

Article

Directing the Legal Radar at Forced Labour—Under Special Consideration of Male Victims in Norway

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Abstract: Human trafficking in the form of labour exploitation appears to have gone under the legal radar domestically, regionally, and internationally, with ensuing grave consequences for the victims concerned. This paper critically discusses the current legal developments and interpretations of global and regional legal sources on forced labour and the challenges they face. A legal analysis is supplemented by information obtained through interviews with 14 presumed male victims of forced labour, who recently escaped a coercive work situation and were living in a safe house in Oslo (Norway). The paper will demonstrate the shortcomings of the law and its application, using the case of Norway and the affected men as an example. It examines the case law of the European Court of Human Rights using a vulnerability approach and argues that the inaction in preventing and prosecuting crimes committed towards people who are exploited for forced labour is a violation of their human rights and may be interpreted as granting impunity to their perpetrators. The situation for male victims of forced labour is particularly severe.

Keywords: forced labour; human trafficking; human rights; modern slavery; ECHR; Norway



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1. Introduction

Human trafficking is prohibited by law on the domestic, regional, and international level. The United Nations (UN) Sustainable Development Goals stipulate in target 8.7. that immediate and effective measures must be taken 'to eradicate forced labour, end modern slavery and human trafficking' (United Nations Economic and Social Council 2016). The international community is determined to bring an end to these harmful practices. Yet, the legal definitions, delimitations, and applications of these different concepts causes confusion and, as a consequence, ineffective and insufficient protection for the victims¹ (McAdam 2019, p. 23).

Forced labour is one form of human trafficking that is on the rise and has become the predominant form of exploitation in many countries (GRETA 2018). Trafficking for labour exploitation has been identified as one of the major challenges in Europe. It remains a humanitarian and legal priority for all member States of the Council of Europe (Jagland 2019, p. 28). Additionally, in Norway, the majority of the victims of human trafficking are believed to be exploited for forced labour (Thorenfeldt and Stolt-Nielsen). Victims of forced labour are entitled to legal protection; however, there is a gap in their protection. This gap is caused by several problems that this paper will address, either on a general level or specifically for the case of Norway, depending on the challenges presented. First, there is no consensus on the definition of forced labour. Second, forced labour takes very different forms and occurs across various sectors in the formal and informal economy (Jagland 2019, p. 28). Moreover, the perpetrators constantly adapt their exploitive practices. Third, the detection of victims of trafficking for the purpose of labour exploitation is challenging, owing partially to the economies where it happens, and partially to a gender dimension

¹ This paper is aware of discussions and controversies surrounding victimhood, especially the presuppositions of passivity and lack of agency. The paper acknowledges but does not further discuss these matters.

(GRETA 2018; Jagland 2019, p. 29). Fourth, the victims are often migrant workers who are particularly vulnerable to exploitation due to their lack of integration in the society and to immigration policies of the respective state (Jagland 2019, p. 28). Finally, there is a lack of awareness of trafficking for labour exploitation, which is reflected in deficient identifications of victims and ensuing low numbers of investigations, prosecutions, and judgments. Research has concluded that the failure to investigate, prosecute and punish these crimes is a widespread problem which is not limited to certain continents, regions, or countries (Mapp 2021, p. 60; Duffy 2016, pp. 400–3; van der Anker and van Liempt 2012, p. 8).

Although cases of forced labour are on the rise and have become a real and pressing social and legal problem, this paper will show that there is slow and rather insignificant legal progress in the case law of the European Court of Human Rights (ECtHR) on this human rights violation that seemingly does not correlate with the developments in Europe. Importantly, on the European regional as well as the domestic level, only very few judgments deal with forced labour. In Norway, for instance, of 50 convictions on human trafficking since 2003, only 10 dealt with human trafficking for the purpose of exploitation by forced labour, while 40 dealt with exploitation of the prostitution of women and girls (Koordineringsenheden 2021, p. 6). The low conviction rate does not reflect the fact that there are more cases of forced labour, and the number of identified male victims seems to be higher than of women. Restrictive interpretations by courts further narrow the protective scope for the victims (Jagland 2019, p. 29). The persistent impunity surrounding forced labour, especially of men, is not specific to Norway. This paper discusses the legal frameworks on the international and regional level, foremost European human rights law, and their respective shortcomings. It shows how the legal definition of forced labour as a form of human trafficking remains vague.

The paper analyses the multilevel protection that the law offers against practices of forced labour. Using Norway as a case and the interviewed men as examples, the paper argues that the legal focus should be increasingly directed at victims of labour trafficking. This includes an increased awareness of labour exploitation and more research on the topic. Moreover, the research gap on male victims that earlier scholarship has exposed must be filled (Mapp 2021, p. 62; Paasche et al. 2018, pp. 43–44; Hebert 2016; Duffy 2016, p. 402; Warren 2012, pp. 107–8; van der Anker and van Liempt 2012, p. 7; Jones 2010; Andrees 2009, p. 90). This paper offers new insights into the situation of alleged male victims of forced labour, under special consideration of Norway.

2. Method

The paper combines a legal doctrinal method with a jurisprudential analysis and qualitative data from semi-structured interviews with purported male victims of forced labour in Norway. Altogether, 14 men living at secret addresses in Oslo were interviewed in June and October 2019.

The selection of the respondents was based on their availability at a safe house, which is run by a nongovernmental organisation (NGO) in Norway. Of the 14 men, two were long-term residents and readily available for interviews. Both spoke English fluently and no translator was required. The employees of the NGO also maintained contact with some former victims, who used to reside in the safe house. We were able to interview one of them who lives and works in Oslo. This interview was done in Norwegian, and no translator was necessary. One other man was interviewed in the National Police Immigration Detention Centre at Trandum. Because he was fluent in English, the interview was conducted in English. The remaining 10 men were interviewed with a translator in a temporary secret location because the safe house did not have the capacity to take them all in at the same time. The turnover of residents in the safe house is often fast, and most of its residents stay there between 1 and 29 days (Lingaas et al. 2020, p. 72). It was therefore important to conduct interviews upon short notice. Most interviews lasted for one hour, some up to three hours.

