

HUMAN TRAFFICKING BY REGIONAL HUMAN RIGHTS COURTS: AN ANALYSIS IN LIGHT OF *HACIENDA BRASIL VERDE*, THE FIRST INTER-AMERICAN COURT’S RULING IN THIS AREA

LA TRATA DE PERSONAS EN LOS TRIBUNALES REGIONALES DE DERECHOS HUMANOS: UN ANÁLISIS A LA LUZ DE HACIENDA BRASIL VERDE, LA PRIMERA SENTENCIA DE LA CORTE INTERAMERICANA EN ESTA MATERIA

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Summary: I. INTRODUCTION II. SPECIALIST TREATIES AND THE LACK OF ENFORCEMENT MECHANISMS: THE SUBSIDIARY ROLE OF REGIONAL HUMAN RIGHTS COURTS III. THE ECtHR’S CASE LAW: FROM *SILADIN* TO *CHOWDURY* IV. THE IACHR’S RULING IN *HACIENDA BRASIL VERDE WORKERS V BRAZIL* V. CONCLUSIONS

ABSTRACT: *Hacienda Brasil Verde Workers v Brazil* is the Inter-American Court of Human Rights’ (IACHR) first ruling on human trafficking and slavery. In this landmark case, the Court provides important guidance on the scope of the exploitative conducts prohibited under Article 6 of the American Convention on Human Rights and of the positive obligations this prohibition entails. After referring to the circumstances that have hindered the adjudication of slavery and human trafficking cases internationally, this study provides an overview of the developing international case law on these forms of exploitation, focusing on the European Court of Human Rights (ECtHR). It then analyzes in detail the reasoning followed by the IACHR in *Hacienda Brasil Verde*, highlighting its main contributions but also some of its weaknesses. Finally, the study presents conclusions on the extent to which the IACHR’s ruling addresses some of the gaps and weaknesses identified in the ECtHR’s case law, in particular by providing greater clarity on the relationship between slavery and trafficking in international law as well as by putting more emphasis on States’ positive obligation to prevent these practices.

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RESUMEN: Hacienda Brasil Verde Workers v Brasil es la primera sentencia de la Corte Interamericana de Derechos Humanos (CIDH) relativa a la esclavitud y la trata de personas. En esta decisión histórica, la Corte proporciona una orientación muy valiosa sobre el alcance de las conductas prohibidas bajo el Artículo 6 de la Convención Americana sobre Derechos Humanos y sobre las obligaciones positivas que conlleva esta prohibición. Después de referirse a las circunstancias que han dificultado la adjudicación de casos de esclavitud y trata de personas a nivel internacional, este estudio proporciona una visión general de la jurisprudencia internacional que se ha desarrollado en este ámbito, haciendo hincapié en la del Tribunal Europeo de Derechos Humanos (TEDH). Luego pasa a analizar en detalle el razonamiento desarrollado por la Corte Interamericana en su decisión Hacienda Brasil Verde, destacando sus principales aportaciones, así como algunas de sus debilidades. Finalmente, el estudio presenta conclusiones sobre la medida en que el fallo de la IACHR aporta soluciones a algunas de las lagunas y deficiencias identificadas en la jurisprudencia del TEDH, en particular al proporcionar mayor claridad sobre la relación entre la esclavitud y la trata en derecho internacional y al poner más énfasis en la obligación positivas de los Estados de prevenir estas prácticas.

KEYWORDS: Slavery; Human trafficking; Forced Labour; Inter-American Court of Human Rights; Due diligence; Positive obligations

PALABRAS LLAVE: Esclavitud; Trata de seres humanos; Trabajo forzado; Corte Interamericana de derechos humanos; Debida diligencia; Obligaciones positivas.

I. INTRODUCTION

While some may think that slavery relates to a page of history that has definitely been turned, nothing could be further from the truth. Slavery and practices similar to slavery persist today all around the world to a lesser or greater extent. The International Labour Organization (ILO) estimates that, in 2016, 40,3 million people were victims of some form of “modern slavery”, a non-legal term used to cover a set of specific legal concepts prohibited under international law. Of these 40 million people, 24,9 million were in a forced labour situation intended in a broad sense, i.e. in a situation of either slavery, practices similar to slavery, forced labour or human trafficking. Another 15,4 million were trapped in forced marriage, a situation that involves forced sexual activity and/or forced labour¹. From a gender perspective, women and girls are disproportionately affected by modern slavery, as they account for 71 per cent of the overall total. They represent 99 per cent of victims in the commercial sex industry, 84 per cent of victims of forced marriages and 58 per cent of victims in other sectors². However, in sectors not related to sexual exploitation such as, for example, agriculture, men are also significantly affected, as will become clear later on when examining the relevant case law.

Trafficking and related practices occur in every region of the world. While it has been identified as most prevalent in Africa (7,6 per 1000 people), followed by Asia and the Pacific (6,1 per 1000 people) and Europe and Central Asia (3,9 per 1000 people), data on

¹ ILO and Walk Free Foundation, *Global estimates of modern slavery: Forced labour and forced marriage*, Geneva, 2017, p. 9.

² *Ibid.*, p. 10.

these phenomena in the Arab region and in the Americas are generally lacking³. This points to significant shortcomings in the attention devoted to the prevention and eradication of these practices in these two regions⁴.

Despite the magnitude of the problem, international rulings on the responsibility of States in relation to these practices have been scarce. The Community Court of Justice of the Economic Community of West African States (ECOWAS Court)⁵ and, more prominently, the European Court of Human Rights (ECtHR)⁶, are among the few ones that have taken a stance on this issue. In a context where the prosecution of trafficking stagnates at a low level worldwide, fueling impunity for this crime⁷, it was indeed high time for the Inter-American Court of Human Rights (IACHR) to rule on these practices and clarify which standards States are expected to fulfill in the region. *Hacienda Brasil Verde Workers v. Brazil*⁸ is the first ruling in which the IACHR directly and comprehensively addresses the responsibility of a State for violating its human rights obligations arising from the prohibition human trafficking and its related exploitative conducts: slavery, servitude and forced labour. This judgment will hopefully contribute to raise the profile of trafficking-related challenges within the region and to clarify States' duties in that regard.

Beyond that, it will also influence the case law of other international bodies and tribunals. From that perspective, a meaningful analysis of the contribution this ruling can make can only be carried out through a comparative analysis with the existing case law, essentially that of the ECtHR. In this context, this study will first present an overview of the legal framework around trafficking and slavery-related practices and the extent to which international judicial and quasi-judicial bodies have addressed these practices at universal

³ ILO and Walk Free Foundation, *Global estimates of modern slavery ...*, cit., p. 10.

⁴ On the existence of and tolerance towards slavery and forced labour in the EU, see European Union Agency for Fundamental Rights (FRA), *Severe labour exploitation: workers moving within or into the European Union. States' obligations and victims' rights*, 2015.

⁵ See ECOWAS Court, *Hadijatou Mani Koroua v. The Republic of Niger*, 27 October 2008, n. ECW/CCJ/JUD/06/08. On this case, see DUFFY, H., "*Hadijatou Mani Koroua v. Niger: Slavery Unveiled by the ECOWAS Court*", *Human Rights Law Review*, vol. 9(1), 2009, pp. 151-170; ALLAIN, J., "*Hadijatou Mani Koroua v. Republic of Niger. Judgment No. ECW/CCJ/JUD/06/08*", *American Journal of International Law*, vol. 103(2), 2009, pp. 311-317; and DUFFY, H., "*Litigating Modern Day Slavery in Regional Courts: a Nascent Contribution*", *Journal of International Criminal Justice*, vol. 14, 2016, pp. 15-19.

⁶ See Section III. below.

⁷ UNODC, *Global Report on Trafficking in Persons*, 2016, Sales n° E.16.IV.6, pp. 50-53. For the low level of persecution in Europe, see European Commission, *Report on the progress made in the fight against trafficking in human beings* (2016), COM(2016) 267 final, p. 10; and Council of Europe, Group of Experts on Action against Trafficking in Human Beings (GRETA), *4th General Report on GRETA's Activities* (2015), para 33.

⁸ *Case of the Hacienda Brasil Verde Workers v. Brazil*, Judgment of 20 October 2016, Series C No. 318 (*Hacienda Brasil Verde*) (only available in Spanish). For an analysis, see GOS, T., "*Hacienda Brasil Verde Workers v. Brazil: Slavery and Human Trafficking in the Inter-American Court of Human Rights*", OxHRH Blog, 24 April 2017, <http://ohrh.law.ox.ac.uk/hacienda-brasil-verde-workers-v-brazil-slavery-and-human-trafficking-in-the-inter-american-court-of-human-rights/>; and WEISER, I., "*Inter-American Court Issues its First Decision on Modern Day Slavery: Case of Hacienda Brasil Verde*", *PKI Global Justice Journal*, vol. 2, 2018, available at <http://www.kirschsinstitute.ca/hacienda-brasil-verde/>.

and regional level (section II.). It will then provide an analysis of the ECtHR case law in this area (section III.). Thereafter, a detailed analysis of the *Hacienda Brasil Verde* case is conducted through a comparative analysis with the ECtHR's case law, where the main strengths and weaknesses of the respective pronouncements are discussed (Section IV.). Finally, conclusions are drawn on the main contributions the *Hacienda Brazil Verde* ruling makes to the existing case law in relation to both the understanding of these concepts and the scope of States' positive obligations in this area (Section V.)

II. SPECIALIST TREATIES AND THE LACK OF ENFORCEMENT MECHANISMS: THE SUBSIDIARY ROLE OF REGIONAL HUMAN RIGHTS COURTS

Slavery, servitude, forced labour and trafficking are prohibited under specialized treaties devoted to these practices. The Palermo Protocol⁹ and the European Anti-Trafficking Convention¹⁰ are the main treaties that regulate trafficking at the universal and European level respectively¹¹. Importantly, the Palermo Protocol includes the first internationally agreed definition of trafficking¹², which was reproduced as is in the European Anti-Trafficking Convention¹³. Slavery and servitude are prohibited under the Slavery

⁹ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, of 15 November 2000, 2237 UNTS 319.

¹⁰ Council of Europe Convention on Action against Trafficking in Human Beings, adopted on 16 May 2005, CETS n° 197.

