v. the United Kingdom,* 12 January 2010 (App. no. 47486/06), at para. 32; ECtHR, *A.A. v. the United Kingdom*, 20 September 2011 (App. no.8000/08), at paras. 46–50.

be demonstrated below, there are peculiarities with the factual and legal analysis undertaken by the ECtHR in *Rantsev* case.

On their face, the facts describing the story of the Russian woman did not indicate that she was, indeed, subjected to abuses that could be qualified as slavery, servitude or forced labour. Bar her deprivation of liberty at the police station and at the private apartment and her subsequent death under undetermined circumstances, there was nothing pointing to abuses against her. The ECtHR itself stated in the section of the judgment on Article 3, which article was also raised by the applicant, that '[…] there is no evidence that Ms Rantseva was subjected to ill-treatment prior to her death'.[14] Consequently, the question of significance here is how Article 4 and the prohibition on slavery, servitude and forced labour came into the picture in light of the facts of the case. They came into the picture because of the allegation that Rantseva was a *victim of human trafficking*: '[…] in the absence of any specific allegations of ill-treatment, any inhuman or degrading treatment suffered by Ms Rantseva prior to her death was inherently linked to the alleged trafficking and exploitation'.[15]

There seem to be two bases for this allegation: first, she entered Cyprus to work as an artiste, and second, there were reports on the situation of artistes in Cyprus claiming that artistes worked as prostitutes and were, thus, victims of exploitation. There were some additional factual circumstances which might point to abuses and which might fit into the general perceptions as to how victims of trafficking are treated. First, the second autopsy of the Rantseva's body carried out in Russia showed that she might have sustained injury or she might have been killed before falling down from the balcony. This factual circumstance was situated within the analysis of the right to life and the obligations incumbent on Cyprus to conduct an effective investigation into the death.[16] Second, when Rantseva and her employer went to the police station, the employer had her passport, which seemed to be linked with the general information that victims of human trafficking are deprived of their identification documents. However, is this fact a sufficient indication that she was a victim of exploitation and/or human trafficking? Third, it was hard to explain why the policemen did not let Rantseva go free by herself, but called her employer to pick her up. This behaviour on the part of the Cypriot policemen could imply that there might have been cooperation between the policemen and the cabaret owner since if she were to be deported, the deportation expenses would have to be covered by the employer. Such cooperation might be interpreted as indications of corruption in the Cypriot police department. However, this factual circumstance seems related to Article 5 and the right to liberty. Ultimately, as explained above, an assertion that Rantseva's story has anything to do with human trafficking is substantiated on two bases: she entered Cyprus to work as

14 *Rantsev v. Cyprus and Russia*, at para. 252.

15 *Rantsev v. Cyprus and Russia*, at para. 252.

16 *Rantsev v. Cyprus and Russia*, at para. 234–242.

an artiste and there were reports on the situation of artistes in Cyprus claiming that artistes work as prostitutes and were, thus, victims of exploitation.

The ECtHR referred to a report by the Cypriot Ombudsman and three reports by the Council of Europe Commissioner for Human Rights. In 2004, The Council of Europe Commissioner for Human Right reported that 'the number of young women migrating to Cyprus as nightclub artistes is well out of proportion to the population of the island'.[17] In 2006, the Commissioner reported that 'The authorities [in Cyprus] are aware that many of the women who enter Cyprus on these artistes visas will in fact work in prostitution.'[18] The 2006 Report continued to state that

> […] There is obviously a risk that the young women who enter Cyprus on artiste visas may be victims of trafficking in human beings or later become victims of abuse or coercion. These women are officially recruited as cabaret dancers but are nevertheless often expected also to work as prostitutes. They are usually from countries with inferior income levels to those in Cyprus and may find themselves in a vulnerable position to refuse demands from their employers or clients. The system itself, whereby the establishment owner applies for the permit on behalf of the woman, often renders the woman dependent on her employer or agent, and increases the risk of her falling into the hands of trafficking networks.[19]

The Council of Europe Commissioner for Human Rights' report issued in 2008 concludes:

> A paradox certainly exists that while the Cypriot government has made legislative efforts to fight trafficking in human beings […], it continues to issue work permits for so-called cabaret artistes and licences for the cabaret establishment. […] The existence of the 'artiste' work permit leads to a situation which makes it very difficult for law enforcement authorities to prove coercion and trafficking and effectively combat it. This type of permit could thus be perceived as contradicting the measures taken against trafficking or at least as rendering them ineffective. For these reasons, the Commissioner regrets that the 'artiste' work permit is still in place today despite the fact that the government has previously expressed its commitment to abolish it.[20]

These reports provide the foundations for easily making the above mentioned assumptions: since Rantseva entered Cyprus to work as an artiste, she also might have been forced or deceived to work as a prostitute; if she had worked as a prostitute

17 Report of 12 February 2004 by the Council of Europe Commissioner for Human Rights on his visit to Cyprus in June 2003 (CommDH(2004)2), at para. 32.

18 Follow-up Report of 26 March 2006 by the Council of Europe Commissioner for Human Rights on the progress made in implementing his recommendations (CommDH(2006)12), at para. 49.

19 Follow-up Report of 26 March 2006 by the Council of Europe Commissioner for Human Rights on the progress made in implementing his recommendations (CommDH(2006)12), at para. 57.

20 Report of 12 December 2008 by the Council of Europe Commissioner for Human Rights on his visit to Cyprus on 7–10 July 2008 (CommDH(2008)36), at paras. 45–48.

she must have been exploited. The reports present the artistes as forced or deceived; this representation was taken on board by the ECtHR.[21] The level of agency that the women might manifest was not discussed.[22] These two assumptions seem to be at the background of the legal analysis offered by the ECtHR as to the application of Article 4 to the case.

In what follows, the Court's legal analysis is scrutinised. The Court determined that 'trafficking itself, within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention [the Council of Europe Convention on Action against Trafficking in Human Beings], falls within the scope of Article 4 of the Convention'.[23] The Palermo Protocol[24] and the Council of Europe Anti-Trafficking Convention[25] define human trafficking in the following way:

> 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, 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.

As it is generally explained, the crime of human trafficking, as defined in the Palermo Protocol, consists of three elements: (1) *action* (recruitment, transportation, transfer, harbouring or receipt of persons); (2) which must have been committed by certain *means*; (3) for the purpose of *exploitation*.[26] 'Exploitation' is left undefined,[27] which

21 *Rantsev v. Cyprus and Russia*, at para. 294.

22 On the denial of migrant sex workers' agency see Doezema, J., 'Loose Women or Lost Women? The Re-emergence of the Myth of White Slavery in Contemporary Discourses of Trafficking in Women', *Gender Issues*, Vol. 18, No. 1, 2000, pp. 23–50; Doezema, J., *Sex Slaves and Discourse Masters The Construction of Trafficking*, Zed Books, 2010; Kampadoo, K., 'From Modal Panic to Global Justice: Changing Perspectives on Trafficking' in: Kampadoo, K. (ed.), *Trafficking and Prostitution Reconsidered New Perspectives on Migration, Sex Work, and Human Rights,* Paradigm Publishers, Boulder, 2005.

23 *Rantsev v. Cyprus and Russia*, at para. 282.

24 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N. Doc. A/45/49 (Vol. I) (2001), *entered into force* 9 September 2003.

25 Council of Europe Convention on Action against Trafficking in Human Beings, (ETS No. 197), Warsaw, 16.V.2005.

26 For an explanation of the different constitutive elements of human trafficking, see Gallagher, A.T., *The International Law of Human Trafficking*, Cambridge University Press, Cambridge, 2010.

27 Concerns have been raised as to the ambiguity of the central element of the definition of human trafficking. See Noll, G., 'The Insecurity of Trafficking in International Law' in: V. Chetail (ed.) *Mondialisation, migration et droits de l'homme: le droit international en question,* Brussels: Bruylant, 2007, pp. 343–361; Davidson, J. and Anderson, B., 'The Trouble with "Trafficking" in: Anker, C.L. van der and Doomernik, J., (eds.) *Trafficking and Women's Rights*, Palgrave Macmillan, Basingstoke,

leaves the exact meaning of 'exploitation of the prostitution of others or other forms of sexual exploitation' uncertain.[28] What is certain, however, is that forced labour, slavery and servitude are examples of abusive practices. These three practices are prohibited under Article 4 of the ECHR.

One might try to diligently search for a quotation of the definition of human trafficking and an explanation of its constitutive elements in the *Rantsev* judgment. These efforts are doomed to fail. There is neither a definition nor an explanation.[29] Instead, the ECtHR determined 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 labor, often for little or no payment, usually in the sex industry but also elsewhere.[30]

This statement begs the following comments. First, the statement appears as being not only legally uniformed, but also with moralistic nuances. It is disconnected from the existing legal definition of human trafficking. It is also coloured with the reference to the 'sex industry'. Second, it is not true that human trafficking, as defined in the Palermo Protocol, 'is based on the exercise of powers attaching to the right of ownership'. Slavery, which could be one of the purposes of human trafficking, is defined as 'status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised'.[31] Jean Allain has, on many

---

2006, p. 17; Munro, V., 'Exploring Exploitation: Trafficking in Sex, Work and Sex Work' in: Munro, V. and Giusta, M.G., (eds.) *Demanding Sex: Critical Reflections on the Regulation of Prostitution*, Ashgate, 2008, pp. 83–97; Marks, S., 'Exploitation as an international legal concept' in Marks, S., (ed.) *International Law on the Left Re-examining Marxist Legacies*, Cambridge University Press, Cambridge, 2008, pp. 281–307.