All men were individually informed about the project and asked by the NGO's employees whether they wanted to be interviewed. Upon oral consent, they were given a written information pamphlet with information, including direct contact information to the researchers. This information and the possibility to withdraw at any given time, without any reasons required, was repeated at the beginning of each interview. Each respondent signed a form of consent that the data can be used in anonymised form for research. The NGO's employees were present in two interviews where they functioned as interpreters. There was a standard battery of questions. All answers are recorded handwritten; thus, no sound or film recordings were done. The data was not coded. Based on the requirements by the Norwegian Centre for Research Data (NSD) that reviewed and approved the project, all data is stored in a safe and will be destroyed in 2023.² For the current paper, the qualitative data provides the backdrop for the discussion. Beyond references to statements of the respondents that exemplify their situation, the qualitative data is not used and is therefore merely illustrative of the men's experiences.

Services for victims of forced labour are typically designed to meet the needs of female victims (Mapp 2021, p. 62). The said NGO is the only one in Norway assisting purported male victims of forced labour, while several other NGOs across the country assist female victims. Since its launch in April 2016 until January 2020, the safe house assisted 41 men, of which 24 came from Romania, and 3 from each Poland, Bulgaria, Moldova, and Mongolia. All came from countries, mostly in Eastern Europe, with a significant lower employment and salary level than Norway and were tempted to make a decent living in Norway. Most men worked in a car wash (17), followed by construction work (4), masonry (2), restaurants (2), and agriculture (2), among others (Lingaas et al. 2020, pp. 55, 57).

The analysis focuses on legal instruments relevant to Norway, foremost those created under the auspices of the UN and the Council of Europe. This paper acknowledges the legal requirement to exhaust domestic remedies before bringing a complaint to the international level. Nevertheless, the examination is limited to international law and thereby excludes domestic (criminal) law.

3. Novelty and Results

The novelty of the paper lies in the legal analysis that focuses on forced labour in Norway. Norway is commonly hailed and has an image of itself as a champion of human rights (Hellum 2016, p. 78). Despite its strong record of protecting and promoting human rights, there remain areas where certain individuals and groups receive insufficient or inadequate protection. The area of human trafficking with the purpose of exploitation of forced labour is one. The victims, mostly men, disappear from the radar of legal protection.

Another novelty lies in the fact that while several research reports and articles (foremost in Norwegian) on the topic have been published (see for instance Brunovskis and Ødegård 2021), there exist hardly any *legal* academic publications in English to date. This paper contributes to filling this gap by providing an overview of the legal instruments dealing with forced labour and applying them to the situation of the men concerned. In doing so, the paper enables a comparative legal perspective and offers insights into the situation of male victims of forced labour. The paper is also one of the first to discuss the recent ECtHR judgment of 7 October 2021 in the case of *Zoletic and Others v. Azerbaijan* (Application No. 20116/12), which reveals parallels to the situation of the 14 men in Norway.

One result of this paper is the delimitation of the different forms of human trafficking. It thereby helps to provide legal clarity to obscure and unclear concepts. This clarification can assist in a more coherent application of the law and, as a consequence, to the increased and comprehensive protection of the victims. In its conclusion, the paper urges state authorities, civil society organizations and researchers to pay increased attention to victims of forced labour, especially migrant men. In order to achieve full protection and respect

² NSD notification form number 715904, approval 29 May 2019.

of fundamental human rights, state authorities, including police officers, case workers, prosecutors and judges should afford equitable attention to all individuals who are exploited for labour. This includes recognising their vulnerability, which is a precondition for their coercion. Only once men are recognised as equivalent victims whose vulnerability is exploited by means of forced labour and receive the same legal protection as women or children will states fully comply with their legal obligations. The paper thereby follows two tracks: the legal clarification of forced labour as one form of human trafficking that is commonly misunderstood as well as the examination of alleged cases of forced labour that the 14 men in Norway were exposed to.

4. Modern Slavery, Human Trafficking, Forced Labour

4.1. Definitional Confusion and Incomplete Protection

Forced and compulsory labour, slavery, modern slavery, servitude, chattel, debt bondage, slavery-like practices, forced marriage, human, child or sex trafficking, domestic servitude, forced prostitution and child soldiering are all terms that describe different grave practices of removing the personal freedom of a human being (Mende 2019, p. 230). These practices threaten the human dignity and fundamental freedoms of their victims and cannot be considered compatible with a democratic society.³ Myriad terms, some of which partially overlap, cause definitional inconsistencies and challenges for anyone working in the field of human trafficking. In trying to deal with potential victims and perpetrators of trafficking, law enforcement agencies, lawyers, legal counsels, courts, caseworkers, social and humanitarian workers have to manoeuvre in a complex, multi-layered web of legal frameworks with distinct requirements and protection mechanisms. The lack of clear and coherent definitions and the ensuing lack of case law on all levels, especially regarding forced labour, create a legal gap in the protection of some of the most vulnerable individuals. Indeed, researchers confirm that conflicting legal rules and regulations as well as unclear practices are a great burden for the victims (Brunovskis 2016, p. 5; Hebert 2016, p. 283; van der Anker and van Liempt 2012, p. 4).

‘I am a victim and deserve justice. But who gives you justice when you are a victim?’, exclaimed one of the men, Nadim. He was being interviewed at the National Police Immigration Detention Centre at Trandum, Norway, from where he was deported to a country in Northern Africa shortly after. He was an alleged victim of forced labour at a farm where he had worked for several years without a working contract or a regular, agreed-upon salary. Initially, he worked without an income, but upon the intervention of neighbours, the farmer, Ole, eventually paid a salary into a bank account. However, the account was in the name of Ole, and Nadim was unable to access the money he had earned. Other men testified similar experiences of having to ask their exploiters for access to their own bank accounts. The financial and psychological control exerted was part of the power relation. ‘Ole knew I depended on him. He used me, and he knew it and I knew it. But I was scared to go to the police because I did not want to be sent out of Norway’. Trapped in between two legal systems—immigration and criminal law—Nadim felt lost and without protection. ‘Norway is always considered the best country [in the world], but it is not in reality,’ he concluded.⁴ ‘I don’t want anything from the system, just the opportunity to work and contribute’. Despite stating that he did not want anything from the system, Nadim hoped for and expected protection. However, under which definition did Nadim fall? Which legal category should provide him protection: was he an illegal migrant without a working permit, an employee exposed to social dumping, or a victim of forced labour? In his case, the immigration regime trumped the protection regime for victims of forced labour and the prosecution of its perpetrators: Nadim was expelled from Norway while Ole evaded criminal charges.

³ European Court of Human Rights (ECtHR), *Rantsev v. Cyprus and Russia*, Application No. 25965/04 (10 May 2010), para. 282; *Chowdury and Others v. Greece*, Application No. 21884/15, Judgment (30 June 2017), para. 93.