¹¹ Few other treaties have been adopted in other regions. In Asia, the ASEAN Convention against Trafficking in Persons, Especially Women and Children, adopted on 21 November 2015 in Kuala Lumpur, Malaysia, and the Convention on Combating the Crime of Trafficking in Women and Children for Prostitution, of 5 January 2002. For an analysis of the ASEAN Convention, see PIOTROWICZ, R.W., "ASEAN takes on trafficking in human beings", *The Australian Law Journal*, vol. 91(4), 2017, pp. 284-295. In the Inter-America continent, there is only one specialized treaty which is partially out-dated since it precedes the Palermo Protocol and only deals with minors: the Inter-American Convention on International Traffic in Minors, adopted in 1994.

¹² Article 3(a) of the Palermo Protocol defines trafficking in persons as: "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". This definition includes three elements, commonly referred to as the action, the means and the purpose.

¹³ Article 4(a).

Convention¹⁴ and the Supplementary Slavery Convention¹⁵. And the prohibition of forced or compulsory labour is addressed in the Forced Labour Convention¹⁶.

However, none of the mentioned specialized treaties are equipped with a judicial or quasi-judicial body that is competent to receive individual complaints, as opposed to what happens with human rights treaties. This is the reason why generalist human rights treaties take a leading role in adjudicating trafficking and slavery-related cases at the international level. In practice, complaints addressing practices such as slavery, forced labour or human trafficking can only be adjudicated by human rights courts or bodies based on the relevant prohibitions included in generalist human rights treaties¹⁷. In that context, the way these courts and bodies apprehend the scope of these prohibitions through a systemic interpretation that results from the interaction between their generalist human rights treaties and the mentioned specialized treaties acquires particular significance.

However, very few cases concerning these practices have been decided at the international level. At the universal level, slavery, servitude and forced labour are prohibited under Article 8 of the International Covenant on Civil and Political Rights (ICCPR) and human trafficking is prohibited under both Article 6 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and Article 35 of the Convention on the Rights of the Child (CRC). However, none of the relevant committees has ever taken a decision establishing a violation of the abovementioned articles by a State party with respect to the abovementioned practices¹⁸. While there might

¹⁴ Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention (Slavery Convention), adopted on 25 September 1926, 60 LNTS 254.

¹⁵ The Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, adopted on 7 September 1956, 226 UNTS 3. For an analysis of why the concept of servitude is identical to the “practices similar to slavery” described in the Supplementary Slavery Convention, see ALLAIN, J., “On the Curious Disappearance of Human Servitude from General International Law”, *Journal of the History of International Law*, vol. 11, 2009, pp. 303-332; GUTTERIDGE, J. A. C., “Supplementary Slavery Convention, 1956”, *The International and Comparative Law Quarterly*, vol. 6(3), 1957, pp. 449-471; and McGEEHAN, N. L., “Misunderstood and neglected: the marginalisation of slavery in international law”, *The International Journal of Human Rights*, vol. 16(3), 2011, pp. 436-460..

¹⁶ ILO Convention concerning Forced or Compulsory Labour (n. 29), adopted on 28 June 1930, 30 UNTS 55.

¹⁷ Under the UN human rights system, individual complaints may also be processed by the so-called Special Procedures, in particular the Special Rapporteur on trafficking in persons, especially women and children and the Special Rapporteur on contemporary forms of slavery, including its causes and consequences. However, due to the simplified procedures they follow, such communications are not comparable to a judicial or quasi-judicial review.

¹⁸ In the only two cases where servitude allegations were made, they were rightly found to be manifestly inadmissible: see *A.J. v. The Netherlands*, CCPR/C/77/D/1142/2002, 14 April 2003, paras. 3.2 and 5.6; and *Vargay v. Canada*, CCPR/C/96/DR/1639/2007, 10 July 2009, para. 8. In cases where forced labour allegations were made, they were also found to be inadmissible either because they were not sufficiently substantiated (*Wolf v Panama*, CCPR/C/44/D/289/1988, 26 March 1992, para. 6.8; *Timmerman v. The Netherlands*, CCPR/C/67/D/871/1999, 2 November 1999, para. 4.2; *Silvia et al. v Zambia*, CCPR/C/75/D/825-828/1998, para. 6.3; *Radosevic v Germany*, CCPR/C/84/D/1292/2004, 5 August 2005, para. 7.3; *Dissanayake v Sri Lanka*, CCPR/C/93/D/1373/2005, 4 August 2008, para. 7.2; and *I.S. v Belarus*, CCPR/C/101/D/1994/2010, 28 April 2011, para. 4.2) or because the work performed was considered as forming part of normal civil obligations as allowed under the exceptions established under Article 8(3)

be multiple reasons lying behind such a vacuum in UN human rights treaty bodies' jurisprudence, it seems to point, at least, to the extreme vulnerability and invisibility of the victims of such crimes and their resulting lack of access to international accountability procedures.

The situation is slightly better at the regional level, even if generalist regional human rights conventions provide a less complete legal coverage of the mentioned practices. In terms of legal standards, all regional generalist human rights treaties in force in the European, Inter-American and African system prohibit slavery. However, servitude and forced labour are expressly outlawed only under the European Convention on Human Rights (ECHR)¹⁹ and the American Convention on Human Rights (ACHR)²⁰, while trafficking is referred to as a prohibited practice only in the ACHR²¹.

As far as the African Charter on Human and Peoples' Rights (ACHPR)²² is concerned, it prohibits, in addition to slavery, "[A]ll forms of exploitation and degradation of man"²³. Beyond the concerns that the use of "man" instead of human being clearly raise from a gender perspective, this wording might most probably be interpreted as including servitude, forced labour and trafficking. However, the failure to use specific language when referring to such severe human rights violations is regrettable as it fails to promote legal certainty. Indeed, States' duty to criminalize each of these practices as distinct criminal conducts in internal law cannot be directly deduced from such a general provision. Finally, human trafficking is expressly prohibited under a distinct African treaty, which does, however, only apply to women: the Protocol to the ACHPR on the Rights of Women in Africa (Maputo Protocol), which requires States to "prevent and condemn trafficking in women, prosecute the perpetrators of such trafficking and protect those women most at risk"²⁴.

This legal landscape suggests at first glance that not all regional human rights conventions provide a sufficiently broad legal basis for establishing States' duties in relation to the mentioned practices, in particular human trafficking. In addition, these

(*Faure v Australia*, CCPR/C/85/D/1036/2001, 23 November 2005, para. 7.5). As far as the prohibition of human trafficking is concerned, the only case brought before a Committee – the Committee on the Elimination of Discrimination against Women (CEDAW) – was also found inadmissible: see *Zhen Zhen Zheng v The Netherlands*, CEDAW/C/42/D/15/2007, 26 October 2009. In the context of this controversial decision, three dissenting members considered that the case was admissible and that the State had infringed Article 6 on the prohibition of trafficking since it had failed to its duty to identify the applicant as a trafficking victim and to provide her with assistance and access to adequate legal remedies: see Dissenting Opinion appended to the Decision.

¹⁹ European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted on 4 November 1950 under the auspices of the Council of Europe (COE), ETS No. 5.

²⁰ Article 4(1) and (2) of the ECHR and Article 6(1) of the ACHR respectively.

²¹ Article 6(1) of the ACHR.

²² African Charter on Human and Peoples' Rights, adopted on 28 June 1981 under the auspices of the Organization of African Unity (OAU), which became the African Union (AU), UNTS n. 1520, p. 217.

²³ Article 5 of the ACHPR.

²⁴ Article 4(g), Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted on 11 July 2003, entered into force on 25 November 2005: 36 out of the 54 States members of the AU have ratified it.

treaties only provide for succinct prohibitions and do not elaborate on the scope of relevant States' obligations arising from them. However, the case law developed by regional human rights courts in the last few years demonstrates that these normative frameworks have significant potential not only for establishing the international responsibility of States in relation to these practices, but also for identifying a comprehensive range of State obligations in these areas.

Indeed, after a long period of inaction where slavery and trafficking-related provisions remained dormant, the ECtHR was the first international human rights court to issue a ruling on these practices, only recently followed by the IACHR²⁵. These ruling have, in turn, been triggered by the *Kunarac* judgment adopted by the International Criminal Tribunal for the former Yugoslavia (ICTY)²⁶, the first international contemporary ruling on slavery and trafficking. As Allain very well puts, "the catalyst that has brought slavery back into the limelight in the Twenty First Century is [...] international criminal law which, in its wake, has made international human rights courts wake up and take notice"²⁷. Indeed, it is only following the inclusion of enslavement as a constituent act of crimes against humanity under the Statute of the International Criminal Court²⁸ that this concept and other slavery-related concepts, including trafficking, were put in the spotlight and started being included in the case law of international tribunals: first international criminal tribunals, and then international human rights courts.

III. THE ECtHR'S CASE LAW: FROM *SILIADIN* TO *CHOWDURY*

1. Slavery

After few cases in which forced labour and servitude allegations were declared inadmissible as manifestly ill-founded, the Court first found a State responsible for

²⁵ The African Court on Human and Peoples' Rights has not yet ruled on slavery and slavery-related practices, while the African Commission on Human and Peoples' Rights (AComHPR) has only briefly addressed these practices, but without reaching a finding that they had actually occurred: see *Malawi African Association and Others v. Mauritania*, Comm. Nos. 54/91, 61/91, 98/93, 164/97 to 196/97 and 210/98, AComHPR, May 2000, and *Bah Ould Rabah v. Mauritania*, Comm. No. 197/97, AComHPR, June 2004. An important decision within the African human rights system was, however, recently taken by the African Committee of Experts on the Rights and Welfare of the Child (ACERWC), which found Mauritania responsible for failing to protect two brothers who were held in slavery in a family and for failing to prosecute the perpetrators for enslavement; see *Minority rights group international and Sos-esclaves on behalf of Said Ould Salem and Yarg Ould Salem v. Mauritania*, Decision No 003/2017, ACERWC, 15 December 2017. On this decision, see the ACERWC press release, "The Committee issues a decision on the Communication against Mauritania", 26 January 2018, available at: <http://www.acerwc.org/the-committee-has-ruled-on-the-communication-against-mauritania/>.

²⁶ *Prosecutor v. Kunarac* Judgment, Case IT-96-23-T& IT-96-23/1-T, Trial Chamber, 22 February 2001 (*Kunarac* Trial Judgment) and *Prosecutor v. Kunarac* Judgment, Case IT-96-23-T& IT-96-23/1-A, Appeal Chamber, 12 June 2002 (*Kunarac* Appeal Judgment).

²⁷ ALLAIN, J., *Slavery in International Law. Of Human Exploitation and Trafficking*, Brill, 2013, p. 111.