28 The Explanatory Report to the Council of Europe Convention on Action against Human Trafficking specifies in para. 88 that 'As regards "the exploitation of the prostitution of others or other forms of sexual exploitation", it should be noted that the Convention deal with these only in the context of trafficking in human beings. The terms "exploitation of the prostitution of others" and "other forms of sexual exploitation" are not defined in the Convention, which is therefore without prejudice of how States Parties deal with prostitution in domestic law'. This means that there is no universal standard even within the Council of Europe's member states as to the approach to prostitution and as to the issue whether it is inherently exploitative. For analysis of different approaches to prostitution see Askola, H., *Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union,* Hart Publishing, Oxford, 2007, p. 13–14.

29 Provisions from the Palermo Protocol and the Council of Europe Trafficking Convention are mechanically cited together with the 1926 Slavery Convention, case law from the International Criminal Tribunal for the Former Yugoslavia, the Statute of the International Criminal Code, the Convention on the Elimination of All Forms of Discrimination against Women, and European Union's and Council of Europe's actions on trafficking. These citations are in *Rantsev* judgment's section entitled 'Relevant International Treaties and Other Materials'. However, the Palermo definition is not cited and its constitutive elements are not explained, when the ECtHR deals with Article 4 on its substance. See *Rantsev v. Cyprus and Russia*, at paras. 253–289.

30 *Rantsev v. Cyprus and Russia*, at para. 181.

31 Article 1(1) of the 1926 Slavery Convention.

occasions, explained the definition of slavery.[32] Allain has also commented on *Rantsev* case and he has criticised the ECtHR for assimilating human trafficking to slavery.[33] Third, and most importantly, the action element of the crime of human trafficking as defined in the Palermo Protocol (recruitment, transportation, transfer, harbouring or receipt of persons), refers to the arrangement and facilitation of the alleged victim's migration. It does not refer to the actual abuses and/or to the actual exercise of powers attaching to the right of ownership, which could imply selling, buying or bargaining of individuals.[34]

The disconnection by the ECtHR from the existing legal definition of human trafficking in the Palermo Protocol and the Anti-trafficking Convention is so striking that one cannot but wonder whether there is anything beyond manifestation of inadvertence. Without foreclosing any other reasonable explanation, it could be suggested that the Court did not want to engage with the elements of the definition. It is much easier to simply refer in abstract to human trafficking and exploitation, which the Court did throughout the whole judgment, than to explain what 'exploitation of the prostitution of others' is, whether Rantseva's prostitution was exploited, and whether her migration to Cyprus was organised with some of the means as indicated in the human trafficking definition. After all, the Palermo definition presupposes a discussion on these issues. It has to be clarified that this article has no objective to argue that in principle the ECtHR has to discuss these issues. As it will emerge later, it adopts the position that the ECtHR does not need the human trafficking framework and the definition of human trafficking in order to address abuses. What it aims at this

32 See, for example, Allain, J., 'The Definition of 'Slavery' in General International Law and the Crime of Enslavement within the Rome Statute', paper delivered at the International Criminal Code, Guest Lecture of the Office of the Prosecutor, 26 April 2007; Allain, J., *The Slavery Conventions The Travaux Préparatoires of the 1926 League of Nations Convention and the 1956 United Nations Convention*, Martinus Mijhoff Publishers, Leiden/Boston, 2008; Allain, J., 'The Definition of Slavery in International Law', *Howard law Journal*, Vol.59, 2009, pp. 239–275.

33 See Allain, L., '*Rantsev v Cyprus and Russia:* The European Court of Human Rights and Trafficking as Slavery', *Human Rights Law Review,* Vol.3, No.10, 2010, pp. 546–557.

34 Hathaway, J., 'The Human Rights Quagmire of Human Trafficking', *Virginia Journal of International Law* Vol. 49, No. 1, 2008, pp. 1–59, at p. 9. Hathaway has noted that there is no obligation flowing from the Trafficking Protocol to do anything about the *conditions* of being exploited. As the definition of human trafficking is formulated, the 'action' element does not include the action of exploiting as such or maintaining an individual in a situation of exploitation. Accordingly, states adopt the obligation to criminalise 'recruitment, transportation, transfer, harbouring or receipt of persons' by certain means for the purpose of 'exploitation'; however, there is no obligation to do something against exploitation of an individual who has *not* been recruited, transported, transferred or received. In addition, the definition of human trafficking requires the adoption of certain 'means', which implies that not every 'recruitment, transportation, transfer, harbouring or receipt of persons for the purpose of exploitation' is to be criminalised, but only such which have been executed through the 'means'. Anne Gallagher has opposed Hathaway's position by arguing that 'the references to harboring and receipt operate to bring not just the process (recruitment, transportation, transfer) but also the end situation of trafficking within the definition. See Gallagher, A.T., *The International Law of Human Trafficking*, Cambridge University Press, Cambridge, 2010, at pp. 30–31.

juncture is pointing out that since the Court takes on board the Palermo definition, it can be expected that it actually engages with it.

As was explained in the beginning of the present section and supported with references to different cases, after determining the material scope of a right, the Court assesses how the factual circumstances of the case fall within that scope. Leaving aside the absence of adequate legal analysis as to what human trafficking is and accepting, for the sake of the argument, that human trafficking does fall within the scope of Article 4, regardless of what the ECtHR's understanding of human trafficking is, the Court did not explain how the factual circumstances of the case were related to human trafficking. Instead, the ECtHR said the following:

> In light of the proliferation of both trafficking itself and of measures taken to combat it, the Court considers it appropriate in the present case to examine the extent to which trafficking itself may be considered to run counter to the spirit and purpose of Article 4 of the Convention such as to fall within the scope of the guarantees offered by that *Article without the need to assess which of the three types of proscribed conduct are engaged by the particular treatment in the case in question*.[35] […] In view of its obligation to interpret the Convention in light of present-day conditions, the Court considers it *unnecessary to identify whether the treatment about which the applicant complains constitutes "slavery", "servitude" or "forced and compulsory labour"*. Instead, the Court concludes that trafficking itself, within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention, falls within the scope of Article 4 of the Convention (my emphasis).[36]

These pronouncements beg the following comments. If human trafficking falls within Article 4, this means that not only slavery, servitude and forced labour, but 'exploitation' as the 'purpose' element of human trafficking will be within the scope of Article 4 (as long as the other constitutive elements of human trafficking are fulfilled). Thus, it is not really necessary to define the treatment only as slavery, servitude or forced labour. However, in accordance with the Palermo definition, the 'exploitation' as the purpose element of human trafficking, has to be linked with certain 'actions' and certain 'means', so that human trafficking is constituted. Eventually, what the Court might have done is expanding Article 4's material scope to cover 'exploitation'. However, this expansion will not cover 'exploitation' *as such,* but only exploitation which is linked with recruitment, transportation, transfer, harbouring or receipt of persons, by means of coercion or deception.[37] This leads to the question why should 'exploitation' as a purpose element of human trafficking be privileged over any type of 'exploitation'? There is another source of confusion at this point; namely, the ECtHR

35 *Rantsev v. Cyprus and Russia*, at para. 279 (emphasis added).

36 *Rantsev v. Cyprus and Russia*, at para. 282.

37 See the definition of human trafficking in Article 3 of the Palermo Protocol and Article 4 of Council of Europe Convention on Action against Trafficking in Human Beings.

referred to Rantseva as 'a victim of trafficking *or* exploitation'.[38] Was she a victim of exploitation within the context of trafficking, which requires linking the exploitation with certain 'means' and certain 'actions'? Alternatively, was she simply a victim of exploitation, which demands the question whether the material scope of Article 4 is enlarged to such an extent as to cover any 'exploitation'?

There is another pertinent question as well: once having expanded the material scope of Article 4 to include 'exploitation', is it not necessary to explain what 'exploitation' actually is? It can be suggested that the ECtHR viewed such an explanation as superfluous since the case was situated within the context of women working as prostitutes and the Court assumed that prostitution was inherently exploitative.[39] The adoption of this assumption precludes any analysis of the abuses themselves and the reasons for the abuses. Another concern caused by the adoption of this assumption in the judgment is that it is left uncertain how the situation of migrants working, for instance, in the agricultural or construction industries, jobs which are not claimed to be inherently exploitative, will be approached. It could be the case that if the Court is faced with abuses not reaching the threshold of forced labour, slavery or servitude, against migrant workers, these abuses might not be construed as being included in the material scope of Article 4.[40]

Does the conclusion reached by the ECtHR that human trafficking falls within Article 4 eliminate the need for making an assessment whether the factual circumstances of the case have anything to do with human trafficking as defined in the Palermo Protocol? Do the 'proliferation of both trafficking itself and of measures taken to combat it' and the 'obligation to interpret the Convention in light of present-day conditions' eliminate the need to assess whether the tragic story of Rantseva had

38 *Rantsev v. Cyprus and Russia*, at para. 296 (emphasis added).