⁴ Another man confirmed: ‘I did not expect to find such conditions in Norway’.

The following sections will present the different concepts of modern slavery and slavery, human trafficking, and forced labour in an effort to reduce the definitional confusions. This presentation will include general reflections on the case of Norway and the specific situation of the interviewed men.

4.2. Modern Slavery

Nadim's story reveals a legal gap in the protection of some of the most vulnerable individuals, but was Nadim a victim of forced labour? In colloquial language, his situation might be described as modern slavery. However, modern slavery is not a legal concept (McAdam 2019, p. 29). The use of nonlegal terminology in the description and denomination of illegal practices risks watering down the effectiveness of the legal protection of vulnerable persons. It is therefore advisable to revert to accepted legal concepts and terminology to describe situations such as Nadim's.

'Definitional problems plague discussions of (. . .) modern slavery', maintains Ronald Weitzer (2015, p. 225). Indeed, suggestions of definitions of modern slavery as the social isolation of individuals who suffer 'parasitical degradation' and are denied membership in the society of their masters create more confusion than clarification (Patterson 2012). Undisputedly, the prefix 'modern' indicates a contemporary version of the historical concept of slavery. The devastating stories and long-term consequences of the Atlantic slave trade reverberate and provide the concept of 'modern slavery' an inherent gravity.

The reference to slavery was also readily used by the interviewed men: 'We were slaves there [at the car wash]', two interviewed men exclaimed and stressed that 'gradually, we were treated like slaves'. However, another man who worked in the kitchen of an upper-class restaurant stated this: 'The owner is rich by having slaves in the restaurant'. These references to slavery convey an image of the seriousness and illegality of the working conditions. The slavery imaginary is certainly effective in distilling a complex phenomenon of trafficking into a simple narrative, but researchers urge caution: calling any form of human trafficking 'slavery' is not only legally inaccurate but also undermines the effective application of the appropriate legal regime and ignores the structural issues that enable trafficking (McAdam 2019, pp. 29–31; Chuang 2015, pp. 146–49; Vijeyaras and Villarino 2012, p. 36; Allain 2015, pp. 160–85). This caution applies to the men in Norway too: the excessive use of the slavery terminology might paradoxically lessen their protection. In calling all acts of trafficking 'slavery', one might not respond to cases of actual slavery.

Modern slavery carries parts of the name of one of the first international treaties against trafficking, namely the Convention against White Slavery of 1904 that sought to suppress the coerced movement of white women and girls from developed countries for purposes of prostitution (Gallagher 2010, pp. 13–25; Roth 2012, pp. 42–61; Obokata 2006, pp. 9–18). The campaign for the convention was situated in the wider framework of abolitionism, using language that resembled the human commodification of the transatlantic slave trade (McAdam 2019, p. 19). It had a deeply problematic racist connotation given that it protected only white females from prostitution. From a historical, legal and gender perspective, the White Slavery Convention was the first in a long line of treaties that focused exclusively on women and children who were exploited for prostitution. (Gallagher 2010, pp. 13–25; Roth 2012, pp. 42–61; van der Anker and van Liempt 2012, p. 7). On par with the term 'slavery', the one-sided focus on women and prostitution lingers on in modern times, a fact that permeates subsequent discussions and has a direct consequence for men as victims of forced labour (Obokata 2006, pp. 27–29). The knowledge, understanding, and respect for the fact that men can be victims is crucial for their protection and for the criminal prosecution of their traffickers. The assertion by an investigator in the section for human trafficking in the Oslo police to one of the interviewed men that 'you don't have the face of a victim' reveals a prejudice against presumed male victims that must be overcome in order to provide them protection under domestic law and thereby fulfill the state's obligations under international law.

International human rights law prohibits slavery in Art. 4 of the Universal Declaration of Human Rights and Art. 8 of the International Covenant on Civil and Political Rights. Unlike slavery, the term of modern slavery is short of legal force and contours (Mende 2019, pp. 233–34; Chuang 2015, pp. 146–49). The apparent increased use of the term in official contexts does little to mitigate its vagueness. Recently, for instance, the Norwegian government issued a foreign policy paper with the title ‘Born to a Life of Freedom: Strengthened Development Policy Efforts to Fight Modern Slavery (2021–2025)’ (MFA 2021), and the former Norwegian Prime Minister, Erna Solberg, stated the following in a speech at the centennial of the International Labour Organization (ILO) in 2019: ‘Modern slavery is one of the biggest challenges to global human rights. Modern slavery exists in all countries and all layers of society’.⁵ From a social, humanitarian, and political perspective, it is an undeniable achievement that attention is being brought to undignified and exploitative working and living conditions of some of the most vulnerable people in society that might reach the threshold of breaches of human rights. From a legal perspective, however, it is deplorable that human rights violations are not denominated correctly, thereby adding to the definitional confusion (Chuang 2015, pp. 146–49). It is therefore advisable to refrain from the continued use of the ‘modern slavery’ terminology, especially if issued by public authorities.

4.3. Human Trafficking

Although it might not be ‘a clear-cut criminal offence’ (McRedmond 2010, p. 186), human trafficking is a clearly defined legal concept that includes acts of sexual exploitation, forced labour, slavery, servitude or the removal of organs. Forced labour is thus one form of human trafficking. The Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (Palermo Protocol) regulates human trafficking on the global level and contains important state obligations to protect victims and to criminalise trafficking offenses. It supplements the UN Convention against Transnational Organized Crime.

The UN Convention against Transnational Organized Crime of 2000 marks a paradigm shift to addressing slavery as the movement of people for the purpose of their exploitation (Mende 2019, p. 231). It is considered the main international instrument in the fight against transnational organized crime and has been ratified by 190 countries, thereby achieving near-universal recognition and revealing a broad consensus of the international community to combat collectively organized crimes. The UN Convention is supplemented by three additional protocols, which each target a specific area of organised crime and must be interpreted together with the convention (Art. 1(1) Palermo Protocol; McAdam 2019, p. 25; Gallagher 2010, p. 73). For the purpose of the present paper, the Palermo Protocol is the most relevant because it deals exclusively with trafficking in persons and exploitation by means of forced labour. As its full title indicates, the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children offers special protection to women and children, who are mentioned seven times, while men are not specifically acknowledged. In Art. 3(a) the protocol provides a very detailed definition of trafficking 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