²⁸ Article 7(2)(c) of the *Rome Statute of the International Criminal Court* (Rome Statute), adopted on 17 July 1998, 2187 UNTS 3.

violating Article 4 ECHR in 2005, in *Siliadin v. France*²⁹. This ruling provides the first comprehensive analysis of the Court in relation to the three practices prohibited under this article. This case concerns Ms. Siliadin, a fifteen-year-old girl who was brought from Togo to France with the intention to study but was instead put to work without pay as a domestic servant in a private household: her passport confiscated, she worked 15 hours a day without any day off for several years.

First of all, the Court establishes that, together with Articles 2 and 3, Article 4 enshrines one of the basic values of the democratic societies making up the Council of Europe³⁰. It then clarifies that, in order to understand the meaning and scope of the acts prohibited under this Article, these should be interpreted in light of the international law provisions that define these concepts as included in the relevant specialized treaty: the Slavery Convention, the Supplementary Slavery Convention and the Forced Labour Convention. Based on these definitions, the Court distinguishes between the three concepts of forced labour, servitude and slavery, and holds that, in order to assess whether France has violated Article 4, it needs to assess whether the facts fall within one or more of these distinct categories³¹.

Based on that scrutiny, the Court reaches the conclusion that Ms. Siliadin was subjected to forced labour as well as servitude³², but not to slavery because the people who forced her into these conditions “did not exercise a genuine right of *legal* ownership over her, thus reducing her to the same status of an object” (emphasis added)³³. This finding has been criticized as providing an extremely narrow understanding of slavery: as slavery *de jure* has been abolished all over the world, referring to *legal* ownership over a person limits the applicability of the prohibition of slavery to cases that are not legally possible today³⁴. As a consequence, the contemporary relevance of the definition of slavery lies in its application to *de facto* situations, where control tantamount to possession is exercised over a person³⁵. This was also the position taken by the ICTY in *Kunarac* where it found that slavery is not limited to chattel slavery or slavery *de jure*, but also applies to contemporary forms of slavery or slavery *de facto*³⁶. Eventually, the ECtHR overruled this narrow vision in 2010 in the *Rantsev v Cyprus and Russia* case³⁷, when the Court adopted a much broader concept of slavery based on the enlarged interpretation taken by the ICTY in *Kunarac*.

²⁹ *Siliadin v France* (n. 73316/01), Judgment of 26 July 2005 (*Siliadin*).

³⁰ *Ibid.*, para 82, reiterated in *Rantsev v Cyprus and Russia* (n. 25965/04), Judgment of 7 January 2010 (*Rantsev*), para. 283.

³¹ *Siliadin*, paras. 117 and 121.

³² *Siliadin*, paras. 120 and 129.

³³ *Siliadin*, para. 122.

³⁴ See PIOTROWICZ, R., “States’ Obligations under Human Rights Law towards Victims of Trafficking in Human Beings: Positive Developments in Positive Obligations”, *International Journal of Refugee Law*, vol. 24(2), 2012, p. 189.

³⁵ For thorough analysis of the notion of slavery in international law based on the concept of slavery *de facto*, see ALLAIN, J. *Slavery in International Law*, cit., pp. 117-142.

³⁶ *Kunarac* Appeal Judgment, para. 117.

³⁷ For the reference, see footnote 30.

A major contribution of *Siliadin* is that it puts the emphasis on the features that make the different conducts prohibited under Article 4 ECHR distinct, clarifying that each conduct shall be assessed according to its distinct definition under international law and that the difference between them is, in essence, a question of degree. Another contribution relates to States' positive obligations arising from this prohibition, since in *Siliadin* the Court recognizes for the first time that Article 4 imposes positive obligations on States. While this is undoubtedly an important finding, its impact is limited by the fact that the Court exclusively pointed to States' positive obligations in the criminal law field. Indeed, it established that France's positive obligations under Article 4 only amounted to adopting an appropriate criminal law framework that allowed the effective prosecution of the perpetrator³⁸. The Court followed this narrow view again in two other cases where applicants were found to have been subjected to forced labour and servitude: *CN and V. v France* and *CN v United Kingdom*³⁹. While the *Siliadin* decision was taken in 2005, it is indeed surprising that the Court persists with this narrow approach to positive obligations in these 2012 cases, as they have been adjudicated after *Rantsev*, when the Court had already identified a broader range of positive obligations rooted in Article 4 in relation to human trafficking. Indeed, in *Siliadin*, *CN and V* and *CN*, the Court failed to refer to States' obligations to adopt measures aimed at preventing these practices and at ensuring the protection of victims, establishing a much narrower range of positive obligations for servitude and forced labour cases as opposed to trafficking cases.

2. Human trafficking

Despite the lack of reference to human trafficking in Article 4 ECHR, the ECtHR was the first international human rights tribunal to issue a judgment on human trafficking in 2010 in the landmark *Rantsev* case. Three other judgments on the merits where trafficking was found to have taken place followed since then and deserve to be examined in order to understand the evolution of the Court's case law in the area. After a brief description of the facts of these four cases, an analysis of the main aspects addressed by the Court and the main conclusions reached will follow.

The first case involved Ms Rantseva, a Russian young woman who was brought into Cyprus, was forced into prostitution and, after escaping, was found by her "employers" and brought to a police station in order to have her deported. She spent several hours at the police station where the police hardly interviewed her and finally contacted the traffickers to come and pick her up. Several hours later she was found dead in front of the apartment building of one of the men concerned. Mr. Rantsev, the father, complained about the failure to investigate the allegations of human trafficking as well as the failure to protect the life of his daughter.

The second case, *L.E. v Greece*⁴⁰, concerns the trafficking into Greece of Ms. L.E., a young Nigerian woman, and her exploitation into prostitution during two years during

³⁸ *Siliadin*, paras. 130-149.

³⁹ *CN and V. v France* (n. 67724/09), Judgment of 11 October 2012 (*CN and V*); and *CN v United Kingdom*, (n. 4239/08), Judgment of 13 November 2012 (*CN*).

⁴⁰ *L.E. v. Greece* (n. 71545/12), Judgment of 21 January 2016 (*L.E.*).

which she was repeatedly arrested, detained, prosecuted, convicted, acquitted and threatened with expulsion by Greek authorities who never detected her status as a potential trafficking victim. She finally reported her situation and brought criminal charges against her traffickers, but her complaint was improperly dismissed and, only after a few months, admitted. Moreover, judicial proceedings took many years and did not lead to the arrest and conviction of the accused. Ms L.E. alleged that Greece had failed to comply with its obligations to protect her and to conduct an effective investigation into her trafficking⁴¹.

The last two cases, *J. and Others v Austria*⁴² and *Chowdury and Others v Greece*⁴³, relate to trafficking into domestic and agricultural work respectively⁴⁴. The first one concerns three Filipino women who were recruited in Manila to work as maids in a household in the United Arab Emirates. Their employers took away their passports and mobiles and exploited them. The abusive treatment continued during a three days' stay in Vienna, where they managed to escape. A few months later they filed a criminal complaint in Austria, but the authorities established their lack of jurisdiction over the offences committed abroad and discontinued the investigation of the events that occurred in Austria.

Finally, *Chowdury and Others* concerns 42 Bangladeshi men who were recruited without work permits to pick strawberries in a farm in Greece. Housed in degrading conditions, they worked 12 hours every day under the supervision of armed guards and did not receive any pay. When a group of 100 to 150 workers requested their salaries to the employer, one of the armed guards opened fire, seriously injuring 30 of them. While the employers and the armed guard were initially arrested and tried for attempted murder and trafficking in human beings, they were finally acquitted from both charges and only ordered to pay an insignificant financial penalty.

As far as the legal reasoning is concerned, two main aspects of this case law should be examined. Firstly, the reasoning followed by the Court in order to qualify a situation as human trafficking and establish that it falls under the definitional scope of Article 4, and secondly, what the Court considers to be the scope of States' positive obligations arising from the prohibition of trafficking.

A) How does trafficking fall under the definitional scope of Article 4

In relation to the first aspect, in *Rantsev* the Court clarifies that the ECHR shall be interpreted as a living instrument in light of present day conditions and in light of

⁴¹ For a detailed analysis of this case, see MILANO, V., "The European Court of Human Rights' Case Law on Human Trafficking in Light of L.E. v. Greece: a Disturbing Setback?", *Human Rights Law Review*, vol. 17(4), 2017, pp. 701-727.

⁴² *J. and Others v. Austria*, (n. 58216/12), Judgment of 17 January 2017 (*J. and Others*).

⁴³ *Chowdury and Others v Greece* (n. 21884/15), Judgment of 30 March 2017 (*Chowdury*).

⁴⁴ For an in-depth and comparative analysis of these two judgments, see MILANO, V., "Uncovering labour exploitation: lights and shadows of the latest European Court of Human Rights' case law on human trafficking", *Spanish Yearbook of International Law*, vol. 21, 2017, pp. 83-117.

increasingly high human rights standards⁴⁵. In the area of trafficking, these standards are mainly to be found in the Palermo Protocol and the European Anti-Trafficking Convention, which “demonstrate the increasing recognition at international level of the prevalence of trafficking and the need for measures to combat it”⁴⁶. On that basis, the Court found that trafficking threatens human dignity and fundamental freedoms and is to be considered incompatible with the ECHR⁴⁷. However, when reaching the conclusion that trafficking is contrary to Article 4 ECHR, the Court found it unnecessary to explain how trafficking relates to Article 4 and to identify whether the situation to which Ms. Rantseva was subjected to constituted slavery, servitude or forced labour. It simply found that trafficking itself, as defined in the Palermo Protocol and the European Anti-Trafficking Convention, fell within the scope of Article 4⁴⁸.

The Court's failure to explain how trafficking falls within the realm of Article 4 and relates to the conducts established therein has been widely criticized⁴⁹. In *L.E.* and in *J. v Others*, the Court avoided the issue again and entirely relied on the reasoning made in *Rantsev*⁵⁰. It is only in *Chowdury* that the Court developed its reasoning a step further.