39 The definition of human trafficking as stipulated in the Palermo Protocol and then reproduced in the Council of Europe Convention on Trafficking, leaves the position that prostitution in inherently exploitative as an available option. This is made possible through the incorporation of the phrase 'exploitation of the prostitution of others', which can be interpreted in different ways. One possible interpretation is that any prostitution is exploitative. This ambiguity inherent in the definition of human trafficking was necessary since at the time of the drafting of the Palermo Protocol there were two opposing camps, which could not be reconciled: (1) one camp taking the stance that there was nothing wrong with voluntary prostitution and (2) another camp arguing that no prostitution is voluntary and any prostitution is exploitative. The formulation 'exploitation of the prostitution of others' with its ambiguous meaning, turned out to be an acceptable option for the both camps. At the same time, an interpretative note was added to the Travaux Préparatoires of the Palermo Protocol to the effect that 'The terms "exploitation of the prostitution of others" or "other forms of sexual exploitation" are not defined in the protocol, which is therefore without prejudice to how States parties address prostitution in their respective domestic laws'. The Explanatory Report to the Council of Europe Convention on Trafficking (at para.88) contains a similar clarification. Within the Council of Europe, different states have different approaches to prostitution. Therefore, an argument that there is something close to a uniform standard as to how prostitution should be approached is precluded. On the drafting history of the Palermo definition see Gallagher, *op.cit.*, note 34, at p. 25; Doezema, J., *Sex Slaves and Discourse Masters The Construction of Trafficking,* Zed Books, 2010, at p. 106–170.

40 On the thresholds of abuses covered by Article 4 of the ECHR, see Section 4 of this article.

anything to do with human trafficking?[41] It is suggested that underlying the whole analysis were the two above mentioned assumptions: since she entered Cyprus to work as an artistes, she worked as a prostitute; and, since she worked as a prostitute she was exploited, with the meaning of 'exploitation' being undetermined since the ECtHR never dared to explain it. As mentioned above, the question of what 'exploitation' means was viewed by the Court as superfluous since prostitution seemed to be regarded as a practice which cannot be anything but exploitative.

3. DANCING ACROSS BORDERS

Once having exhausted the legal analysis by concluding that human trafficking falls within Article 4 of the ECHR and assuming that the *Rantsev* case is one of human trafficking, the ECtHR enumerated States' obligations under Article 4. These obligations are altogether five: (1) adopting criminal law measures to punish traffickers; (2) putting in place appropriate legal and administrative framework, which includes 'adequate measures regulating businesses often used as a cover for human trafficking' and ensuring that 'a State's immigration rules […] address relevant concerns relating to encouragement, facilitation or tolerance of trafficking';[42] (3) taking of protective operational measures when it is demonstrated that 'the State authorities were aware, or ought to have been aware, of circumstances giving rise to a credible suspicion that an identified individual has been, or was at real and immediate risk of being, trafficked or exploited';[43] (4) investigating situations of trafficking; (5) cooperating in cross-border trafficking cases with the relevant authorities of other States concerned.[44]

The objective of this section of the article is to address the second obligation relating to States' immigration rules. Cyprus was found to be in violation of Article 4 since it failed to put in place an appropriate legislative and administrative framework to protect Rantseva from human trafficking. The problem was the Cypriot immigration policy and, in particular, the artiste visa regime. Unfortunately, the Court did not offer an explanation on how the artiste visa regime was a factor in any ill-treatment or alleged abuse suffered specifically by Rantseva under Article 4. The absence of such an explanation forms part of the problem identified in the second section of the article, viz. absence of a meaningful investigation into how the factual circumstances of the particular case are related to Article 4. It can be speculated, based on the Council of Europe Commissioner for Human Rights' reports, that as an artiste Rantseva was forced to work as a prostitute; however, she refused and her employer tried to have her deported since he wanted to bring in another artiste for his cabaret. Nevertheless, these are mere speculations and there are no facts pointing to such types of events.

41 *Rantsev v. Cyprus and Russia*, at para. 282.

42 *Rantsev v. Cyprus and Russia*, at para. 284.

43 *Rantsev v. Cyprus and Russia*, at para. 286.

44 *Rantsev v. Cyprus and Russia*, at paras. 282–289.

Even if the above described events did happen, this does not axiomatically mean that she was 'exploited' or subjected to servitude and slavery. What if she did agree to work as a prostitute, but she subsequently changed her mind? What if she came to Cyprus with the intention to work as a prostitute?

3.1. THE DANCING …

Leaving the tragic story of Rantseva for a while, the focus will be directed on the artiste visa regime in Cyprus. The regime was, indeed, highly problematic. The regime incorporated certain conditions which made the artistes in Cyprus vulnerable to abuses. These conditions include the following: the applications for entry, residence and work permit had to be submitted by the prospective employer; artistes' agents and cabaret managers were required to deposit money to cover possible repatriation expenses of the artistes; the work permit was valid for three months and was tied to a single employer; if the artiste did not show up for work she would be tracked down by her employer; and, in case of deportation, the expenses were to be covered by the deposited money. Therefore, the 'dancing' under these conditions implied hardships, vulnerability and abuses. The correlation between the artiste visa regime conditions and the women's vulnerability has been explained within the Canadian context by Audrey Macklin in her article 'Dancing Across Borders: "Exotic Dancers," Trafficking, and Canadian Immigration Policy'. Macklin commented that '[…] employment authorizations are temporary because the insecurity created by linking permission to remain in Canada with service to a particular employer or occupation ensures that workers tolerate wages and working conditions Canadians and permanent residents find unacceptable'.[45] Therefore, women's vulnerability was planned within the artiste regime itself. As it will emerge in the following section, specific objective was pursued by ensuring the artistes' vulnerability within the regime.

3.2. … AND THE BORDERS

The artiste visa regime conditions were incorporated with the objective of controlling the entry and residence of foreign nationals in Cyprus. The artiste visa's specific conditions pursued the objective to regulate the presence and stay of the artistes as foreign nationals in the territory of Cyprus. For instance, the conditions ensured that in case of termination of the employment when an artiste had no legal ground to be present any more, she could be traced down and deported. They also ensured that the deportation did not constitute a financial burden for the State. At the same time, as the ECtHR rightly pointed out, the artiste visa regime made artistes dependent on their employers. The ultimate conclusion is that migrants on a temporary work visa,

45 Audrey Macklin, 'Dancing Across Borders: 'Exotic Dancers', Trafficking, and Canadian Immigration Policy', *International Migration Review*, Vol. 37, No. 2, 2003, pp. 464–500, at p. 467.

and in particular the artistes, *had* to be vulnerable so that their presence and stay within Cyprus could be easily controlled.

At this junction, there seems to be an irreconcilable conflict: on the one hand, the particular visa regime conditions existed in service of a State's interest in controlling the entry and presence of aliens, and on the other hand, the conditions were such that made migrant artistes vulnerable to abuses. The position of the Council of Europe Commissioner on Human Rights, which was supported by the ECtHR, was in favor of elimination of the artiste visa regime altogether; the message seems to be that women should better stay in their home countries since if they migrate under the given conditions they run the risk of becoming prostitutes and being exploited. In fact, after the *Rantsev v. Cyprus and Russia* judgment, Cyprus eliminated the artiste visa regime.[46] The following question, however, still remains: did the elimination of the regime eliminate the abuses? The more fundamental question is whether the elimination of a legal channel for immigration is the tool for eliminating abuses. A possible answer to the last question can be extracted from Macklin's article, where she says the following:

> By prohibiting the lawful entry of foreign women employed in the sex trade, the state can avoid the embarrassment of propping up the exotic dancer market and play into an anti-prostitution, law and order agenda, but only *at the cost of consigning trafficked women to the most unregulated market of all: the underground market.* […] The denial of legal access to Canada does not actually prevent entry, and it is virtually impossible to know whether it even reduces it. One certain outcome is that it exacerbates the vulnerability of the women into intimidation, violence and exploitation by ruthless agents, pimps and brokers. […] After all, *if there is one group who is more vulnerable to exploitation than workers on temporary work visas, it is undocumented workers.*[47]

Macklin is not alone in her arguments. The Special Rapporteur on Violence against women has voiced identical concerns.[48] It should be also noted that Macklin does not comment on a decision by a human rights court. She simply comments on the Canadian

---

46 See Communication from the delegation of Cyprus in the case of Rantsev against Cyprus and the Russian Federation, Secretariat of the Committee of Ministers, DH – DD(2010)376E, 12 August 2010.

47 Macklin, A. 'Dancing Across Borders: 'Exotic Dancers,' Trafficking, and Canadian Immigration Policy', *International Migration Review*, Vol. 37, No. 2, 2003, pp. 464–500, at p. 484 and 485 (emphasis added).

48 *See* Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Ms. Radhika Coomaraswamy, on trafficking in women, women's migration and violence against women, submitted in accordance with Commission on Human Rights Resolution 1997/44, E/CN.4/2000/68, 29 February 2000, paras. 83–84. 'Protective measures are not only problematic because of the reaction of traffickers, but also because of the measures' paternalistic nature that causes women to be further disadvantaged. For example, abolishing the visa category for dancers would further limit women's opportunity for legal migration, and drive yet more of them into the arms of traffickers. Finally, Governments may feel that entry restrictions absolve them of responsibility for persons trafficked into other States'.

immigration policy. In contrast to her, the present article comments on a judgment by the ECtHR, which appears to have implicated itself in an anti-immigration agenda without having much understanding of the broader issues pointed out by Macklin. In particular, the ECtHR made the following sweeping statement as part of States' general obligations under Article 4: 'Furthermore, a State's immigration rules must address relevant concerns relating to encouragement, facilitation or tolerance of trafficking'.[49] In practice, this aspect of States' positive obligations means that the artiste visa as a legal channel for migration should be eliminated.