⁵ ILO (2019). Address by H.E. Ms Erna Solberg, former Prime Minister of the Kingdom of Norway (2019), timestamp 9:46–9:56, available at: <https://ilo.cetc.stream/2019/06/10/address-by-h-e-ms-erna-solberg-prime-minister-of-the-kingdom-of-norway/> (accessed on 19 April 2022).

forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.⁶

In order to fall under the definition of human trafficking, three separate elements have to be present: first, an act that involves the movement or harbouring of people; second, the act is achieved by means of deception or coercion; and third, the act is committed with the purpose of exploitation (Mapp 2021, p. 38; McAdam 2019, p. 26; Allain 2015, p. 223; UNODC 2015; UNODC 2013, p. 16; Gallagher 2010, pp. 29, 78; McRedmond 2010, pp. 189, 194). For the purpose of the Palermo Protocol, ‘exploitation’ includes sexual exploitation, forced labour, slavery, servitude or the removal of organs. Forced labour is thus one of several forms of human trafficking (Gallagher 2010, p. 29; Hernandez and Rudolph 2015, p. 120).⁷ Researchers have noted that the absence of a settled understanding of what constitutes ‘exploitation’ is one reason behind definitional fluidities (Jovanovic 2020, pp. 678–79; Gallagher 2010, p. 49), a problem that directly affects alleged victims, including the interviewed men in Oslo. Were they recruited for the purpose of exploitation? Were they transported or received by means of threat or use of force or other forms of coercion? Were they subsequently exploited and therefore exposed to forced labour—or were they just unlucky with their employment? These questions frame the further discussion.

The Palermo Protocol was adopted by UN General Assembly resolution 55/25 and entered into force on 25 December 2003. With 178 ratifications, among other by Norway, the Palermo Protocol has obtained a high degree of recognition. Significantly, the protocol is the first legally binding global instrument with an agreed definition on trafficking in human persons. It obliges the member states to prevent and combat human trafficking and to cooperate by means of information exchange, training, and border measures (Arts. 9–12). The aim of the treaty is to facilitate convergence in national approaches, especially regarding domestic criminal offences. Another objective of the protocol is the protection and assistance of victims of trafficking with full respect for their human rights. The treaty obligations thus extend beyond cooperation and convergence to reconfirming the member states’ obligations under human rights law.

As an internationally binding treaty that aims at coalescing national penal approaches to human trafficking while at the same time respecting the victims’ human rights, the protocol elegantly ties together different strands of international law: public international law and state responsibility, human rights law, and criminal law with corresponding individual liability. However, albeit including a strong victim-protection dimension, the protocol is not a human rights instrument because it does not create a claim for an individual victim against a state in cases of human trafficking (McAdam 2019, p. 24; Jovanovic 2020, p. 682). Nevertheless, the criminal justice response that the protocol stipulates must be facilitated in accordance with human rights law. In other words, although it is not a human rights treaty, the protocol must be implemented by considering relevant human rights obligations (McAdam 2019, p. 24; Obokata 2006, p. 151). For the sake of classification, the UN has categorized the Palermo Protocol as a penal matter, thus foregrounding the criminal law aspect of trafficking.⁸ The placing of the protocol in the sphere of criminal justice is also seen as one of the key achievements: the implementation of domestic legislation in accordance with the protocol would not have happened if trafficking had remained in the sphere of human rights (McAdam 2019, p. 24).

The protocol’s definition has been adopted by all relevant UN organs and agencies, and most state parties, including Norway, have enacted legal provisions prohibiting human

⁶ UNODC, United Nations Convention against Transnational Organized Crime and the Protocols Thereto, available at: <https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html> (accessed on 19 April 2022).

⁷ Confirmed by the ECtHR: ‘exploitation through work is one of the forms of exploitation covered by the definition of human trafficking, and this highlights the intrinsic relationship between forced or compulsory labour and human trafficking (Chowdury and Others v. Greece, Application No. 21884/15, Judgment (30 June 2017), para. 93).

⁸ United Nations Treaty Collection, Chapter XVIII, Penal Matters, available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18 (accessed on 19 April 2022).

trafficking (Gallagher 2010, p. 42).⁹ Researchers claim that the high state support was only achievable because the protocol is not a human rights instrument (McAdam 2019, p. 249). The compliance with and respect for the protocol seem to be very high and might even be an indicator of its customary law status because it attracts no principled dissent (Duffy 2016, pp. 375–76; Hathaway 2008–2009, pp. 7–8). However, the lack of full implementation suggests that the evidence of general practice as a required element of customary law (Art. 38(1)(b) of the Statute of the International Court of Justice) is absent. The scarcity in Norway and elsewhere of domestic criminal cases on trafficking, especially involving practices of forced labour of men, is a reminder that there is still room for improvement in the fulfilment of the treaty obligations. The admission of the Oslo police that cases of forced labour are not prioritised in terms of resources or investigations (Thorenfeldt and Stolt-Nielsen 2021), and the allegation by a certain interviewee that ‘the police and the prosecution know [that people work like slaves] and close their eyes’, add to the impression of incomplete legal protection.

The case of Norway is not an isolated occurrence (Jansson 2014, p. 3). The translation of the Palermo Protocol into domestic legislation and its effective implementation remain problematic: despite the fact that 97 percent of its states parties have enacted domestic criminal provisions prohibiting human trafficking, only few perpetrators are convicted, and most victims are never identified or given assistance (Mapp 2021, p. 60; UNODC 2020, p. 8; McRedmond 2010, pp. 181 and 195; Gallagher 2010, pp. 103–4; Arnegaard and Davis 2019, p. 9). Based on data from 41 countries, the United Nations Office on Drugs and Crime (UNODC) observes a global trend towards increasing criminal prosecution and conviction for trafficking crimes. This trend, however, does not apply to Europe, where conviction rates have been stagnating or decreasing over the last few years, despite increased official efforts to abolish human trafficking and the available technology to detect organised crime networks. Notwithstanding the decline in judgments, the absolute figure for the continent of Europe is still the highest in the world (UNODC 2020, pp. 16, 23). Rather than being an exception, the case of Norway thus seems to confirm the rule. It is unclear whether the lower number of judgments reflects a lower level of trafficking activities, or undetected crimes. Numerous studies point to a connection between increased knowledge about the victims, their identification, and the number of prosecutions of human trafficking, meaning that an awareness is needed to recognise and protect victims of human trafficking and criminally prosecute their perpetrators (Hulting 2012, pp. 145–60; van der Anker and van Liempt 2012, p. 3; Arnegaard and Davis 2019, p. 9; UNODC 2018, pp. 8, 13, 23, 45). This understanding must extend to the dynamics and social conditions that facilitate these human rights abuses.