In the latter, the Court found that the facts under scrutiny amounted to forced labour as well as trafficking and constituted a violation of Article 4(2)⁵¹. It is the first time that the Court qualified a trafficking situation as amounting to one of the three conducts proscribed under Article 4, establishing a link between one of the latter and trafficking. While this is a welcome clarification, the reasoning followed by the Court lacks, again, some coherence. It is only in the first part of its analysis that the Court follows a clear reasoning: it examines in detail the conducts the workers were subjected to and qualifies that treatment as forced labour⁵², highlighting why the Greek Court was wrong when assessing the facts against the higher threshold of servitude and, as a consequence, in ruling that trafficking had not taken place. In that part of its reasoning, the Court provides useful guidance on the distinction between servitude and forced labour as a prerequisite for properly qualifying a situation as trafficking⁵³. However, it then simply asserts that the facts constitute human trafficking and forced labour and that they match with the definition of trafficking as set out in the Palermo Protocol and the European Trafficking Convention, but without explaining why, without developing any legal reasoning that supports this conclusion⁵⁴. As opposed to what it did to establish the existence of forced labour, the Court fails to establish that the constitutive elements of human trafficking have

⁴⁵ *Rantsev*, para. 277.

⁴⁶ *Ibid.*, para. 278.

⁴⁷ *Ibid.*, para. 282.

⁴⁸ *Ibid.*

⁴⁹ PIOTROWICZ, R., “States's Obligations under Human Rights Law ...”; cit., p. 196; ALLAIN, J., “Rantsev v Cyprus and Russia: The European Court of Human Rights and Trafficking as Slavery”, *Human Rights Law Review*, vol. 10(3), 2010, p. 554; and STOYANOVA, V., *Human Trafficking and Slavery Reconsidered, Conceptual Limits and States' Positive Obligations in European Law*, Cambridge University Press, 2017, pp. 298-299.

⁵⁰ *L.E.*, para. 58 and *J. and Others*, para. 104.

⁵¹ *Chowdury*, paras. 100-102.

⁵² *Ibid.*, paras. 94-99.

⁵³ *Ibid.*, para. 99, also referring to *C.N. and V.*, para. 91.

⁵⁴ *Chowdury*, para. 100.

been fulfilled (in particular the “action” element, as it might be well argued the other two elements – the means and the purpose - can be subsumed under the notion of forced labour⁵⁵). The end result is that in *Chowdury* forced labour and trafficking have been conflated, as no distinctive feature between the two is acknowledged by the Court⁵⁶.

On that basis, we conclude at two major shortcomings in the Court’s case law in this area: 1. As opposed to what it does with the other practices prohibited under Article 4, the Court fails to ascertain the constitutive elements of trafficking in any given situation and thus to establish why a given situation constitutes trafficking⁵⁷; 2. Once it has established that trafficking has occurred, either it fails to relate trafficking with any of the conducts of Article 4, or, when it does so, it assimilate them, failing to establish a coherent relationship between them that acknowledges what remakes them distinct and, at the same time, related.

B) States’ positive obligations under Article 4

In *Rantsev* the Court broadens the scope of States’ positive obligations as previously identified in *Siliadin*, establishing that these must address three aspects: the prevention of trafficking, the protection of victims and the punishment of traffickers, as follows:

The Court observes that the Palermo Protocol and the Anti-Trafficking Convention refer to the need for a comprehensive approach to combat trafficking which includes measures to prevent trafficking and to protect victims, in addition to measures to punish traffickers [...]. The extent of the positive obligations arising under Article 4 must be considered within this broader context.⁵⁸

Moreover, the Court identifies three different categories of States’ obligations. Firstly, the obligation to put in place an appropriate legislative and administrative framework to punish traffickers, prevent trafficking and protect victims⁵⁹. Secondly, the obligation to take operational measures to protect victims when State authorities were or should have been aware that an identified individual was at real and immediate risk of being trafficked⁶⁰. And thirdly, the obligation to investigate and prosecute potential trafficking situations⁶¹.

The *Rantsev* case should be praised for adopting a comprehensive approach to trafficking, in line with the European Trafficking Convention and, more broadly, with the Court’s doctrine of positive obligations. The latter requires States to take proactive action to prevent, stop and remedy human rights abuses so as to guarantee a practical end effective

⁵⁵ For the three elements of the definition of human trafficking, see footnote 11 above.

⁵⁶ For a more detailed analysis on this point, see MILANO, V., “Uncovering labour exploitation ...”, cit., pp. 90-94.

⁵⁷ Indeed, in all other trafficking cases it adjudicated, the Court also failed to ascertain that the constitutive elements of trafficking had been fulfilled, simply asserting that trafficking had taken place.

⁵⁸ *Rantsev*, para. 285.

⁵⁹ *Ibid.*, para. 284.

⁶⁰ *Ibid.*, para. 286.

⁶¹ *Ibid.*, para. 288.

protection of rights, including against acts committed by non-state actors⁶². On that basis, the ECtHR has issued the first international pronouncement establishing that trafficking is a severe human rights violation that creates wide-ranging positive obligations for States. However, it is regrettable that the Courts' subsequent case law highlights a regressive trend in relation to this holistic approach. Such regression affects all three categories of obligations, but most distinctively the first one: the obligation to put in place an appropriate legislative and administrative framework, as explained henceforth.

In *Rantsev* and *L.E.* the Court explains that the legislative and administrative framework must not only be directed at punishing traffickers but also at preventing trafficking and at protecting victims.⁶³ In *Rantsev*, it verified whether these requirements had been fulfilled and found that they were not, principally because Cypriot immigration laws promoted the trafficking of young women into cabarets in Cyprus for the purpose of sexual exploitation and, despite having been alerted by relevant national and international bodies, Cypriot authorities had failed to amend the relevant regime (the *artiste visas* regime)⁶⁴. In *L.E.*, however, the Court fails to perform a comparable review, as it checks compliance with these requirements in a very superficial way. The existence of legislation addressing trafficking is considered sufficient to establish that the normative framework is adequate, without exploring the content and scope of that legislation and without considering whether the rest of the legislative and administrative framework is adequate to address trafficking or, at least, not to encourage it⁶⁵.

In the last two cases, the set-back is even greater. In *Chowdury*, the need for the regulatory framework to address these three areas - prevention, protection and prosecution - is not even referred to and the Court entirely fails to review whether Greek laws and regulations address the prevention of trafficking and the protection of its victims. Also, it only summarily reviews the adequacy of the criminal law framework, and even in that context fails to detect important shortcomings. It fails to point to the fact that the Greek legislation does not criminalize forced labour as a conduct separate from human trafficking. Also, it fails to detect that even the definition of trafficking fails to adequately refer to forced labour⁶⁶. Finally, in *J. and Others* the setback is complete: the Court does not even include

⁶² On the doctrine of positive obligations as developed by the ECtHR, see STARMER, K., *Positive obligations under the Convention. Understanding Human Rights Principles*, Hart Publishing, 2001; MOWBRAY, A. R., *The development of positive obligations under the European Convention on Human Rights by the European Court of Human Rights*, Hart Publishing, 2004; AKANDJI-KOMBE, J. F., *Positive Obligations under the European Convention on Human Rights, A guide to the implementation of the European Convention on Human Rights*, Council of Europe: Human rights handbooks, 2007; and XENOS, D., *The Positive Obligations of the State under the European Convention on Human Rights*, Routledge, 2011.

⁶³ *Rantsev*, para. 285; and *L.E.*, para. 65.

⁶⁴ *Rantsev*, paras. 291-292. See MILANO, V., "The European Court of Human Rights' Case Law ...", cit., pp. 712-713.

⁶⁵ *L.E.*, para. 72. See MILANO, V., "The European Court of Human Rights' Case Law ...", cit., pp. 711-716.

⁶⁶ *Chowdury*, paras. 105-109. For a detailed explanation, see MILANO, V., "Uncovering labour exploitation ...", cit., pp. 97-99. On this point, see also STOYANOVA, V., "Sweet Taste with Bitter Roots: Forced Labour and *Chowdury v Greece*", *European Human Rights Law Review*, n. 1, 2018, pp. 73-74.

the need to have an adequate legislative and administrative framework in the set of positive obligation it reviews°.

This negative trend in the Court's consideration of States' positive obligation to have an adequate legislative and administrative framework is extremely worrying. Such a framework is an essential component of prevention, protection and prosecution efforts. The Court shall, first of all, ensure that the normative framework adequately criminalizes relevant offences. In addition, it shall ensure that it addresses structural factors in areas such as immigration and labour laws that promote trafficking in the first place and create vulnerability to severe forms of exploitation. It shall also ensure that the legal and administrative framework provides for adequate protection and assistance measures for identified victims. How can the Court establish that a State fulfilled its positive obligations under Article 4 if it does not assess the existence and adequacy of such a framework? These aspects shall be addressed in national policies and frameworks from a preventative perspective, and the fact that adequate measures might have been taken in a particular case is a separate question, a question that relates to a separate obligation⁶⁷.

In terms of protective operational measures to be taken in the particular case, the Court has been moving quite randomly between two conceptions. It first adopted a broad one in *Rantsev*, where it required States to proactively identify victims and rescue them, an approach that fully conforms to its broader *Osman* test or doctrine of the foreseeable risk⁶⁸. Indeed, it found Cyprus in violation of its obligations under Article 4 because the police failed to proactively interview Ms Rantseva during the hours she spent at the police station and, based on available indicators, to identify her and protect her as a potential trafficking victim. The Court then inexplicably abandoned this perspective in *L.E.* to only focus on a reactive duty solely triggered when victims themselves report their situation. This is a dangerously restrictive approach to protection duties, in particularly when knowing that trafficking victims are in the vast majority of cases too afraid to proactively report their situation. For that reason, the European Anti-trafficking Convention requires public officials to be able to identify signs of trafficking, to inform victims of their rights and to provide them with protection and assistance. According to these standards, when there are reasonable grounds to suspect that a person might be a victim of trafficking, State authorities have a proactive duty to identify and protect them, without waiting for the victim to self-identify as a trafficking victim⁶⁹. Finally, the Court came back to a proactive conception in *Chowdury*.

⁶⁷ The study carried out by the EU Fundamental Rights Agency identified inadequate legal and institutional framework as one of the four main risk factors for labour exploitation; in FRA, *Severe labour exploitation ...*, cit., p. 44. See also MILANO, V., "Uncovering labour exploitation ...", cit., pp. 95-102.

⁶⁸ On the *Osman* test, see EBERT, F. C. and SIJNENSKY, R. I., "Preventing Violations of the Right to Life in the European and Inter-American Systems: From the *Osman* test to a Coherent Doctrine on Risk Prevention?", *Human Rights Law Review*, vol. 15, 2015, pp. 343-368. On how the ECtHR applied it to trafficking cases, see STOYANOVA, V., *Human Trafficking and Slavery reconsidered*, cit., pp. 400-407.