Why did the ECtHR become implicated into an anti-immigration and anti-prostitution agenda? The following section proposes an answer to this question.

4. THE 'RISE' OF HUMAN TRAFFICKING AND THE MARGINALISATION OF SLAVERY, SERVITUDE AND FORCED LARBOUR IN HUMAN RIGHTS LAW

The positive obligation of Cyprus to put in place an appropriate legislative and administrative framework to protect against abuses falling within the material scope of Article 4 was considered within the human trafficking framework. What are the consequences flowing from this way of construing the problem? As was elaborated upon in the first section of the article, the *actus reus* of the crime of human trafficking relates to the migration and the movement of individuals. Once construing the case within the human trafficking framework, the problem is framed as one of immigration and controlling immigration. This resonates very adamantly in the Council of Europe Commissioner for Human Rights' reports on which the ECtHR heavily relied: '[…] the number of young women migrating to Cyprus as nightclub artistes is well out of proportion to the population of the island and that the authorities should consider introducing preventive control measures to deal with this phenomenon […]'.[50] Once having construed the problem in this way, it stands to reason that the solution sought is preventing the possibility for migration, which implies elimination of the artiste visa regime.

How could the problem be construed if the human trafficking framework is discarded? How could the problem be construed if human trafficking is not used as the overarching frame of reference? If the human trafficking framework is discarded, the focus will be on the conditions of artistes and how the State-imposed regulations create susceptibilities to abuses. The focus will not be on the migration aspect and on whether women are engaged in prostitution; but on how to modify those regulations so that abuses by private parties are prevented. In summary, it is submitted that the

49 *Rantsev v. Cyprus and Russia*, at para. 284.

50 *Rantsev v. Cyprus and Russia*, at para. 94.

construction of the problem as one of human trafficking is not necessary in order to bring the conditions of the artiste visa regime come under scrutiny.

The Court did pay attention to the State-imposed regulations and the problems that they caused; it did find that the 'measures which encourage cabaret owners and managers to track down missing artistes' and the lodging of a bank guarantee to cover potential deportation costs, were troubling.[51] However, these considerations had predetermined meaning since they were already situated within the human trafficking framework. Lamentably, the ECtHR did not take that road of examining the conditions on their own; it adopted the human trafficking framework which led the Court to very contestable legal analysis and which resulted in anti-immigration and anti-prostitution implications.

The Court could have taken a very different road; a road which stays away from the concept of human trafficking. The Court could have devoted its resources to elaborate on the meaning of slavery, servitude and forced labour and to give these three practices progressive interpretation. The Court should have clarified the scope and the thresholds of slavery, servitude and forced labour in Article 4 of the ECHR. Eventually, the ECtHR could have said that given the particular conditions within the artiste visa regime, the regulatory framework in Cyprus was of such a character that it did not provide for adequate safeguards against abuses. In this way, the underlying message will be a call for amendments within the regulatory framework; the message sent to Cyprus would be to change the visa regime so that the migrant artistes are independent from employers and have access to necessary protection and assistance facilities.

The legal analysis of the regulatory framework could include another element; namely, an element of *vulnerability*. This suggestion intends to shift the focus by emphasising the vulnerability associated with being a migrant worker.

The ECtHR has in its jurisprudence recognised certain groups as vulnerable. Such groups include children,[52] Roma minority,[53] persons with mental disabilities,[54]

51 *Rantsev v. Cyprus and Russia*, at para. 292.

52 ECtHR, *A. v. the United Kingdom*, 23 September 1998 (App. no. 25599/94), at para. 22.

53 ECtHR, *Oršuš and Others v. Croatia [GC], 16 March 2010 (App. no. 15766/03),* at *para. 147.* 'As the Court has noted in previous cases that as a result of their history, the Roma have become a specific type of disadvantaged and vulnerable minority. They therefore require special protection'.

54 ECtHR, *Alajos Kiss v. Hungary,* 20 May 2010 (App. no. 38832/06), at para. 42. 'In addition, if a restriction on fundamental rights applies to a particularly vulnerable group in society, who have suffered considerable discrimination in the past, such as the mentally disabled, then the State's margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question. The reason for this approach, which questions certain classifications *per se*, is that such groups were historically subject to prejudice with lasting consequences, resulting in their social exclusion'.

women subject to domestic violence,[55] and asylum-seekers.[56] Judge Sajo has tried to argue in his Partly Concurring and Partly Dissenting Opinion in *M.S.S. v. Belgium and Greece*, that 'The concept of vulnerability has a specific meaning in the jurisprudence of the Court' and that a group is vulnerable only if it has been historically subject to prejudice with lasting consequences, resulting in social exclusion.[57] However, contrary to Judge Sajo's arguments, the Court has not established a strict criterion for defining a group as vulnerable. The Court has not conditioned 'vulnerability' based on historical prejudice with lasting consequences resulting in social exclusion. This is evidenced, for instance, from the Court's findings that women subject to domestic violence and asylum-seekers are vulnerable groups. Thus, the ambit for finding vulnerability of various groups and due to various circumstances is open. It has been well documented that migrant workers, both documented and undocumented, are vulnerable categories in countries of destination.[58] Therefore, it can be argued that the regulatory framework in Cyprus with regard to the artiste visa regime created a basis for further abuses and, in this way, exacerbated their vulnerability.

Before proceeding, the points made so far in this section will be summarised. The ECtHR was criticised for adopting a human trafficking framework as a point of reference. It was suggested that the conditions within the artiste visa regime should be scrutinised on their own without any resort to the concept of human trafficking. In addition, the conditions within the visa regime should be condemned as not providing sufficient protection against abuses suffered by a vulnerable group of people, namely migrant workers.

---

55 ECtHR, *Opuz v. Turkey*, 9 June 2009 (App. no. 33401/02), at para. 160. 'The Court considers that the applicant may be considered to fall within the group of "vulnerable individuals" entitled to State protection. In this connection, it notes the violence suffered by the applicant in the past, the threats issued by H.O. [the applicants husband who had violent behavior towards her] following his release from prison and her fear of further violence as well as her social background, namely the vulnerable situation of women in south-east Turkey'.

56 *M.S.S. v. Belgium and Greece*, at paras. 232, 233 and 252. 'In the present case the Court must take into account that the applicant, being an asylum seeker, was particularly vulnerable because of everything he had been through during his migration and the traumatic experiences he was likely to have endured previously'; 'In addition, the applicant's distress was accentuated by the vulnerability inherent in his situation as an asylum seeker'; 'The Court attaches considerable importance to the applicant's status as an asylum seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection'. See also *Party Concurring and Party Dissenting Opinion of Judge Sajo* in *M.S.S. v. Belgium and Greece*. Judge Sajo argues that asylum-seekers cannot be recognised as a 'particularly vulnerable group' because 'They are not a group historically subject to prejudice with lasting consequences, resulting in their social exclusion. In fact, they are not socially classified, and consequently treated, as a group'.

57 See *Party Concurring and Party Dissenting Opinion of Judge Sajo* in *M.S.S. v. Belgium and Greece*.

58 There are many reports documenting the situation of migrants and in particular the dire situation of undocumented migrants. At the time of writing, The European Union Agency for Fundamental Rights published two studies: Migrants in an Irregular Situation: Access to Healthcare in 10 European Union Member States, FRA (2011); Migrants in an Irregular Situation employed in domestic work: Fundamental Rights Challenges for the European Union and its Member States, FRA (2011).

To further buttress these arguments, an exploration of the relationship between, on the one hand, human trafficking and, on the other hand, the practices of slavery, servitude and forced labour is necessary. This exploration is essential for substantiating the proposition that the human trafficking framework could be discarded and instead the legal and factual analysis should be centered on the practices already prohibited by Article 4 of the ECHR. In what follows, it is also proposed how the Court should have engaged itself with the legal definition of slavery in relation to the factual circumstances in the *Rantsev v. Cyprus and Russia* case.

4.1. SLAVERY – SERVITUDE – FORCED LABOUR – HUMAN TRAFFICKING (EXPLOITATION)

Article 4 of the ECHR contains a cluster of different concepts. It introduces a fragmentation of abusive practices, namely, forced labour, servitude and slavery. A discussion on definitional problems related to each one of them and on the distinctions among them is pertinent because the definition of human trafficking has introduced another concept, viz 'exploitation'. More specifically, there is an issue as to whether the threshold of 'exploitation' is lower than the thresholds of slavery, servitude and forced labour.[59] A meaningful legal debate on this issue is, however, impeded due to the lack of certainty as to the meaning of 'exploitation'.[60] A fruitful debate on this issue is further hampered due to the lack of the ECtHR's jurisprudence on Article 4. Besides *Siliadin v. France*,[61] there is no other case in which the Court has examined the meaning of slavery, servitude and forced labour in the context of abuses against immigrants in countries of destination.[62] In addition, the ECtHR's pronouncements in *Siliadin v. France* have to be accepted with the reservation that the case was about a child and the Court emphasised the girl's age constantly throughout the whole judgment. Accordingly, there is still indeterminacy as to how the ECtHR will consider a similar situation of an adult migrant worker. Another reason for being wary about *Siliadin v. France* is the ECtHR's statement that slavery is the exercise of 'genuine

59 The Palermo Protocol places the concept of 'exploitation' at the heart of the definition of human trafficking; however, it does not define it, it only gives examples of what it could include at the minimum.