4.4. Forced Labour

While the Palermo Protocol offers a detailed definition of human trafficking in Art. 3(a), it does not define forced labour.¹⁰ However, a much older legal instrument, the ILO Forced Labour Convention of 1930, does provide a definition of forced labour. Its Art. 2(1) holds that the term ‘forced or compulsory labour’ shall mean ‘all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily’. Norway ratified the treaty, which remains in force, in 1932. It is also state party to the Protocol of 2014 to the Forced Labour Convention, which attempted to fill the gaps in the implementation of the convention. The ILO Protocol of 2014 notably contains an obligation to prevent and eliminate the use of forced labour as well as the protection of victims and the sanction of perpetrators of forced labour (McAdam 2019, p. 29).

‘Before we came here, we knew our salary and the number of weekly hours’, confirmed one of the purported victims of forced labour. The men all left their home country of their

⁹ The Norwegian Penal Act prohibits human trafficking in § 275.

¹⁰ For a discussion of forced labour under the European Convention of Human Rights, see Section 7.3.

own will, often triggered by information on social media about work opportunities in Norway.¹¹ The men offered their work voluntarily, and it was not exacted under the menace of a penalty. Following the general rules of interpretation, it would have to be concluded that the men do not fall under the protection of ILO Forced Labour Convention, which narrowly prohibits nonvoluntary work extortion.

However, the ILO supervisory bodies concluded that a labourer's right to free choice of employment is an inalienable right. Conversely, the inability to change or leave work at any time, under threat of a serious penalty, is a strong indication of forced labour (ILO 2009, p. 13). This insight is important for the case of the 14 men: while they voluntarily accepted their jobs and came to Norway, they found themselves unable to leave their employment. Thus, their situation changed and was characterised by an involuntariness to remain and an incapacity to leave.¹² The inability to leave a position of employment is often connected to practices of coercion related to threats, for instance threats of denunciation or deportation as in the case of Nadim, but also threats of wage deductions or retentions. Most of the interviewed men confirmed the use of threats, especially of wage deductions. Beate Andrees points out that 'threats can only be understood by taking the perspective of those who are subjected to them and by analysing the cultural background of the threatened persons' (Andrees 2009, p. 102). Threats can have a strong psychological effect on the workers: even if nobody physically stops them from leaving their workplace, they might nevertheless subjectively experience a lack of freedom of movement (Andrees 2009, p. 102). This holds true for the men who were physically able to leave their workplace, but nonetheless stated that they felt obliged to stay, for reasons of pride among others. Confronted with threats of wage deductions, most men considered it too embarrassing to do anything else than accept them and work even longer hours to compensate for the loss. In their mind, it was impossible to return to their home countries in Eastern Europe with a massively reduced wage because it would make them look weak or unsuccessful. A cultural sensibility is therefore necessary for frontline workers who meet potential victims of forced labour, especially members of the police, but also of social welfare or health services.

Note that while the ILO supervisory bodies recognised that psychological coercion could amount to the menace of a penalty, they were hesitant to accept that a situation of economic constraint that keeps workers in a job was equivalent to any threat of penalty (ILO 2009, p. 12). Arguably, the ILO Convention contains an outdated definition of forced labour that does not correspond to contemporary insights into the exploitation of peoples' vulnerability. There appears to have been no evolutive interpretation of the convention's provisions to include the exploitation of economic vulnerability by means of forced labour. The next section examines the concept of vulnerability more closely and applies it to the exploited men in Oslo, followed by a discussion of the risk of competing legal regimes.

5. The Vulnerability of the Men

Central to the idea of human trafficking and to the Palermo Protocol is the concept of abuse of vulnerability (UNODC 2013, p. 5; Mapp 2021, p. 39; Jovanovic 2020, p. 694). The preparatory works of the protocol define this abuse to include 'any situation in which the person involved has no real or acceptable alternative but to submit to the abuse involved' (Gallagher 2010, p. 32). The Council of Europe Convention on Action against Trafficking in Human Beings is the European counterpart to the Palermo Protocol and was inspired by the latter (COE 2005, para. 6). It establishes a parallel system of protection

¹¹ This confirms research findings by Mapp (2021, p. 43); Andrees (2009, pp. 97, 100) and Rijken (2003, p. 6).

¹² In her study, Andrees uses the key question 'Were you free to leave your employment at any given point in time?' to differentiate between successful migrants and victims of trafficking (Andrees 2009, p. 91). This question alone is, however, not able to capture victims of trafficking who are at liberty to leave their employment but would only be able to do so under major economic, social, or personal losses. Andrees therefore adds the important element of 'free to leave without being faced by threats or the loss of any rights or privileges (e.g., nonpayment of wages or threat of violence against them or family members)' (Andrees 2009, p. 91.).

against trafficking on the European regional level. Norway, a member of the Council of Europe, ratified the convention in 2008. Although the convention reproduces verbatim the Palermo Protocol's definition of human trafficking, it goes further in its explanatory report and interprets vulnerability to include 'any kind, whether physical, psychological, emotional, family-related, social or economic'. In sum, 'any state of hardship in which a human being is impelled to accept being exploited' (COE 2005, para. 83). The ILO asserts that the categorisation of a person as a victim of forced labour must depend on an overall assessment of the specific situation. It includes factors such as the individual's age, education, gender, social, economic, and other elements. It must consider not only the working and salary conditions, but also living and sanitation environments, and degree of freedom of movement and isolation (ILO 2017, pp. 33, 51; see also Mapp 2021, p. 39). This overall assessment creates an image of the exploitation based on a vulnerability and thereby contributes to the legal determination of a person as a victim of forced labour.

As will be shown, all the interviewed men probably fall under this broad definition of vulnerability. Despite their distinct experiences of forced labour, they share common denominators, namely the escape of poverty and despair. Low gross domestic products and high unemployment rates were push factors that made them leave their home countries.¹³ While some of the younger ones were fortune hunters and left their home country without a grand plan for their future, the more settled ones were driven by a motivation to help their family financially. They left voluntarily with an understanding that they would earn a decent salary in Norway. Counter to the stereotype of the uneducated and naïve victim of forced labour, some men were university graduates with significant work and living experience from other European countries. These findings cohere with recent research that suggests an increased diversification of the background of the victims (Hernandez and Rudolph 2015, pp. 118–39).