⁶⁹ The duty to identify and protect trafficking victims as soon as reasonable grounds to suspect arise is clearly established in European law: see Article 10(2) of the European Trafficking Convention and Article 11(2) and (4) of the Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, O.J. L 101/1,

In addition to this lack of coherence on the proactive side of protection, it is argued that the reactive side is also considered from a too narrow perspective. For example, in *J. and Others* the Court praises Austria for adopting a broad set of protection and assistance measures for the victims – interview by specialized officers, adoption of a personal data disclosure ban, granting of a residence and work permit and assistance by a specialized NGO⁷⁰ – in the absence of any allegation in that respect from the applicants. On the contrary, in *Chowdury* the Court fails to assess whether similar measures have been implemented by Greek authorities while applicants had pointed to failures in that regard⁷¹.

Finally, the obligation to investigate and prosecute is generally addressed in an adequate and comprehensive way in the Court's trafficking case law, with the exception of *J. and Others*. In the latter, the complex transnational aspects of the case lead the Court to address the way this feature determines national and transnational investigation and prosecution duties. However, the Court provided a too narrow interpretation of such duties⁷². This is particularly worrying when considering that one of the main purposes of international anti-trafficking instruments is the promotion of judicial investigation and cooperation in transnational trafficking cases. The Court shall not be too lenient on these duties, since effective investigation and cooperation in transnational trafficking cases is key to successfully prevent and fight this crime.

IV. THE IACHR'S RULING IN *HACIENDA BRASIL VERDE WORKERS V. BRAZIL*

In *Hacienda Brasil Verde*⁷³, the IACHR addressed the abusive living and working conditions to which more than 100 workers were subjected to in "Hacienda Brasil Verde", one of the biggest cattle ranching companies in the State of Pará, in the north of Brazil⁷⁴. Two groups of workers were identified as victims by the Court in this case: a first group of 43 men that was rescued by the Ministry of Work in 1997, following a complaint by the Comisión Pastoral de la Tierra (CPT), and a second group of 85 men that was rescued by the Ministry in 2000, following a complaint made by two workers – one of them minor - who had managed to escape the ranch⁷⁵. All workers had been recruited in poor areas of Brazil under false promises of a decent job, and once transferred to the ranch were

15.04.2011. For a discussion on how the Court interprets this duty in *L.E.* as opposed to *Rantsev*, see MILANO, V., "The European Court of Human Rights' Case Law ..."; cit., pp. 716-721.

⁷⁰ *J. and Others*, para. 111.

⁷¹ *Chowdury*, para 71. For a more detailed analysis of these aspects in the ECtHR's trafficking case law, see MILANO, V., "Uncovering labour exploitation ...", cit., pp. 102-106.

⁷² *Ibid.*, pp. 108-113.

⁷³ See footnote 8.

⁷⁴ The case was initially submitted to the Inter-American Commission of Human Rights (IACmHR) by the Comisión Pastoral de la Tierra and the Centro por la Justicia y el Derecho Internacional in 1998. The IACmHR decision was issued on 3 November 2011, in Report N° 169/11. On 4 March 2015, the IACmHR filed the case before the IACHR.

⁷⁵ However, the Court appears to focus more on the violations relating to the second group when adjudicating the case.

forced to work and prevented to leave under the threat of violence. They were watched over by armed security guards, left without adequate shelter or food, and never received the promised salaries. Despite several raids in the ranch between 1988 and 2000 where more than 300 workers were rescued by the authorities, no criminal charges had been levelled at the company and none of the workers had received any compensation⁷⁶.

We will now turn to examine the reasoning followed by the Court in this case and the findings reached, structuring our analysis around the same two broad issues addressed when examining the ECtHR's case law: the definition scope of the prohibition of trafficking and its relationship with slavery, servitude and forced labour, and the scope of the positive obligations triggered by the prohibition of these conducts. While the main focus is on trafficking, the way the other conducts are interpreted is also essential as it contributes to determine how trafficking is understood.

1. On the prohibition of trafficking, slavery, servitude and forced labour

The Court first establishes that the prohibitions of slavery, servitude and trafficking in women included in Article 6(1) and the prohibition of forced labour included in Article 6(2) are of an essential character as they form part of the list of non-derogable rights as established under Article 27(2) of the American Convention⁷⁷. Since this is the first time the Court directly addresses a case under Article 6(1), it considered that it needed to provide clarity on how the conducts prohibited under that Article should be interpreted⁷⁸. Similarly to what the ECtHR does when applying its living document doctrine, the Court takes as a starting point of its analysis the rule of evolutive or systemic interpretation as enshrined in Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT), based on which it will interpret Article 6 in the framework of the entire legal system that prevails at the time of its interpretation in order to ascertain the current meaning of these prohibitions⁷⁹.

On slavery, the Court reiterates its character as a *jus cogens* prohibition⁸⁰ and finds that the 1926 Convention has not changed substantially and is consolidated in international law⁸¹. However, having regard to the jurisprudence of other international tribunals, it considers that its interpretation has evolved and finds that the contemporary definition of slavery features two elements. First, it includes both the *de iure* or *de facto* situation or condition of the victim, meaning that it does not require establishing any "legal property"

⁷⁶ For the facts of the case, see *Hacienda Brasil Verde*, paras. 128-188.

⁷⁷ *Ibid.*, para. 243. Similarly, see *Rantsev*, para 283.

⁷⁸ *Hacienda Brasil Verde*, para. 244. Slavery and forced labor had been referred to by the Court in other few cases, such as *Rio Negro Massacres v Guatemala* (Judgment of 4 September 2012, IACHR Series C, N° 250) and *Ituango Massacres v Colombia* (Judgment of 1 July 2006, IACHR Series C, N° 148 (*Ituango Massacres*)), but they were not that central to the case and were thus not comprehensively addressed. On these cases, see DUFFY, H., "Litigating Modern Day Slavery in Regional Courts...", cit., pp. 21-23.

⁷⁹ *Ibid.*, paras. 245-247.

⁸⁰ *Ibid.*, para 249.

⁸¹ *Ibid.*, para 268.

over a person⁸². Second, it finds that what characterizes slavery is the exercise of “the powers attaching to the rights of ownership” by the perpetrator. At this point, it develops its reasoning a bit further on what this expression actually means and requires. It finds that ascertaining whether these powers have been exercised requires establishing whether the attributes of property have been exercised over a person. It then explains that, in light of the present-day evolution, this exercise should be understood as the control exercised over a person that significantly restricts or deprives that person of his or her individual freedom, with the intent of exploitation through the use, management, benefit, transfer or divestment of a person, and which is generally obtained through violence, deception and/or coercion⁸³. After listing a series of elements that should be considered in order to ascertain whether the attributes of property have been exercised, the Court concludes that a situation of slavery represents a substantial restriction of the legal personality of a human being⁸⁴. This finding is coherent with the latest interpretation of the concept of slavery made by the ECtHR, and recalls more specifically the interpretation of that notion made by the ICTY in *Kunarac* where contemporary slavery (or slavery *de facto*) is described as follows:

the victim is not subject to the exercise of the more extreme rights of ownership associated with “chattel slavery”, but in all cases, as a result of the exercise of any or all of the powers attaching to the right of ownership, there is some destruction of the juridical personality; the destruction is greater in the case of “chattel slavery” but the difference is one of degree⁸⁵.

With regard to servitude, in order to identify the content of this prohibition the Court refers to the Supplementary Convention on Slavery – confirming the assumption we referred to above that practices similar to slavery and servitude are the same⁸⁶ – and to the interpretations of the notion of servitude made by the ECtHR in its servitude case law⁸⁷, to reach the conclusion that servitude under Article 6(1) of the ACHR must be interpreted as “the obligation to perform work for others, imposed by coercion, and the obligation to live on another person's property, without the possibility of changing that condition”⁸⁸.

On trafficking, having considered the Palermo Protocol, the European Trafficking Convention and the ECtHR's view that the notion of trafficking in persons is subsumed under the prohibition of slavery, servitude and forced labour of Article 4 ECHR, the IACHR finds that, in the current stage of development of international human rights law, the notions of “slave trade and traffic in women” in Article 6(1) have transcended their

⁸² Ibid., paras. 268-269. For the same reasoning by the ECtHR, see above pp. 8-9.

⁸³ Ibid., para. 271. In developing this interpretation, the Court relies on the contemporary meaning of slavery developed by J. ALLAIN, who submitted a report and intervened in the proceedings as an expert called by the Court (that reasoning can also be found in ALLAIN, J. *Slavery in International Law* ..., cit., pp. 127-141). It also refers to the *Bellagio-Harvard Guidelines on the Legal Parameters of Slavery*, adopted by a group of experts in 2012: see *Hacienda Brasil Verde*, para 271.

⁸⁴ *Hacienda Brasil Verde*, para. 273.

⁸⁵ *Kunarac* Appeal Judgments, para. 117.

⁸⁶ See above footnote 15.

⁸⁷ *Hacienda Brasil Verde*, paras. 278 and 279 respectively.

⁸⁸ Ibid., para. 280 (author's translation).

literal meaning to protect all “persons” being trafficked, not only women. They should therefore be read as “trafficking in persons”, in accordance with the Palermo Protocol definition⁸⁹. This is certainly an important decision, which updates the reading of Article 6(1) ACHR in accordance with the significant evolution the notion of trafficking has experienced in international law in the last twenty years. Indeed, when the ACHR was adopted, trafficking was consistently considered a conduct that only affected women, both at universal and regional level. Since at the end of the nineties a new awareness relating to other types of trafficking has significantly changed the understanding of the notion of trafficking, a new reading of that ACHR prohibition based on Article 31(3)(c) of the VCLT was indeed required, in order to provide effective protection to victims and potential victims under present-day international standards⁹⁰.

Finally, in relation to forced labour, the Court reiterates the need to refer to the ILO Forced Labour Convention definition, recalling that in accordance with the interpretation it made of this notion in the *Ituango Massacres* case, forced labour includes two elements: that the work is performed “under the menace of a penalty” and that it is not offered voluntarily⁹¹. This is in conformity with the way this notion is generally interpreted, including by ILO and the ECtHR.

The Court then applies these concepts to the facts of the case. Having ascertained that the circumstances of the case included, inter alia, deceit, coercion, exploitation, limitation of the freedom of movement, lack of salary and degrading living and working conditions⁹², the Court establishes that the conditions the workers were subjected to not only amounted to bonded labour and forced labour⁹³, but also reached the higher threshold of slavery, finding that control as a manifestation of the right to property was exercised over the workers⁹⁴.