60 Noll, G., 'The Insecurity of Trafficking in International Law' in Chetail, V. (ed.) *Mondialisation, migration et droits de l'homme: le droit international en question,* Bruylant, Brussels, 2007, pp. 343–361.

61 ECtHR, *Siliadin v. France*, 26 July 2005 (App. no. 73316/01); *See* Cullen, H., 'Siliadin v France: Positive Obligations under Article 4 of the European Convention on Human Rights', *Human Rights Law Review,* Vol.6, No.3, 2006, pp. 585–592; Nicholson, A., 'Reflections on Siliadin v France: slavery and legal definition', *The International Journal of Human Rights*, Vol. 14, No. 5, 2010, pp. 705–720.

62 At the time of writing, there are pending cases, in which the ECtHR will have to consider this issue. See ECtHR, *Elisabeth Kawogo v. The UK*, (Appl. no.56921/09); ECtHR, *C.N. v. The UK*, (Appl. no.4239/08); ECtHR, *Lilyana Sashkova Milanova and Others v. Italy and Bulgaria* (App. no.40020/03).

right of legal ownership',[63] which is in conflict with the definition of slavery under international law. The Slavery Convention of 1926 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'.[64]

Siliadin was a girl from Togo. She arrived in France at the age of 15 with Mrs D. It was agreed that she would work at Mrs. D.'s home until the reimbursement of the cost of her air ticket, that Mrs. D. would attend to her immigration status and find her a place at school. Siliadin became an unpaid housemaid for D.s' family and her passport was taken from her. Subsequently, she was 'lent' to Mr. and Mrs. B. and became their housemaid. She worked seven days per week from 7.30 a.m to 10.30 p.m. cooking, cleaning and taking care of the children. She was occasionally authorised on Sundays to attend mass. She was never paid. Siliadin confided in a neighbour about her situation, who made the French authorities aware. Mr. and Mrs. B were prosecuted. However, the French courts acquitted the defendants of criminal charges. Siliadin filed a complaint to the ECtHR alleging violation of Article 4 of the ECHR. She claimed that France failed to comply with its positive obligation under the ECtHR to put in place adequate criminal-law provisions to prevent and punish the perpetrators of the abuses against her.

In *Siliadin v. France*, the ECtHR developed a clear gradation among the abusive practices of slavery, servitude and forced labour. One can make an analogy with the gradation established in the jurisprudence of the Court regarding the prohibition on torture, inhuman or degrading treatment or punishment, with torture constituting the gravest abuse, inhuman treatment referring to a lesser level of severity and degrading treatment referring to the minimum level of severity to fall within the scope of Article 3.[65] The ECtHR qualified Siliadin's situation as forced labour based on the definition of forced labour in the ILO Forced Labor Convention, which provides that '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'.[66] The Court said that 'the applicant was, *at the least,* subjected to forced labour within the meaning of Article 4 of the Convention at a time when she was a minor.'[67]

The ECtHR then moved on to the concepts of slavery and servitude. Without initiating any legal analysis on the meaning of slavery as defined in the 1926 Slavery Convention, the Court simply concluded that Mr. and Mrs. B. did not exercise 'a genuine right of legal ownership over her, *thus reducing her to the status of an*

63 *Siliadin v. France*, at para. 122; *Rantsev v. Cyprus and Russia*, at para. 276.

64 See Article 1(1) of The Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926 (Slavery Convention of 1926), 60 L.N.T.S. 253, entered into force 9 March 1927.

65 ECtHR, *Jalloh v. Germany* [GC], 11 July 2006, (App. no. 54810/00,) at para. 68.

66 Convention concerning Forced or Compulsory Labour (ILO No. 29), 39 U.N.T.S. 55, *entered into force* 1 May 1932.

67 *Siliadin v. France*, at para. 120 (emphasis added).

"object"'.[68] Although, Siliadin was not reduced to the status of an object, in the opinion of the Court, she was held in servitude. The ECtHR has defined servitude as '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"*'.[69] The Court did not make it explicitly clear what actually the link between slavery and servitude was. However, it can be implied from the judgment that the reduction of somebody to the status of an object, which is slavery, is graver than servitude.

The ECtHR pointed to at least two distinguishing features of servitude as opposed to forced labour: (1) living on another person's property and (2) impossibility of altering his/her condition.[70] The judgment in *Siliadin v. France* indicates that a set of circumstances can be qualified as both forced labour and servitude. However, the ECtHR still emphasised the distinguishing features of 'servitude' which allowed the situation to be assessed not only as forced labour, but also as servitude.

Despite this apparent gradation introduced in *Siliadin v. France,* there is still uncertainty. The source of the uncertainty is that the ECtHR did not ponder upon the meaning of 'powers attaching to the right of ownership'.[71] If slavery is interpreted as exercise of 'powers attaching to the right of ownership' as it is actually stipulated in the 1926 Slavery Convention, then the following questions arise: When are powers attaching to the right of ownership exercised, is it enough for a case to be qualified as slavery', when an individual has become an object of purchase, exchange or transfer without involvement of physical abuses, and does the exercise of 'powers attaching to the right of ownership' always imply more severe abuses in contrast to forced labour? These questions show that the human rights law is yet to develop so that the contours of the meaning of 'powers attaching to the right of ownership' become clearer. It is unfortunate that instead of going into a direction contributive to the abovementioned development, the focus has been concentrated on the concept of human trafficking.

There are examples of national courts which have tried to interpret the meaning of 'powers attaching to the right of ownership'. The decision by the High Court of Australia in the case of *The Queen v. Tang*[72] has been commended 'for providing the most far-reaching and cogent examination to date of the definition of "slavery" as established in international law'.[73] Although the legal analysis might be correct since the High Court of Australia defined slavery based on 'powers attaching to the right of ownership' (as opposed to the ECtHR, which defines slavery as requiring 'genuine

68 *Siliadin v. France*, at para. 122 (emphasis added).

69 *Siliadin v. France*, at para. 124 (emphasis added).

70 *Siliadin v. France*, at para. 123. When the Court examined the facts it pointed out that Siliadin 'had no means of living elsewhere than in the home of Mr. and Mrs. B' and that 'the applicant could not hope that her situation would improve …' at paras. 126 and 128.

71 See the definition of slavery in the 1926 Slavery Convention, which is cited by the ECtHR in *Siliadin v. France* (at para. 122).

72 *The Queen v. Tang* [2008] High Court of Australia 39, 28 August 2008, M5/2008.

73 Allain, J., 'R v Tang: Clarifying the Definition of 'Slavery' in International Law', *Melbourne Journal of International Law*, Vol. 10, No. 1, 2009, pp. 246–257.

right of legal ownership'), the legal analysis and the final conclusion in *The Queen v. Tang* have to be considered in combination with the factual circumstances.

The Queen v. Tang was a criminal case in which the accused was charged with the crime of slavery with regard to five women of Thai nationality. The women were used as sex workers in a brothel. They came voluntary to Australia to work as sex workers upon the understanding that once they had paid off their debt, they would have the opportunity to earn money on their own account as prostitutes. They were escorted during their flight and upon arrival were treated as being 'owned' by those who procured their passage. The amount of their debt was set at $45 000. This debt had to be worked off at the rate of $50 per customer. They earned nothing in cash while under the contract with the exception that they had one free day per week during which they could keep the $50 per customer. The women were well-provisioned, fed, and provided for. They were not kept under lock and key. However, it was concluded that in the totality of the circumstances, 'the complainants were effectively restricted to the premises'.[74] After paying off their debt, the restrictions on the women were to be lifted, their passports returned and they were free to choose their hours of work, and their accommodation.

The above described set of circumstances was qualified as slavery by the High Court of Australia. After establishing that the definition of slavery should be based on Article 1 of the 1926 Slavery Convention and in particular 'powers attaching to the right of ownership' which covers a *de facto* condition of slavery,[75] Gleeson CJ concluded for the majority that:

> In this case, the critical powers the exercise of which was disclosed (or the exercise of which a jury reasonably might have disclosed) by the evidence were the power to make the complainants an object of purchase, the capacity, for the duration of the contracts, to use the complainants and their labor in a substantially unrestricted manner, the power to control and restrict their movements, and the power to use their services without commensurate compensation.[76]

If 'slavery' is to be reserved for truly grave forms of abuses, the facts in *Queen v. Tang* do not really point into that direction.[77]

Despite these obstacles related to the distinctions between the three practices in Article 4 of the ECHR, one might argue that 'exploitation' is a form of abuse of a lower threshold as opposed to slavery, servitude and forced labour.[78] If this argument

---

74 *The Queen v. Tang* [2008] HCA 39, 28 August 2008 M5/2008, Gleensone CJ, at para. 16.