Section 4.4 above discussed that the men were in a state of hardship, which was typified by an economic, social, and family-related vulnerability. The need and wish to earn money for their own livelihood or to support their families led the men into employment relationships characterised by coercion or exploitation.¹⁴ Their vulnerability was increased once they were threatened of or exposed to wage deductions, which put them under pressure due to familial or social expectations. Note that although some men witnessed physical violence, in their eyes, physical vulnerability did not characterise their situation. On the contrary, the men did not consider themselves victims at all.¹⁵ They eventually realised the deception but would not be able to confide this to their families, who expected regular remittances. It would be too shameful to admit that they worked so hard yet received no payment. Even though the men without exception were—objectively—being exploited,¹⁶ their pride prevented them from accepting a victim role: they simply wanted the money they had earned. Nonetheless, despite their refusal to be seen as victims, the men were nonetheless in a vulnerable position.

Their migrant status was an important factor that increased their vulnerability. One of the interviewees exclaimed: 'The police [in the section for human trafficking] don't care because I am a migrant', implying that they were aware of his situation, exploitation, and inability to escape his traffickers. Research has shown that migrants are a highly vulnerable group, one which is particularly vulnerable to human trafficking and forced labour as one of the forms of exploitation.¹⁷ The migrants' vulnerability is caused by numerous, often interdependent, factors that vary from case to case: they commonly do not know the local

¹³ For a detailed analysis of global drivers, see: Maria Ravik, *The Fight against Human Trafficking: Drivers and Spoilers* (Ravik 2020, pp. 49–76).

¹⁴ Gallagher (2010, p. 124) confirms on a general level that 'most victims of trafficking (. . .) just want to go home or get a decent job'.

¹⁵ Thereby confirming earlier research by Paasche et al. (2018, p. 39) and Hulting (2012, p. 148).

¹⁶ Statement by the men's legal counsel.

¹⁷ Migrant workers are considered the most vulnerable workers and thus at greater risk of human trafficking (Jovanovic 2020, p. 695; McRedmond 2010, p. 7; Arnegaard and Davis 2019, p. 6; Special Rapporteur 2019, p. 6; ILO 2017, pp. 30–31).

language; are not integrated into the local community and have no family or social network; and are unaware of their rights and duties, domestic laws and regulations, and the legal system as a whole. These facts are valid for the situation of all the interviewed men: they found themselves in Norway, a country where they had no connections or social contacts. They did not speak the local language, nor did they know the system or their rights, such as minimum hourly wages or maximum weekly working hours. Their exploiters were fully aware of these vulnerabilities and took advantage of them.

Some men, for instance, never received an employment contract and were threatened when they asked for one. Large-scale investigations into forced labour migrants in Europe confirms this common practice (Andrees 2009, p. 99; see also Mapp 2021, pp. 40, 43). Others signed contracts but did not understand them either because they were written in Norwegian or due to their complex terminology. Moreover, the contracts were standardised and seemingly adhered to the labour law regulations, while in reality the men had to work many more hours than stipulated. Several exploiters operated with fabricated working hour lists that could be presented to the authorities in the case of an unannounced inspection.

A recurring theme in the men's stories is that salaries started off on a decent level, but then gradually decreased. Adrian, for example, worked for more than a year in a car wash and initially received 10,000 NOK (approximately 1000 Euros) per month. Later, the payment was reduced to 4000 NOK, then 3000 NOK, while the working hours remained the same. Most men worked between 12 to 14 h a day, seven days a week. 'I felt like a toy', recalled Adrian, implying that the employers controlled much of his life. The men had very little free time because they were made to work around the clock in places with little public insight or control.

The men lived in basic and arguably undignified living conditions, in every case provided for by their traffickers, who often deducted an exorbitant rent directly from their salaries. Adrian mentioned a two-bedroom flat that he shared with five other workers; another man talked about a five-room apartment that housed 14 men. Each evening, when all were back from work, there was a queue to go to the bathroom and to make food. In addition to the rent, several men owed their traffickers for the transport to Norway, meaning they were already indebted before they started working. The low salary and high house rent made it impossible to ever work off their debt, a fact the exploiters were aware of. Large sample surveys confirm that migrants who are coerced into forced labour and accumulated debts they owed to their exploiter(s) are particularly vulnerable (Andrees 2009, p. 99). With a few exceptions,¹⁸ the men did not have financial or other resources to return home or travel to another country.

In Norway, moreover, social research has concluded that 'neither the Norwegian labour unions nor the government seem to have seen the trafficking framework as ideal for addressing discrimination of migrant workers and exploitation in the labour market' (Jahnsen and Skilbrei 2015, p. 159; Skilbrei 2012, pp. 211–27). Instead, the anti-trafficking framework is designed to address victimisation through (female) sexual exploitation rather than through (male) exploitation of labour (Jahnsen and Skilbrei 2015, p. 159; McRedmond 2010, p. 184). Thus, their migrant status puts the men in a situation of vulnerability, which is exacerbated by the help apparatus' design to discover and assist female victims of sexual exploitation. The Norwegian framework does not sufficiently address the men's situation because it does not focus on the exploitation of men for labour. International research confirms that conceptions of vulnerability in anti-trafficking policies are heavily gendered and that there is a bias towards sexual exploitation of women and girls, leading to the association of victimhood and vulnerability with femininity (Mapp 2021, pp. 62–63; van der Anker and van Liempt 2012, pp. 7–8; Paasche and Skilbrei 2017, pp. 149–66). However, the discussions above and the overall assessment of their situation have shown that men

¹⁸ One man fell ill and did not have health insurance. He decided to return home for treatment. Later, he came back to Norway and the same car wash. Arguably, he was at liberty to leave his employment and not return to Norway and/or the same employer. This might therefore not be a clear-cut case of forced labour, despite other elements of vulnerability and coercion.

can also be in a vulnerable situation. This vulnerability was caused by a state of hardship on psychological, emotional, family-related, social or economic grounds, their migratory status and gender. This multiple vulnerability impelled the men to accept their exploitation, leading to the conclusion that they probably were victims of forced labour.

Forced labour constitutes a breach of international state obligations, human rights law, and domestic criminal law. At the same time, the victims are often foreigners without work or residence permits. This situation entails the application of competing legal regimes to the disadvantage of the concerned individuals.