Finally, the Court turns to examine whether the facts also constitute trafficking. It finds that the circumstances of the case amount to trafficking in persons since the victims were recruited from the poorest regions of the country through fraud, deceit and false promises, according to established patterns of human trafficking in Brazil as described by relevant experts and victims themselves⁹⁵. Importantly, this assessment points to the element of recruitment and movement, i.e. the “action” element of trafficking, as the distinctive element of trafficking as opposed to its forms of exploitation taken *per se*, an element the ECtHR failed to substantiate in its trafficking case law. As has been referred to earlier,

⁸⁹ Ibid., paras. 288-290.

⁹⁰ On the evolution of the international law of human trafficking since the adoption of the first anti-trafficking conventions, see GALLAGHER, A., *The International Law of Human Trafficking*, Cambridge University Press, 2010, pp. 12-143; STOYANOVA, V., *Human Trafficking and Slavery Reconsidered*, cit., pp. 19-31; and MILANO, V., “Protección de las víctimas de trata con fines de explotación sexual: Estándares internacionales en materia de enfoque de derechos humanos y retos relativos a su aplicación en España”, *Revista Electrónica de Estudios Internacionales*, vol. 32, 2016, pp. 5-28.

⁹¹ See *Hacienda Brazil Verde*, paras 291-293; and *Ituango Massacres*, paras. 155-164.

⁹² *Hacienda Brazil Verde*, paras. 297-303.

⁹³ Ibid., paras. 303-304.

⁹⁴ Ibid., para. 304.

⁹⁵ Ibid., para. 305.

in *Chowdury* the ECtHR carefully assessed the existence of the two elements of forced labour, which also substantiate two of the three elements of the trafficking definition – deceit and/or threat as a means, and forced labour itself as a form of exploitation –, but then simply stated that the victims had been trafficked without explaining why, i.e. how the third element, the action element, had been fulfilled.

In contrast, the IACHR reasoning brings much needed clarity in this regard. It shows that the action element - which entails movement - is the one that differentiates a forced labour/servitude/slavery situation from a trafficking into forced labour/servitude/slavery situation, and that this element needs to be corroborated in order to establish that trafficking has indeed taken place. As a result, the constituent elements of the relevant conducts are identified: each practice appears as distinct and, at the same time, related, avoiding conflation.

2. On States' positive obligations

The Court reiterates its due diligence or positive obligations doctrine according to which it is not enough for States to refrain from violating rights: they are also bound to adopt positive measures in that regard⁹⁶. Already in its first judgment, *Velásquez Rodríguez v. Honduras*⁹⁷, the IACHR showed a strong commitment to this concept, whose legal basis is to be found in Article 1 of the ACHR that requires States Parties not only to “respect” but also to “ensure” the rights recognized in the Convention⁹⁸. Thus, “the State is obligated to prevent, investigate and punish human rights violations”⁹⁹, and this obligation is not limited to State conduct:

An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.¹⁰⁰

In that first case, the Court already established that the Convention requires States to exercise due diligence to prevent, investigate and punish violations of human rights that are the act of individuals, and to restore the right violated and provide compensation for damages resulting from the violation¹⁰¹.

⁹⁶ Ibid., para. 316.

⁹⁷ *Velásquez Rodríguez v. Honduras*, Judgment of 29 July 1988, Series C No. 4 (*Velásquez Rodríguez*).

⁹⁸ Ibid., para. 166.

⁹⁹ Ibid., para. 172.

¹⁰⁰ Ibid..

¹⁰¹ *Velásquez Rodríguez case*, paras. 166 and 174. On the due diligence obligations in international human rights law and its development by human rights courts and bodies, see PISILLO MAZZESCHI, R., “Responsabilité de l’Etat pour violation des obligations positives relatives aux droits de l’homme”, *Collected Courses of The Hague Academy of International Law*, vol. 333, 2008, pp. 175-506; GALLAGHER, A., *The International Law ...*, cit., pp. 235-251; EBERT, F. C. and SIJNISKY, R. I., “Preventing Violations of the Right to Life ...”, cit., pp. 343-368.

On that basis, in *Hacienda Brasil Verde* the Court finds that Article 6 read in conjunction with Article 1.1., requires not only that

nobody is subjected to slavery, servitude, trafficking or forced labour, but also that States take all appropriate measures to put an end to those practices and prevent the violation of the right not to be subjected to these conducts, in accordance with the duty to ensure the full and free exercise of the rights of all persons under its jurisdiction¹⁰².

This entails the obligation to create the conditions required so that violations to these rights do not take place and, in particular, the duty to prevent both its agents and third parties from infringing them¹⁰³. In that context, and referring to the high number of victims in Brazil in what are “the last links of the supply chains of a globalized economy”, the Court emphasizes that measures to prevent these practices must include measures to reduce the demand that fuels labour exploitation¹⁰⁴. This is certainly an important contribution when considering that the ECtHR has weakened the initial focus it had put on prevention strategies. It shall be hoped that the IACHR will maintain its stance on this point and avoid following the same path taken by the ECtHR. Undoubtedly, addressing structural weaknesses of the State apparatus and legal deficiencies that encourage and maintain these exploitative practices is key to their eradication. In a context where States fail to address trafficking and related practices as systemic problems sustained by laws and policies that create specific vulnerabilities, the focus human rights courts will put on States’ responsibility to prevent these extreme forms of exploitation through modifying structural deficits is of key importance.

The Court then spells out in more details the content of State’s positive obligations in relation to slavery, servitude, trafficking in persons and forced labour, generally referred to by the Court as the duties to “prevent and investigate” such situations. According to the Court, States have the obligation to:

- (i) initiate ex officio and immediately an effective investigation to identify, prosecute and punish those responsible, when there is a complaint or reason to believe that persons subject to their jurisdiction are subject to one of the cases provided for in Article 6.1 and 6.2 of the Convention;
- (ii) eliminate all legislation that legalizes or tolerates slavery and servitude;
- (iii) criminalize such figures, with severe penalties;
- (iv) conduct inspections or other measures to detect such practices, and
- (v) take measures to protect and assist victims¹⁰⁵.

In line with the holistic approach to positive obligations taken by the ECtHR in *Rantsev*, the Court insists on States’ duty to adopt comprehensive measures in order to comply with their due diligence duty. To that effect, States should first of all have in place a legal framework that provides adequate protection from these conducts, and, secondly, apply

¹⁰² Ibid., para. 317 (translation by the author).

¹⁰³ Ibid.

¹⁰⁴ Ibid., para. 318.

¹⁰⁵ Ibid., para. 319 (translation by the author).

it¹⁰⁶. When applying these principles to the case, the Court finds that Brazil violated its positive obligations to prevent and prosecute the trafficking of the 85 workers into conditions amounting to slavery. We will examine the Court's findings from the perspective of the three main areas where States' obligations are triggered: protection, prevention and prosecution.

A) Protection

The duty to protect victims is included by the Court in the list of States' duties referred to above. However, when developing its reasoning and listing its findings, the Court does not single it out as a separate category, which already shows a certain side-lining of protection and assistance duties in the Court's reasoning. Indeed, the Court develops a first part of its reasoning around the State's duties to effectively prevent trafficking and slavery-related practices (paras. 322-342), and a second part around its duties to effectively investigate and prosecute these practices in full respect of judicial guarantees (paras. 344-434). No heading is devoted to protection aspects: the Court only focuses on protection from the preventive side, as will be examined in more details under the next heading devoted to prevention. It focuses on what we referred to in the ECtHR's context as the proactive aspect of protection, i.e. the duty to avoid that a human rights violation takes place or lasts as soon as the circumstances point to a possibility that such violation might be taking place.

While this is indeed a fundamental aspect, it does not explain why the IACHR fails to address the reactive aspects of protection. From a human rights perspective, and in line with human trafficking instruments, a victim who has already been identified and rescued should be protected from further harm and given access to a range of assistance services. Indeed, a few paragraphs earlier the Court itself included that aspect in the list of States' obligations, referring to their duty to "take measures to protect and assist victims"¹⁰⁷. Moreover, the applicants addressed this aspect in their allegations, emphasising that the State must guarantee the recovery and rehabilitation of persons subjected to slave labour in the country and must inform them promptly of their rights and of the social programs they can access to¹⁰⁸.

In this context, it is regrettable that the Court failed to adequately review compliance with this duty, or did so in a very superficial way. In its reasoning, the Court refers to the fact that the State has generally increased actions at the national level in the areas of prevention and workers rehabilitation, but it does not substantiate that claim. It exclusively refers to a law that guarantees access to unemployment benefits to workers rescued from forced labour or slavery¹⁰⁹. This measure alone is, of course, far from guaranteeing the protection and assistance victims require. Beyond the reference to unemployment benefits, the Court fails to ascertain the existence of general policies, laws and mechanisms that properly address victims' protection and assistance needs in terms

¹⁰⁶ Ibid., para. 320.

¹⁰⁷ Ibid., para. 319, referred to in the previous page.

¹⁰⁸ Ibid., para. 464.

¹⁰⁹ Ibid., para. 469 b) and c).

of, inter alia, safety, access to shelter and to medical, psychological, social and legal assistance, protection of their privacy and access to reintegration programmes.

Moreover, the Court fails to determine whether protection and assistance have been provided to the victims in the case at hand. The only exception concerns the minor who escaped from the farm and reported the situation to the police, about whom the Court states that, based on the Worst Forms of Child Labour Convention, the State should have provided him with appropriate assistance for his rehabilitation and social integration, as well as access to free basic education and, where possible, to vocational training¹¹⁰. Beyond this assertion, which strangely enough does not lead the Court to establish a violation of the duty to provide protection and assistance to victims, Brazil's obligation to provide adult victims with protection and assistance remains unaddressed.

In sum, nothing is said by the Court either about the protection and support measures available to slavery and trafficking victims under Brazilian law or about whether the victims of the *Hacienda Brasil Verde* case have been informed about their rights and provided with access to any such measures. For this reason, we disagree with the Court's finding that actions and policies adopted by the State in the area of protection are sufficient and that it is not necessary for it to order additional measures¹¹¹.

B) Prevention

On the contrary, the Court puts considerable emphasis on the duty to prevent slavery, servitude, trafficking and forced labour, and spells out in some detail what a comprehensive prevention strategy requires:

- addressing risk factors;
- strengthening institutions so that they can provide an effective response to the phenomenon;
- taking preventive measures in specific cases where it is clear that certain groups of persons may be victims of trafficking or slavery, which is particularly stringent in these cases in light of the peremptory character of the prohibition of slavery and of the gravity of the human rights violations involved¹¹².