75 *The Queen v. Tang* [2008] HCA 39, 28 August 2008 M5/2008, Gleensone CJ, at para. 25.

76 *The Queen v. Tang* [2008] HCA 39, 28 August 2008 M5/2008, Gleensone CJ, at para. 50.

77 *The Queen v. Tang* [2008] HCA 39, 28 August 2008 M5/2008, Kirby J, at para. 79. Justice Kirby pointed out arguments against the finding that the women were held in slavery.

78 See Gallagher, A.T., 'Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway', *Virginia Journal of International law*, Vol. 49, No. 4, 2008, pp. 789–848.

is pursued, then the concept of human trafficking could be necessary since it could encompass lesser forms of harm. This claim is without prejudice to the statement previously made in the article as to the lack of understanding concerning what 'exploitation' actually is. The insecurity as to the meaning of 'exploitation' which is a central element in the definition of human trafficking continues to be a valid and relevant consideration. However, the objective at this stage is to examine the relationship between the three practices prohibited in Article 4 of the ECHR and human trafficking as defined in the Palermo Protocol.

As already mentioned, the action element of human trafficking as defined in the Palermo Protocol is not 'exploitation' as such. With the Trafficking Protocol, States do not adopt an obligation to criminalise 'exploitation', but the 'recruitment, transportation, transfer or receipt of persons' by certain means 'for the purpose of exploitation'. A logical conclusion from this line of thought could be that there is no overlap between 'human trafficking' and the three abusive practices prohibited by Article 4 of the ECHR. The practices in Article 4 prohibit the actual abuses, while human trafficking prohibits the movement by certain means for the purpose of 'exploitation'. The problem, however, that slavery, servitude and forced labour under Article 4 might be too demanding in terms of the level of abuses required to meet the necessary thresholds, is still present. This is not an unsolvable problem, though.

4.2. PROGRESSIVE INTERPRETATION OF ARTICLE 4

To support the assertion that that slavery, servitude and forced labour do not set too exacting standards rendering Article 4 of the ECHR non-operational, the following three points deserve consideration.

First, the steps which the ECtHR undertook in *Rantsev v. Cyprus and Russia* in order to finally conclude in the judgment that 'trafficking itself within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-trafficking Convention, falls within the scope of Article 4 of the Convention' have to be reviewed.[79] The ECtHR resorted to the principle that the rights in the ECHR had to be interpreted and applied 'so as to make its safeguards practical and effective'.[80] It further noted that

> '[…] in assessing the scope of Article 4 of the Convention, sight should not be lost of the Convention's special features or of the fact that it is a living instrument which must be interpreted in the light of present-day conditions. The increasingly high standards required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably require greater firmness in assessing breaches of the fundamental values of democratic societies.'[81]

79 *Rantsev v. Cyprus and Rus*sia, at para. 281.

80 *Rantsev v. Cyprus and Russia*, at para. 275.

81 *Rantsev v. Cyprus and Russia*, at para. 277.

The principle of effectiveness and the notion of the Convention as a 'living instrument' are 'the bedrock of evolutive interpretation' of the ECHR.[82] Both of these principles were used by the Court to conclude that 'treatment associated with trafficking fell within the scope of the article [Article 4]'[83] and that there was treatment which 'run[s] counter to the spirit and purpose of Article 4 of the Convention such as to fall within the scope of the guarantees offered by that Article […]'.[84] If the Court can use the above-mentioned means of progressive interpretation to conclude that Article 4 covers human trafficking, then why should the Court not use the same means to decide that Article 4 covers lesser forms of abuses than the potentially high standards established with the concepts of slavery, servitude and forced labour? A progressive interpretation of Article 4 of the ECHR could bring the ECtHR to the conclusion that Article 4's material scope encompasses a certain minimum level of severity. The concept of human trafficking and the definition of human trafficking are redundant for reaching the above conclusion. The Court did not have to go through the concept of human trafficking in order to expand the material scope of Article 4.

An alternative road which the ECtHR could have possibly taken is using the means for evolutive interpretation of the Convention in order to interpret forced labour, slavery and servitude more expansively so that these three harmful practices are 'interpreted in light of the present day conditions' and in light of 'the increasingly high standards required in the area of the protection of human rights and fundamental liberties'. At this point, the proposal elaborated above and related to the special vulnerability of migrant workers could be useful. This road will, however, imply that the Court has to revisit its restrictive interpretation of slavery as requiring legal ownership. The reconsideration of the scope of slavery should not be that difficult since the definition of slavery in the 1926 Slavery Convention does not exact legal ownership.

In order to elaborate on the third point, a reproduction of the most prominent ECtHR's pronouncement in *Rantsev v Cyprus and Russia* is necessary:

> […] 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 labor, often for little or no payment, usually in the sex industry but also elsewhere.[85]

As was already commented on, the determination that trafficking in human beings is 'based on the exercise of powers attaching to the right of ownership' is not correct. Trafficking has a specific definition in international law and it is the definition of slavery which reads that slavery is an 'exercise of powers attaching to the right of ownership'. At this junction, the following question arises: accepting the ECtHR's

82 While, R.C.A. and Overy, C., The European Convention on Human Rights, Oxford, 2010, at p. 73.

83 *Rantsev v. Cyprus and R*ussia, at para. 279.

84 *Rantsev v. Cyprus and Ru*ssia, at para. 279.

85 *Rantsev v. Cyprus and Ru*ssia, at para. 181(emphasis added).

determination in the above quote at face value, was there any need for the concept of human trafficking, when, in fact, international law and human rights law already have a concept covering abuses against human beings defined as an 'exercise of powers attaching to the right of ownership'? Why should the Court go through the concept of human trafficking in order to determine that 'exercise of powers attaching to the right of ownership' is an abuse within the material scope of Article 4? The Court already has in its legal toolbox the concept of slavery. All it has to do is analyse the definition of slavery and explain whether and how the abuses in the particular case manifest an exercise of powers attaching to the right of ownership.

There is, however, one very welcoming result from the pronouncement quoted in the beginning of the previous paragraph. The ECtHR, without open recognition, revisited its previous position that 'exercise of powers attaching to the right of ownership' means exercise of 'a genuine right of *legal ownership*'. As explained before, in *Siliadin v. France*, the ECtHR ruled that no powers attaching to the right of ownership were exercised with regard to Siliadin since the story of the girl did not show that Mr. and Mrs. B 'exercised a genuine right of *legal ownership* over her, thus reducing her to the status of an object.' In *Rantzev v. Cyprus and Russia*, the Court dropped the requirement for legal ownership and gave the following explanation as to when powers attaching to the right of ownership are exercised: treating '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.'[86]

Despite this welcoming development, the ECtHR did not undertake an inquiry into how powers attaching to the right of ownership were exercised with regard to Rantseva. In the following section of the article, a suggestion is offered as to how the Court could have made this inquiry.

In conclusion, the ECtHR should not have marginalised the concepts of slavery, servitude and forced labour. They offer the necessary potential for addressing the need for effective protection of human rights. The ECtHR should not have contributed to the 'rise' of the concept of human trafficking, which is anyway uncertain and problematic and which leads to negative externalities.

4.3. LEGAL ENGAGEMENT WITH THE DEFINITION OF SLAVERY

In the sections above, arguments concerning generally to the material scope of Article 4 were advanced. The next stage of the article is giving hints to the Court as to how it could have actually engaged and worked with the definition of slavery as exercise of powers attaching to the right of ownership, in relation to the particular facts in *Rantsev v. Cyprus and Russia*. This stage proceeds on the premise that slavery is not legal ownership since the law does not allow one human being to own another human being.

86 *Rantsev v. Cyprus and Ru*ssia, at para. 281.

Before immersing again into the factual circumstances in *Rantsev v. Cyprus and Russia,* it is necessary to clarify that there are not many sources which could be of assistance for elucidating when powers attaching to the right of ownership are exercised and what the indicators of such powers are. A report by the UN Secretary General from 1953 lists some characteristics: making an individual an object of purchase; using the individual's capacity to work in an absolute manner; making the products of the individual's labour property of the master without any compensation commensurable to the value of the labour, and lack of possibility for terminating the situation by the will of the individual.[87] Another relevant source is the International Criminal Tribunal for the former Yugoslavia's (ICTY) Trial Chamber's[88] and Appeals Chamber's[89] judgments in *Kunarac et al.,* where the ICTY elaborated on the meaning of enslavement under the ICTY's Statute. The ICTY Appeals Chamber identified indicia of enslavement. It pointed to 'control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour'.[90] As already mentioned, the High Court of Australia has engaged with the definition of slavery and has also identified the indicia. It referred to

> […] power to make the complainants an object of purchase, the capacity, for the duration of the contracts, to use the complainants and their labor in a substantially unrestricted manner, the power to control and restrict their movements, and the power to use their services without commensurate compensation.[91]

The High Court of Australia relied on the above mentioned UN Secretary General Report from 1953 and on the ICTY *Kunarac et al.* judgment to develop these indicators.

The Rome Statute of the International Criminal Court (ICC) and the ICC Elements of Crimes are valuable sources of assistance as to the meaning of 'powers attaching to the right of ownership'.[92] The Rome Statute defines the crime against humanity[93] of

87 See ECOSOC, *Slavery, the Slave Trade, and Other Forms of Servitude*, *Report of the Secretary-General*, *UN Doc E/2357* (27 January *1953*).