6. Disadvantageous Competing Legal Regimes

By ratifying the Council of Europe Convention on Action against Trafficking in Human Beings, Norway pledged to ensure that victims and their human rights are protected during the investigation of trafficking cases. The convention provides stronger rights than the Palermo Protocol and is therefore an important legal instrument for alleged victims.¹⁹ According to Art. 1(1)(a), the convention aims at preventing and combating trafficking in human beings, 'while guaranteeing gender equality'. Women and children are mentioned in Arts. 6 and 10(1), while the convention is silent on the issue of male victims. Albeit explicitly guaranteeing gender equality, the convention exhibits the same focus as the Palermo Protocol, namely that women and children are victims of human trafficking, first and foremost.

The Council of Europe Convention and the Palermo Protocol share further commonalities in that they consider their human rights perspective and focus on victim protection as the main added value. The preamble of the Council of Europe Convention explicitly states that trafficking constitutes a violation of human rights and 'an offence to the dignity and integrity of the human being'. The convention has even been termed the most important human rights treaty of the last ten years (Gallagher 2010, p. 126), yet, due to competing legal regimes, the recognition and implementation of the human rights of the victims are not fully realised: the perpetrators of forced labour are often granted impunity while the human rights of the victims are violated (Mapp 2021, p. 60; Duffy 2016, p. 403; Obokata 2006, p. 4). The breaches of immigration and employment law regimes by the persons exploited seem to trump the violation of criminal provisions on forced labour by the traffickers, as the above case of Nadim exemplified.

Arguably, evidentiary considerations render investigations, prosecutions, and convictions for forced labour more demanding and are therefore not prioritised by law enforcement authorities.²⁰ The exploiters' practices are hidden from the public eye, shrouded in secrecy, and difficult to expose (Duffy 2016, p. 400; McRedmond 2010, p. 6). As a consequence, the perpetrators of forced labour are not investigated or prosecuted, while the victims either face criminal or administrative charges and/or are deported (Gallagher 2010, p. 118). The one-sidedness in dealing with cases of illegal employment that allegedly also reach the threshold of forced labour give the impression that domestic authorities expedite the immigration or labour law track, while not ensuring the effectiveness of the criminal law or human rights law track (Duffy 2016, p. 383; McRedmond 2010, p. 8; van der Anker and van Liempt 2012, pp. 1, 5). Research has concluded that although patterns of trafficking for forced labour vary across economic sectors and geographical regions, they share a common aspect: forced labour is 'generally the result of a deterioration of labour rights, such as lower salaries, longer working hours, reduced protections and informal employment' (UNODC 2020, p. 10). This documented and unambiguous link between the

¹⁹ Gallagher (2010, pp. 114–16), clarifies that the Palermo Protocol focuses on prevention, whereas the Council of Europe Convention emphasises human rights and victim protection.

²⁰ The police will likely only initiate an investigation following a complaint from a victim. Yet, victims for reasons of intimidation or worry about repercussions are rarely willing to make complaints against traffickers. See: (Gallagher 2010, p. 124; Hulting 2012, pp. 147–48; Obokata 2006, p. 158). The lack of evidence was also an issue in a case before the European Court of Human Rights: *CN v. UK*, Application No. 4239/08, Judgment (13 November 2012).

weakening of labour rights and forced labour makes the one-sided focusing of domestic authorities on infringements of labour law by the exploited men objectionable.

The impression that the victims suffer double victimisation—first by being exploited, then by not being vindicated for the violation of their human rights—is not easily refuted. This supposition is confirmed for Oslo, where the Attorney General criticised the police for being more concerned with ‘fulfilling specific target figures for expulsion and deportation cases’ than identifying potential victims of human trafficking. The result of this prioritisation is the deportation of potential victims out of the country before their case is investigated, thereby making investigations even more difficult given that possible witnesses no longer reside in Norway (Thorenfeldt and Stolt-Nielsen 2021).

Despite their experience of abuse and exploitation, the men did not receive the required attention of the police. Several had secretly hoped that a police inspection would expose their dire situation. ‘I don’t know what is wrong with the law here [in Norway]’, said one man. When he was back home, in an Eastern European country, he always thought of Norway as a nice and strong state. Norway had a good reputation as a safe country with many well-paid jobs. However, after his experiences, he changed his opinion: if he had experienced the same at home, his employer and exploiter would have been jailed. ‘I am frustrated that the authorities do not do anything’, he exclaimed. ‘We want justice’, he added, speaking also on behalf of his co-workers. More than two years after the first interviews and even longer since their employment begun, not one exploiter has been prosecuted or held criminally liable.²¹

7. Forced Labour in the Jurisprudence of the European Court of Human Rights

7.1. Introduction

The above analysis has shown that the concept of vulnerability is embedded in human trafficking, including forced labour as one of its forms. Vulnerability is also a concept that is gaining increased scholarly attention on the human rights level: several academics argue that it is gaining momentum in the case law of the ECtHR (Peroni and Timmer 2013, pp. 1056–85; Arnardóttir 2017, pp. 150–71; Adorno 2016, pp. 257–72; Morawa 2003, pp. 139–55; Jovanovic 2020, pp. 694–700). This section will provide an overview of the court’s jurisprudence on forced labour, in part using a gender lens that considers the implications for men who, due to their vulnerability, were exploited for labour. It will also, where appropriate, apply the court’s findings to the situation of the men in Norway.

7.2. Art. 4 ECHR: A Definitional Quagmire

Art. 4 of the European Convention on Human Rights (ECHR) prohibits slavery, servitude, and forced and compulsory labour. The ECtHR held that that vulnerability is ‘the common feature of all forms of exploitation’ of Art. 4 ECHR.²² For the purpose of the present discussion, Art. 4(2) ECHR is the central provision that reads: ‘No one shall be required to perform forced or compulsory labour’.

The definitional quagmire²³ on the international level that Section 3. discussed equally extends to the European regional level. Scholars have lamented the limited efforts of the ECtHR to clearly interpret and delimit the legal boundaries of human trafficking, slavery, and forced labour (Stoyanova 2017a, 2017b, 2020; Allain 2014, pp. 111–42). It is worth mentioning that the ECHR does not contain the term ‘human trafficking’. In the *Rantsev v. Cyprus and Russia* judgment, however, the court added human trafficking to the conceptual apparatus of Art. 4 ECHR. In performing a teleological and dynamic interpretation of the ECHR as a living instrument, the court held that it was unnecessary to identify whether the treatment in question constituted ‘slavery’, ‘servitude’ or ‘forced or compulsory labour’, the three available legal categories provided by Art. 4 ECHR. Instead, it concluded that

²¹ Confirmed by several independent sources.