This latest element refers to the proactive aspect of protection we mentioned under the previous heading: it refers to States' duty to proactively identify and protect victims as soon as the circumstances point to a possibility that a person or group of persons might be in a situation of slavery or trafficking¹¹³.

This is the same test the ECtHR applies to assess if States have complied with their duty to adopt protective operational measures in a given case. This aspect actually lies in between protection and prevention. It is indeed about rescuing and protecting, at the

¹¹⁰ Ibid., para. 332-333.

¹¹¹ Ibid., para. 470.

¹¹² Ibid., para. 320.

¹¹³ On when this duty is triggered, see *ibid.*, paras. 322-324

earliest possible stage, victims whose rights have already been infringed, and not so much about avoiding these forms of exploitation to take place. However, it also has a preventive aspect to the extent that relevant policies and interventions should be effective enough to detect abuses at an early stage and to avoid future exploitations in a same location, which did regrettably not happen in the Hacienda Brasil Verde ranch.

Indeed, when the Court turns to apply these principles to the facts of the case, it finds a violation of the duty to prevent slavery and trafficking, which manifested itself in two ways. First, despite its awareness that practices amounting to slavery or similar to slavery were taking place in Hacienda Brasil Verde since 1988 - several inspections had taken place between 1988 and 2000 – the State did not adopt preventive measures that could be considered sufficient or effective to prevent slavery to continue to take place in the mentioned location. Indeed, the State should have intensified the inspections in order to eradicate slavery in the ranch. Secondly, following the complaints by the two victims who managed to escape, the police had failed to act promptly: too much time elapsed between the complaint and the inspections, and the intervention of the federal police was not properly coordinated¹¹⁴.

Moreover, the Court focuses on another important aspect of prevention, one that refers to the systemic aspects of exploitation: the duty to address its root causes. The Court finds that the State of Brazil did not address the structural historical discrimination of the 85 workers based on their situation of extreme poverty (they were all recruited in the poorest regions of Brazil) and illiteracy. In a timely manner, the Court recalls that Article 1(1) of the ACHR extends the prohibition of discrimination to the enjoyment of all the rights established in the Convention and that the “economic position” of individuals is one of the grounds of discrimination expressly prohibited under Article 1(1). It then finds that the well-known structural discrimination of the workers and their ensuing vulnerability to exploitation and slavery had not been considered nor addressed by the State, which the Court qualifies as constituting a violation of Article 6 (1) of the American Convention read in conjunction with Article 1(1) on non-discrimination¹¹⁵.

This attention to the root causes of exploitation and to the ensuing States’ duty to address structural discrimination as a determining factor is particularly relevant. It puts a long-awaited emphasis on the structural aspects of slavery, trafficking and other forms of exploitation. It highlights how these phenomena are not the result of isolated criminal actions but the consequence of structural situations of inequality that the State fails to address and is, as a consequence, responsible for perpetuating.

From this perspective, the IACHR went beyond the ECtHR’ overall understanding of preventive duties. Certainly, the ECtHR embraced a broad understanding of prevention in *Rantsev*, establishing that prevention requires addressing systemic problems such as immigration regulations that provide traffickers and employers easy ways to traffic people and continue to exploit them. However, it never referred to States’ duty to address inequality and discrimination as root causes that make people vulnerable to trafficking,

¹¹⁴ Ibid., paras. 326-328 and 342-343.

¹¹⁵ Ibid., paras 339-341.

such as, for example, gender discrimination and poverty. Indeed, in *Rantsev* and *L.E.* gender discrimination was clearly a determining factor, but the Court failed to address it from the perspective of a root cause of trafficking and never pointed to States' duties to adopt policies that address gender discrimination in the first place¹¹⁶.

In this context, the IACHR shall be praised for highlighting States' duty to adopt positive measures to change situations of discrimination that affect particular groups within the society, and their special duty to protect members of these groups from the action of third parties who take advantage of and exacerbate such discrimination¹¹⁷.

Only one criticism can be levelled at the Court in this context. When it refers to the shared "characteristics of particular victimization" within the group of workers exploited in Hacienda Brasil Verde, it does not refer to the fact that the most of the victims were not only poor and illiterate but also afro-descendants, a characteristic the Court had referred to earlier in its judgment¹¹⁸. In light of the serious and structural nature of racial discrimination against afro-descendants in Brazil and in the region, the Court should have further developed its analysis by including racial discrimination as one of the multiple or intersecting grounds of discrimination that constitute a major obstacle to the enjoyment of the rights enshrined in the ACHR, including the right to be free from slavery and human trafficking¹¹⁹.

Based on all these findings, the Court concludes that the State did not act with the due diligence required to adequately prevent the situation of slavery victims were subjected to and that it did not act as could have been reasonably expected to put an end to the mentioned violation. It thus established a violation of Article 6(1) ACHR, related with, inter alia, Article 1(1)¹²⁰.

C) Prosecution

Turning to the examination of the violations related to the criminal investigation and prosecution, the Court recalls that the prohibition of slavery and other practices in Article 6 also entails the State's positive obligation to initiate ex officio an investigation in order to establish the corresponding individual responsibilities when States are aware of an act

¹¹⁶ On the ECtHR approach to gender discrimination and stereotyping, see TIMMER, A., "Toward an Anti-Stereotyping Approach for the European Court of Human Rights", *Human Rights Law Review*, vol. 11(4), 2011, pp. 707-738; and MILANO V., "The European Court of Human Rights' ...", cit., pp. 720-721.

¹¹⁷ *Hacienda Brasil Verde*, para. 336. This had already been said by the IACHR in, for example, *Juridical Condition and Rights of Undocumented Workers*, Advisory Opinion OC-18/03, 17 September 2003, para. 104; *Case of Angel Alberto Duke v. Colombia*, Judgment of 26 February 2016, Series C No. 310, para 92; and *Caso Comunidad Indígena Xákmok Kásek. v. Paraguay*, Judgment of 24 August 2010, Series C No. 214, para 271.

¹¹⁸ See *Hacienda Brasil Verde*, paras. 113 and 226.

¹¹⁹ In this vein, see also GOS, T., "Hacienda Brasil Verde Workers v. Brazil: Slavery ...", cit. On the persisting violence, racial discrimination and institutional racism against Afro-descendants in Brazil, see the recent statement by the IACmHR "IACHR Expresses Deep Concern over Growing Violence against Afro-descendants in Brazil", Press Release 209/18, 26 September 2018, available at: http://www.oas.org/en/iachr/media_center/PReleases/2018/209.asp.

¹²⁰ *Hacienda Brasil Verde*, para. 343.

prohibited under Article 6, referring to it as a due diligence obligation. The Court eventually finds a violation of that duty because unjustifiable delays and procedural obstacles ended-up with the dismissal of the case. As a consequence, no judicial proceedings on the merits ever took place and the crimes went unpunished, which is a particularly serious consequence in light of the seriousness of the human rights violations involved¹²¹.

The Court also established that the fact that the crime of slavery is prescriptible under Brazilian law is contrary to international law and represents a major obstacle to victim's access to justice¹²², and requests Brazil to modify the law in order to make the crime of slavery imprescriptible¹²³. We cannot agree with the Court's statement on this point. Beyond any consideration on whether this might be desirable, only international crimes are considered imprescriptible in international law. Therefore, slavery should only be considered as imprescriptible when it reaches the threshold of a crime against humanity or a war crime, which is not the case in *Hacienda Brasil Verde*. Surprisingly, the Court refers to slavery as such as an international crime, which is not correct, linking imprescriptibility to the *jus cogens* nature of the prohibition. This appear to be an expansionist reading of States' obligations under international law, since the *jus cogens* nature of a prohibition has to do with the nature of the State's obligation but not with the imprescriptibility of a crime in domestic criminal law.

Finally, when considering the reparations due by the State of Brazil, the Court decides that Brazil must reopen the investigation and conduct it according to a number of criteria¹²⁴ and pay victims a compensation for non-pecuniary damage (between 30.000 and 40.000 US dollars per worker)¹²⁵.

The reasoning followed by the Court and the findings reached appear generally appropriate. There is, however, one important shortcoming in the Courts' reasoning. The Court failed to adequately assess whether Brazil complied with another positive obligation that is fundamental to prosecution: the criminalization duty. Indeed, the Court did not accede to the applicants' request that Brazil should modify the definition of human trafficking in its domestic law because the human trafficking offence under Brazilian law only includes trafficking for the purpose of sexual exploitation. In our view, the applicants rightly argued that according to the Palermo Protocol, the State must criminalize trafficking in persons so as to include any type of trafficking, including trafficking for labour exploitation¹²⁶.

¹²¹ Ibid., paras. 367-368.

¹²² Ibid., paras. 412-413.

¹²³ Ibid., paras. 454-455.

¹²⁴ Ibid., para. 445: a) Ensure full access and capacity to act to the victims and their families at all stages of the investigations; b) refrain from recourse to tools such as amnesties, as well as to any procedural obstacle; c) ensure that the case is maintained under the federal jurisdiction; and d) publish the outcome of the proceedings as a way to raise awareness among the society.

¹²⁵ Ibid., para. 487.

¹²⁶ Ibid., para. 456.

The reasoning followed by the Court to dismiss this argument is highly questionable¹²⁷. The Court considers that the fact that trafficking is typified solely for the purpose of sexual exploitation has had no major impact in the present case. This consideration by the Court is based on the fact that the trafficking for labour exploitation cases concerned were covered by Article 207 of the Criminal Code, which reads: "Recruiting workers through deceit, in order to take them from one locality to another in the national territory: Penalty - detention of one to three years, and fine". As is apparent, this provision is far from complying with the requirements of the trafficking for labour exploitation offense under international law. In addition to failing to name that offense as trafficking, many of the elements of the trafficking definition are missing. In addition, the penalty is excessively lenient.

In order to abide with the ACHR prohibition of trafficking which in the words of the Court should be interpreted according to the Palermo Protocol's definition¹²⁸, one of the central obligations of Brazil should be to criminalize that conduct in domestic legislation in line with the definition enshrined in that treaty¹²⁹. By failing to do so, the Court contradicts its doctrine on States' positive obligations as developed since *Velasquez Rodriguez* and reiterated at the beginning of this same judgment. Indeed, in the latter the Court established that States' positive obligations in relation to slavery, servitude, trafficking in persons and forced labour require the State to "(iii) criminalize such figures, with severe penalties"¹³⁰.