88 International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, *Prosecutor v. Kunarac et al* (IT-96–23-T and IT-96–23/1-T) Trial Chamber, 22 Feb 2001, at paras. 542–543.

89 ICTY *Prosecutor v. Kunarac et al.* Case No IT-96–23 & IT-96–23/1-A, Appeals Chamber, 12 June 2002, at paras. 119–120.

90 ICTY Appeals Chamber, *Prosecutor v. Kunarac et al.*, at para. 119.

91 *The Queen v. Tang* [2008] HCA 39, 28 August 2008 M5/2008, Gleensone CJ, at para. 50.

92 Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90, entered in to forced 1 July 2002; International Criminal Court, Elements of Crimes, U.N. Doc. PCNICC/2000/1/Add.2 (2000).

93 The Rome Statute defines enslavement as a crime against humanity 'when committed as part of a widespread or systemic attack directed against any civilian population'. See Article 7(1)(c) of the Rome Statute.

enslavement as 'exercise of any or all of the powers attaching to the right of ownership over a person […]'.[94] The Elements of Crimes indicate the following elements of the crime of enslavement:

> The perpetrator exercises any or all of the powers attaching to the right of ownership over one or more person, such as *purchasing, selling, lending or bartering* such a person or persons, *or* by imposing on them a *similar deprivation of liberty*.[95]

Without venturing into a more detailed and profound legal analysis on the elements of the crime of enslavement, it is noteworthy that the 1953 UN Secretary General Report, the *Kunarac et al.*, *The Queen v. Tang* and the ICC Elements of Crimes make significant contribution for enhancing the understanding of when powers attaching of the right of ownership are exercised. The indicia of transaction (making an individual an object of transaction), usage of labour capacity and deprivation of liberty are clearly discernible from the above sources. The definition of slavery is, nevertheless, in need of further elaboration.

Henceforth, the objective is introducing and elaborating on suggestions on how the ECtHR could have utilised the definition of slavery in *Rantsev v. Cyprus and Russia*. The focus has to be first guided on the conditions within the artiste visa regime and in particular the requirement for a bank deposit. Artiste agents were required to deposit a bank letter guarantee in the sum of 15.000 CYP (approximately 25.000 EUR) to cover possible repatriation expenses. Cabaret managers were required to deposit a bank warranty in the sum of from 2.500 CYP to 10.000 CYP (approximately from 4.200 EUR to 17.000 EUR) to cover a repatriation for which the manager was responsible.[96] The requirement for a bank deposit presented itself as a transaction. The parties within the transaction were, on the one hand, the State and, on the other hand, the cabaret agents and managers. The cabaret agents and managers deposited a substantial amount of money to the State so that in case of deportation the State could cover its expenses. The object of that transaction was ultimately the artiste; she did not have any say in this transaction; she could not 'negotiate' her place within the relation between the State and the cabaret owners. The bank deposit should be considered in combination with the consequences flowing from it. In particular, the agents and the managers were aware that if an artiste was deported they would

94 Article 7(2)(c) of the Rome Statute. The whole definition of enslavement is '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'. The second half of the definition refers to 'trafficking'. However, it is beyond the scope of this article to discuss the meaning of 'trafficking' in the Rome Statute.

95 Article 7(1)(c) of the ICC Elements of Crimes (emphasis added). The contextual elements of the crime are omitted from the citation. The elements of the crime of enslavement are accompanied by a footnote which facilitates further clarification what 'similar deprivation of liberty' in the context of enslavement could imply.

96 *Rantsev v. Cyprus and Russia*, at paras. 115–120.

lose the deposit. Because of the deposit, the managers behaved as if they 'owned' the artistes. Accordingly, the whole scheme could be viewed as a transaction since the cabaret managers paid money to the State so that the State allowed them to have artistes working for them. The amount of the deposit was also of some significance. The deposit constituted a substantial amount of money which could not be justified based on potential administrative costs incurred by the State.

This transaction played out under the legitimacy of the law. Apparently, there was no issue of legal ownership since the law did not sanction actual ownership of the artistes by the agents and managers. However, the legal requirement for a bank deposit made the exercise of powers attaching to the right of ownership possible.

The collusion between the State and the cabaret managers did not end here. The policemen, as agents of the State, behaved as if Rantseva was under the cabaret manager's custody and he was the authority to be approached in matters regarding her. This is evidenced by the facts that the policemen called the manager and they witnessed the action of him picking her up from the police station.

Besides the bank deposit, a relevant factor when making an assessment as to whether powers attaching to the right of ownership were exercised in regard to Rantseva, was the displacement and in general terms her placement in the space and on the territory. As mentioned in the previous section, the Court has distinguished as one of the relevant factors in the assessment whether a situation can be defined as servitude whether the individual has to live on the employer's premises.[97] Living on the employer's premises presupposes some form of territorialising the person. In a similar fashion, the placement of the person in the space and on the territory should be a pertinent consideration in the examination whether the situation can be qualified as slavery. Thus, the relocation of Rantseva from the police department to the private flat is of legal relevance. Her placement and confinement in the apartment is equally pertinent. When these two events are considered in conjunction with the bank deposit, the result is that the manager had 'bought' the privilege to territorialise 'his' artiste.

The Court should be urged to initiate such legal analysis so that it contributes to the understanding of the meaning and parameters of Article 4. Instead of going into the human trafficking issue, the ECtHR should have made use of what Article 4 already has to offer. Arguably, the conceptualization of the facts in *Rantsev v. Cyprus and Russia* based on the slavery argument, as demonstrated above, foregrounds Cyprus' involvement in the abuses. In contrast, the trafficking argument makes Cyprus less complicit in Rantseva's fate.[98] If the slavery argument is pursued, then the bank deposit required by the Cypriot legislation comes very much into the spotlight. If the slavery argument is pursued, the fact that the public authorities handed Rantseva

97 *Siliadin v. France*, at para. 123 and 126. The ECtHR noted that Siliadin 'had no means of living elsewhere than in the home of Mr and Mrs B'.

98 I am grateful to Prof. Gregor Noll for suggesting that the trafficking argument makes Cyprus less complicit in Ms. Rantseva's fate.

over to the manager is also strongly spotlighted. As opposed to the slavery argument, the trafficking argument highlights the issues of prostitution, the allegedly inherently exploitative nature of prostitution and the immigration of 'poor' Easter European women.

5. VICTIMS TO BE SAVED?

Cyprus was also found in violation of Article 4 since the authorities failed to take protective operational measures to remove Rantseva from the harm of human trafficking.[99] The legal analysis related to protective operational measures, is introduced with the statement that

> There can therefore be no doubt that the Cypriot authorities were aware that a substantial number of foreign women, particularly from the ex-USSR, were being trafficked to Cyprus on artistes visas and, upon arrival, were being sexually exploited by cabaret owners and managers.[100]

This general background of the situation, as reported by the Council of Europe Commissioner for Human Rights, plays a paramount role in the Court drawing the following conclusion:

> In the Court's opinion, there were sufficient indicators available to the police authorities, *against the general backdrop of trafficking issues in Cyprus,* for them to have been aware of circumstances giving rise to *a credible suspicion* that Ms Rantseva was, or was at real and immediate risk of being, a victim of trafficking or exploitation. Accordantly, a positive obligation arose to investigate without delay and to take any necessary operational measures to protect Ms Rantseva.[101]

This section starts with a revision of the ECtHR's jurisprudence on protective operational measures. Following the revision, *Rantsev v. Cyprus and Russia* will be situated within the principles established therein. The human rights obligation imposed on the State Parties to the ECHR to undertake protective operational measures was established with the *Osman* test. The case of *Osman v. the United Kingdom*[102] was about a teacher who developed an unbalanced relationship with one of his students, Osman. The teacher subsequently killed Osman's father and wounded Osman. The issue under consideration was whether the UK authorities failed to protect their right to life. The ECtHR established the following test:

---

99 Article 4 of the ECHR, similarly to Article 2 and Article 3, may require a State to take protective operational measures. See *Rantsev v. Cyprus and Russia*, at para. 286.

100 *Rantsev v. Cyprus and Russia*, at para. 294.

101 *Rantsev v. Cyprus and Russia*, at para. 296 (emphasis added).