Also, it is not acceptable to argue that the Palermo Protocol definition informs the interpretation of the prohibition of trafficking under Article 6(1) ACHR only *rationae personae*, i.e. as far as the categories of victims is concerned, but not *rationae materiae*, i.e. as far as the purposes of exploitation are concerned. Assuming the contemporary definition of trafficking should inform all requirements related to States' obligations under the ACHR. States party to that treaty should criminalize trafficking according to the Palermo Protocol's definition, in the same way that they should criminalize forced labour according to the ILO Forced Labour Convention's definition and slavery according to the Slavery Convention.

With regard to the Court's justification that any shortcoming in the definition of trafficking in persons has had no impact on the impunity of human rights violations identified in this case¹³¹, this is again questionable, for two main reasons. First, this appears to be an arbitrary statement by the Court. On what basis can the Court state that what it actually describes as "shortcomings in the definition" had no impact on the impunity that ended up prevailing in this case? It is argued that a more comprehensive criminalization of trafficking with stronger penalties - and perhaps clearer jurisdictional rules - may have prevented the case to languish during ten years before different tribunals

¹²⁷ Ibid., paras. 456-458.

¹²⁸ Ibid., paras. 288- 290.

¹²⁹ Beyond the applicability of the Palermo Protocol by way of systemic interpretation of Article 6(1) ACHR, the Palermo Protocol is directly applicable to Brazil since it ratified it in 2004.

¹³⁰ Ibid., para. 319. See above p. 19.

¹³¹ Ibid., para. 458.

and to end up being struck-out because, according to the law, the offense had already prescribed. Also, a harsher penalty would surely have entailed a longer statute of limitations period.

Secondly, proper criminalization of conducts under Article 6(1) should be assessed by the Court *per se*, regardless of the impact that criminalization may have had on the case under review, as this is a fundamental duty in terms of, *inter alia*, prevention of the human rights violations concerned through deterrence. The fact that a deficient criminal law provision can violate the ACHR *per se* without requiring a causal link with the abuses identified in the given case has been recognized in the case law of both the IACHR¹³² and the ECtHR¹³³.

In relation to the specific conducts at stake, the ECtHR insisted on the need to outlaw the conducts prohibited under Article 4 ECHR in *Siliadin*. While France argued that despite the absence of a specific provision criminalizing servitude and slavery, other criminal offenses covered the conduct at stake, the ECtHR observed that “slavery and servitude are not as such classified as offences under French criminal law” and, referring to the provisions referred to by France as applicable to the case, it held that:

those provisions do not deal specifically with the rights guaranteed under Article 4 of the Convention, but concern, in a much more restrictive way, exploitation through labour and subjection to working and living conditions that are incompatible with

¹³² In *Suárez Rosero v Ecuador*, the Court observes, referring to the Ecuadorian Criminal Code, that “in its opinion, this law violates *per se* Article 2 of the American Convention, whether or not it was enforced in the instant case”, *Suárez Rosero v Ecuador*, Judgment of 12 November 1997, Series C No. 35, paras. 97-98. In *Castillo Petruzzi and Others v Peru*, the Court held that the anti-terrorism law “is itself a violation and breach of the American Convention”, *Castillo Petruzzi and Others v Peru*, Judgment of 30 May 1999, Serie C. No. 52, para 202(a). For other IACHR cases, see PISILLO MAZZESCHI, R., “Responsabilité de l’Etat pour violation ...”, cit., pp. 329-330.

¹³³ The ECtHR has repeatedly found States in violation of their duties under the Convention for shortcomings in their legal frameworks without requiring the establishment of a causal link between these shortcomings and the abuse suffered by the applicant. In *Opuz v. Turkey*, for example, the Court found that “a failure to take reasonable measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State”, where the main shortcoming identified by the Court in that case was that “the legislative framework then in force [...] fell short of the requirements inherent in the State’s positive obligations to establish and apply effectively a system punishing all forms of domestic violence and providing sufficient safeguards for the victims”, in *Opuz*, paras. 136 and 145. In *M.C. v Bulgaria*, the Court found that the Bulgarian criminal law on rape was not adequate as it only covered certain types of rape and thus failed to guarantee the right enshrined in Article 3 ECHR; in *M.C. v Bulgaria*, paras 150 and 153. See also *Klass and Others v Germany*, Application n. 5029/71, Merits and Just Satisfaction, 6 September 1978, *E. and Others v. the United Kingdom*, Application n. 33218/96, Merits and Just Satisfaction, 26 November 2002, para. 99; *Rantsev*, paras 291-293; and *O’Keefe v Ireland*, Application n. 35810/09, Merits and Just Satisfaction, 28 January 2014, para 149. For an analysis of the positive obligation to establish an appropriate legal framework, see LAVRYSEN, L., “Protection by the Law: The Positive Obligation to Develop a Legal Framework to Adequately Protect ECHR Rights”, in E. Brems and Y. Haeck, *Human Rights and Civil Liberties in the 21st Century*, Springer, 2014, pp. 69-129; and PISILLO MAZZESCHI, R., “Responsabilité de l’Etat pour violation ...”, cit., pp. 311-329. For an in-depth reflection on the criminalization duty in the ECtHR’s case law, see TOMAS-VALIENTE LANUZA, C., “Deberes positivos del Estado y Derecho penal en la jurisprudencia del TEDH”, *InDret*, vol. 3, 2016, pp. 12-15 and 27-34.

human dignity.¹³⁴

That same issue was examined again by the Court in two similar cases¹³⁵. In all of them the Court found that the criminal legislation in force at the material time did not afford the applicant practical and effective protection against the abuses. Regrettably, the ECtHR lost sight of the central importance of this requirement in its latest trafficking case law¹³⁶. In the same way we criticized this important setback in these latest ECtHR cases, we shall equally emphasize that the IACHR should have carried out a more thorough analysis of the State's criminalization duties in *Hacienda Brasil Verde* so as to require trafficking to be criminalized under Brazilian law in full compliance with the international definition of trafficking.

V. Conclusions

The ICtHR *Hacienda Brasil Verde*'s ruling brings significant contributions to the understanding of the prohibition of trafficking in international law and of the rights and obligations this prohibition entails. It adds to the important but still incomplete legal construct build by the ECtHR in the last few years. As has been examined, the IACHR contribution does not cover all aspects. As far as States' positive obligations to protect and assist victims and to criminalize trafficking and slavery-related conducts are concerned, we highlighted that both Courts fail to develop a coherent understanding of such duties. The weakness of their reasoning around these fundamental issues is of particular concern.

Beyond that, the ECtHR should certainly take note of the IACHR's ruling on a number of important aspects. Firstly, on how trafficking relates to the conducts prohibited under Article 4 ECHR. The IACHR establishes a clear and fluid relationship between trafficking on the one hand and slavery, servitude and forced labour on the other hand. Where the ECtHR addressed them as unrelated and, later, then, as indistinct, the IACHR rightly describes them as closely related but still distinct. The IACHR follows a coherent reasoning. It first identifies the exploitative conducts the applicants were subjected to and, right thereafter, examines whether that situation might additionally be qualified as trafficking. That is to say, it firstly establishes whether the thresholds of forced labour, servitude or slavery have been reached. And secondly, it checks the element that is left to substantiate in order to assess whether trafficking has also taken place: the "action" element, assessing whether and how the victims have been recruited and moved.

This clarifies the relationship between these conducts. It clarifies that trafficking requires an additional element to be proven, an element that relates to the *process* that led the

¹³⁴ *Siliadin*, para 142

¹³⁵ *CN and V.*, paras. 105-108, and *CN*, para 76. On the requirements for effectively labelling criminal offenses under Article 4 and compliance with content and quality requirements, see GALLAGHER, A., *The International Law ...*, pp. 373-377; and ERIKSSON, M., "The Prevention of Human Trafficking. Regulating Domestic Criminal Legislation through the European Convention on Human Rights", *Nordic Journal of International Law*, vol. 82, 2013, pp. 339-368.

¹³⁶ See above at p. 13.

victims to be subjected to exploitation, to the elements of *recruitment* and *movement*. If that process fulfils the requirements of the “action” element of the trafficking definition, a forced labour or servitude or slavery situation will also be found to amount to trafficking. If it does not fulfil these elements, trafficking cannot be established and the conducts will be found to “solely” amount to forced labour, servitude and/or slavery. This reasoning very well captures the fact that trafficking is a somewhat broader offense than forced labour, servitude or slavery as it adds to them a particular process through which victims are brought into forced labour, servitude or slavery. However, if that process did not take place or cannot be demonstrated, the forced labour, servitude or slavery remain established and must produce their legal effects *per se* –which in turn highlights the importance of properly criminalizing these three conducts as autonomous crimes–.

Another positive contribution of *Hacienda Brasil Verde* is that the range of positive obligations identified by the Court applies to all conducts prohibited under Article 6(1) and (2). The scope of positive obligations applicable to slavery, servitude and forced labour, on the one hand, and to trafficking, on the other hand, are the same. This is also a more coherent approach than the one taken by the ECtHR, that has generally found the broad range of positive obligations corresponding to the three Ps (prevention, protection and prosecution) solely applicable to trafficking cases, while in forced labour and servitude cases it only identified obligations in the area of criminalization and prosecution. It is hoped that, encouraged by the stance taken by the IACHR in this case, the ECtHR will consolidate the approach it has taken in its latest ruling, i.e. *Chowdury*, where it found for the first time that the facts constituted both forced labour and trafficking and, as a consequence, attached the same broader scope of positive obligations to the two concepts. Indeed, it is hardly defensible that, unlike trafficking victims, victims of forced labour *per se* would not be in a position to invoke State’s duty to prevent forced labour and to provide them with protection and assistance.

Finally, the focus on States’ duty to combat the root causes of these exploitative practices, with reference to the deep-rooted discrimination and exclusion suffered by certain groups, is another important contribution. It should be hoped that the IACHR will continue to insist on this aspect and even broaden it – to include racial discrimination –, and that its approach will constitute a wake-up call for the ECtHR. Indeed, if the European Court is to comply with a human rights-based approach to these phenomena, it is particularly important that it comes back to an approach that gives to the underlying and systemic causes of these exploitative practices the relevance it deserves. This first ruling by the IACHR constitutes an important and timely confirmation that this is indeed the way forward if we are to address these appalling and widespread forms of exploitation with more ambition: that is to say, not as isolated criminal facts but as a consequence of structural inadequacies that generate widespread vulnerabilities within our societies.