102 ECtHR, *Osman v. the United Kingdom [GC]*, 28 October 1998 (App. no. 23452/94).

> […] where there is an allegation that the authorities have violated their positive obligation to protect the right to life […] it must be established to its [the Court's] satisfaction that the authorities *knew or ought to have known* at the time of the existence of a *real and immediate risk* to the life of an *identified* individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their power, which judged reasonably, might have been expected to avoid the risk [my emphasis].[103]

The test consists of two elements: (1) the knowledge element and (2) the due diligence element, which demands doing what reasonably could be expected to avoid a real and immediate risk. After reviewing the sequence of the events leading to the shooting, including the teacher's behaviour and the police actions, the ECtHR concluded that '[…] the applicants have failed to point to any decisive stage in the sequence of the events leading up to the tragic shooting when it could be said that the police knew or ought to have knows that the lives of the Osman family were at real and immediate risk'.[104]

To further demonstrate the application of the *Osman* test, the case of *Opuz v. Turkey* is relevant.[105] This was a domestic violence case, in which a husband assaulted his wife and her mother and eventually killed the mother. After reiterating the test established in *Osman v. the United Kingdom,* the ECtHR emphasised that when deciding the case it will take account of the general problem of domestic violence in Turkey as reported from various sources. The Court stressed that the issue of domestic violence 'cannot be confined to the circumstances of the present case' and accordingly, it 'will bear in mind the gravity of the problem at issue when examining the present case'.[106]

The Court reviewed the history of assaults against the two women and the reaction by the authorities; it concluded that the authorities not only knew but could have foreseen a lethal attack.[107] Accordingly, the first prong of the *Osman* test was fulfilled. The ECtHR proceeded with the second prong of the test, namely the due diligence element. The women filed complaints but had to withdraw them due to threats and pressure exerted on them. Pursuant to the Turkish legislation at the material time, if the victim withdrew her complaint, the prosecutor could no longer bring criminal proceedings against the abuser.[108] Thus, the crucial issue in *Opuz v. Turkey* was 'whether the local authorities displayed due diligence to prevent violence against the applicant and her mother, in particular by pursuing criminal or other appropriate preventive measures against H.O despite the withdrawal of complaints by the victims'.[109] Turkey was found in failure of its positive obligation to protect the right

---

103 *Osman v. the United Kingd*om, at para. 116 (emphasis added).

104 *Osman v. the United Kingdom*, at para. 121.

105 ECtHR, *Opuz v. Turkey*, 9 June 2009 (App. no.33401/02).

106 *Opuz v. Turkey*, at para. 132.

107 *Opuz v. Turkey*, at para. 136.

108 Meyersfeld, B.C., '*Opuz v. Turkey*: confirming the state obligation to combat violence against women', *European Human Rights Law Review,* Vol.5, 2009, pp. 684–693, at p. 687.

109 *Opuz v. Turkey*, para. 131. The Court recognised that there is no general consensus among the states in the Council of Europe regarding the pursuance of criminal prosecution against perpetrators

to life since it did not display due diligence. What is of significance for the purposes of the present analysis is that to reach its conclusion the ECtHR relied on accounts of the general problem of domestic violence in Turkey. Nevertheless, this reliance did not preclude scrutiny as to the agency of the women to make the authorities aware of their dire situation.

Three steps can be distinguished in the ECtHR's analysis on protective operational measures in *Rantsev v. Cyprus and Russia*. The first step is referral to reports which gave general information about the 'flourishing' of trafficking in Cyprus, the connection between the 'flourishing' and the artiste visa regime and that many of the artistes were from the former USSR. The second step is noting that Rantseva was an artiste in Cyprus from a Russian nationality who was taken by her employer from the police station. The third step is reminding States of their obligations under the Trafficking Protocol to 'strengthen training for law enforcement, immigration and other relevant officials in the prevention of trafficking in persons'.[110] In the opinion of the Court, the above mentioned indicators were enough to make the authorities aware of circumstances 'giving rise to a *credible suspicion* that Ms Rantseva was, or was at real and immediate risk of being, a victim of trafficking or exploitation'.[111] In comparison with the standards and the level of scrutiny adopted by the Court in the previously mentioned cases, there are significant deviations in the *Rantsev* case. First, in *Opuz v. Turkey*, the gravity of the general problem of domestic violence was taken into account and the particular case was put within the context of that gravity. However, this contextual approach still did not preclude the Court from reviewing all the incidents of violence and complaints filed by the women, which gave the foundations for establishing whether the authorities could have foreseen the lethal attack and have acted with due diligence. Since such a review is lacking in *Rantsev v. Cyprus and Russia,* one can infer that 'against the general backdrop of trafficking issues in Cyprus' any foreign woman in Cyprus who is on an artiste visa and comes from Eastern Europe can be presumed to be a victim of trafficking and exploitation when the police happen to be in contact with her.

Second, the test established in *Osman v. the United Kingdom* and subsequently applied by the Court in other cases,[112] has been modified in *Rantsev v. Cyprus and Russia* to the effect that a new element is added which makes the test *less* demanding. The new element is 'circumstances giving rise to a *credible suspicion*'.[113] It is not

---

of domestic violence when the victim withdraws her complaint. However, the possibility for continuation of prosecution in the public interest despite withdrawal should be available. See *Opuz v. Turkey*, at paras. 138 and 139.

110 Article 10, UN Trafficking Protocol. The ECtHR refers also to the Council of Europe Convention on Action against trafficking in human beings. However, at the time of the events (March 2001), this Convention was not yet drafted.

111 *Rantsev v. Cyprus and Russia*, at para. 296 (emphasis added).

112 ECtHR, *Z and Other v. the United Kingdom* [GC], 10 May 2001 (App. no. 29392/95); Opuz v Turkey, at para. 139.

113 *Rantsev v. Cyprus and Russia*, at para. 296 (emphasis added).

required that the applicants show that the authorities knew or ought to have known of the existence of a real and immediate risk; under the *Rantsev* test, it has to be established that the authorities knew or ought to have known of 'circumstances giving rise to a credible suspicion' of a real and immediate risk.

The Court does not explain where the standard of 'credible suspicion' comes from. Neither does it give any hints as to why exactly this standard was endorsed. To answer these questions which were left open by the ECtHR, an analogy with the procedural mechanism introduced with Article 10(2) of the Council of Europe Trafficking Convention is possible. Article 10(2) stipulates that

> […] if the competent authorities have *reasonable grounds to believe* that a person has been victim of human trafficking, that person shall not be removed from its territory until the identification process as a victim of an offence provided for in Article 18 of this Convention [the offence of human trafficking] has been completed (emphasis added).

In addition, the Council of Europe Convention ensures a minimum level of assistance to those individuals for whom there are reasonable ground to believe that they are victims. Thus, the Council of Europe Convention guarantees temporal non-removal and provision of minimum social assistance to presumed victims. The introduction of the standard of 'reasonable grounds to believe' in the Council of Europe Convention is regarded as necessary since it is reported that victims do not actually perceive themselves as victims[114] and that 'national authorities are often insufficiently aware of the problem of trafficking in human beings.'[115] By analogy, the ECtHR in *Rantsev v. Cyprus and Russia* might have had to 'soften' the *Osman* test on protective operational measures by establishing that it is sufficient if the authorities knew or ought to have known of 'circumstances giving rise to a credible suspicion' of a real and immediate risk. However, the less demanding *Rantsev* test raises some questions.

It would have been beneficial if the ECtHR had substantiated and explained the modification of the *Osman* test. In the *Rantsev* judgment, the Court introduced the test applicable when making an assessment whether the State authorities had fulfilled their positive obligations to take protective operation measures under Article 4.[116] In the same paragraph, the Court also referred to *Osman v. the United Kingdom* and to *Mahmut Kaya v. Turkey*.[117] However, the Court did not explain why the test should be different with regard to trafficked persons. Is it because they are foreign nationals who are reluctant to approach the State authorities for assistance? Is it because migrants who suffer abuses do not regard themselves as victims? Is it because of some specific vulnerabilities which justify greater vigilance on behalf of the authorities? Is it because

114 *Rantsev v. Cyprus and Russia*, at para. 320.

115 Council of Europe Convention on Action against Trafficking in Human Beings, Explanatory Report, at para. 128.

116 *Rantsev v. Cyprus and Russia*, at para. 286.

117 ECtHR, *Mahmut Kaya v. Turkey*, 28 March 2000 (App. no. 22535/93).

women who are supposedly prostitutes need a higher level of protection? Is it because foreign women who are supposedly prostitutes need a higher level of protection? There are further questions that are left uncatered for. Is the less stringent *Rantsev* test of relevance only to persons who are allegedly victims of human trafficking for the purpose of prostitution? Are States' positive obligations to protect migrants, both regular and irregular, against abuses falling within the material scope of Article 4, going to be tested under the same standard? In light of the weak legal analysis behind the test, the test is questionable. Is the *Rantsev* test applicable only with regard to foreign prostitutes who have to be saved, irrespective of whether they want to be saved or whether there is something to be saved from?

6. CONCLUSION: DANCING ON THE BORDERS OF ARTICLE 4

In *Rantsev v. Cyprus and Russia,* the ECtHR took on board the Palermo definition of human trafficking without actually explaining its elements and how they related to the particular factual circumstances. Once having started a 'dance' with the human trafficking argument, the Court performed on an anti-prostitution and anti-immigration stage.

The ECtHR should not have resorted to the human trafficking framework. Instead, it should have focused on the abusive practices covered by Article 4 of the ECHR. This article suggested how the material scope of Article 4 could be interpreted 'in light of the present day conditions' and in light of 'the increasingly high standards required in the area of the protection of human rights and fundamental liberties'. Arguments were developed on how the facts in *Rantsev v. Cyprus and Russia* indicate that powers attaching to the right of ownership could have been exercised. More specifically, at least two factors indicate that powers attaching to the right of ownership could have been exercised with regard to Rantseva: (1) the bank deposit which presents itself as a transaction and (2) the displacement of Rantseva in the space. Finally, although, it is commendable that the Court found that States have positive obligations to take protective operational measures, the legal analysis relating to protective operational measures in the *Rantsev* case is far from persuasive and leaves many questions unanswered.