²² *Choudury and Others v. Greece*, Application No. 21884/15, Judgment (30 June 2017), para. 82.

²³ Inspired by Hathaway (2008–2009, p. 1).

human trafficking is part and parcel of Art. 4 on the basis of the Palermo Protocol and the corresponding provision in the Council of Europe Convention.²⁴ The recent Grand Chamber judgment in *S.M. v. Croatia* followed suit, stressing that ‘it is not possible to characterise a conduct or a situation as an issue of human trafficking unless it fulfils the criteria for the phenomenon in international law’.²⁵ Note that the judgment also confirmed that ‘force’ in forced labour encompassed subtle forms of coercive conduct. (para. 301).

In reverting to global and other regional treaties, the ECtHR promotes a cross-fertilisation and coherent legal interpretation of human trafficking (Duffy 2016, pp. 387, 402). Such an approach streamlines the international community’s efforts to combat human trafficking, hence a positive aim. The Guidelines on Art. 4 ECHR even explicitly state that the court does not apply the rights and freedoms in a vacuum and that the provisions of the convention are not the sole framework of reference for their interpretation (ECtHR 2021, pp. 5–6). Furthermore, Vladislava Stoyanova correctly points out that the reference to the Council of Europe Convention enables the ECtHR to draw on an already established regional human trafficking framework, which imposes important obligations on its state parties (Stoyanova 2020). Nonetheless, she and other scholars critique the inclusion of a legal term by reference to other international treaties, notably without clarification of how ‘human trafficking’ as defined there relates to the other concepts under the ECHR, thereby creating a ‘definitional quagmire’.

The disentanglement of these legal terms, both within the same and from distinct legal instruments, is important. The different prohibited practices and their thresholds must be clearly determined and distinguished in order to prevent, identify, and punish breaches. Only once the different concepts receive a precise delimitation can the identification of the victims and perpetrators, the possibility to provide redress to victims, and the change or adaptation of conflicting domestic practices and laws occur (Chuang 2015, pp. 146–49; Allain 2015, pp. 217–29).

Because human trafficking in general and forced labour in particular are on the rise (UNODC 2020, p. 15; Obokata 2006, p. 3), more cases and litigation before domestic and regional courts ought to be expected. In the context of forced labour, over the last 15 years, the number of detected male victims has statistically increased more than women. This has led to a change in the victim profile: the share of adult women fell from 70 percent to less than 50 percent in 2018 (UNODC 2020, p. 15). Not only has the victim profile changed but the motive for trafficking has too. While trafficking for sexual exploitation is still the most common form in the world, the percentage of those trafficked for forced labour has more than doubled—from 18 to 38 percent among the detected cases. Thus, trafficking for forced labour is more often detected and represents a larger number of cases (UNODC 2020, p. 16).²⁶ Given these statistical changes of crimes and victim profiles, an increase in cases of forced labour before the courts should be expected. Interconnected, there might also be an increase in cases concerning male victims of forced labour. Therefore, the ECtHR must be prepared to provide unambiguous legal interpretations so as to deliver accurate judgments and offer guidance to the domestic judiciary.

7.3. Case Law on Forced Labour until 2017

The ECtHR has rendered just under 64,500 judgments, yet surprisingly few deal with human trafficking and forced labour (Duffy 2016, p. 400; Stoyanova 2017a). In *Rantsev v. Cyprus and Russia*, the court even admitted that it ‘is not regularly called upon to consider

²⁴ *Rantsev v. Cyprus and Russia*, Application No. 25965/04 (10 May 2010), para. 282. Discussed in: (Jovanovic 2020, pp. 676, 682; Duffy 2016, pp. 385–89). For a critique: (Stoyanova 2012, pp. 163–94; Vijeyaras and Villarino 2012, pp. 36–61; Allain 2015, pp. 217–29).

²⁵ *S.M. v. Croatia*, Application No. 60561/14, Grand Chamber Judgment (25 June 2020), para. 290.

²⁶ These figures do not cohere with the ones provided for by the (European Commission 2016, p. 14), which mentions that the majority (75%) of all victims of trafficking registered with recognized authorities are female, while 26% of the registered victims of labour exploitation are female. This discrepancy can be owed to different geographical focus (global vs. Europe) or that sexual exploitation, where women represent 96% of all registered victims is more readily discovered, recorded, and investigated.

the application of Article 4'.²⁷ To date, only 19 cases have been litigated under Art. 4(2) ECHR, which prohibits forced and compulsory labour.²⁸ Because forced labour is a major and growing societal problem, it is striking that the court has found a violation of Art. 4(2) ECHR in only four cases: *Zoletic and Others v. Azerbaijan* (2021), *Chowdury v. Greece* (2017), *Chitos v. Greece* (2015), and *C.N. and V. v. France* (2012). This section will examine some of the court's judgments on human trafficking and forced labour beyond the previously mentioned *Rantsev v. Cyprus and Russia* and *S.M. v. Croatia*, with a focus on their relevance for the cases of the 14 men in Norway.

Siliadin v. France was the first human rights case to address practices of human trafficking. It dealt with a Togolese national who came to France to study. She alleged that for several years, she was forced to work as a domestic servant in a private household, without pay or holiday. While the court found that the applicant's treatment did not amount to slavery, it concluded that Siliadin was a victim of servitude and forced labour and that France had violated Art. 4 ECHR. In order to find the degree of control and constraint, the ECtHR applied the ILO standard, wherein forced labour involves 'the menace of a penalty'.²⁹ Arguably, the court went beyond the standards of the ILO in holding that the seriousness of threats and fear of deportation were a situation equivalent to 'penalty'.³⁰ The situation of Siliadin is undoubtedly graver and more invasive to the freedom of movement and liberty than any man interviewed in Oslo experienced. Siliadin was a female minor from Africa who never received a work contract or salary while working in France for several years 15 h a day, seven days a week. However, *Siliadin* probably does not set the threshold for forced labour as stipulated by Art. 4(2) ECHR. Rather, it clarified that a

²⁷ *Rantsev v. Cyprus and Russia* Application No. 25965/04, Judgment (7 January 2010), para. 279.

²⁸ The court found that the totality of the applicants' arguments and submissions made both before the domestic courts in their civil claim and before the court (concerning excessively long work shifts, lack of proper nutrition and medical care, physical and other forms of punishments, retention of documents and restriction of movement) constituted an "arguable claim" that the applicants had been subjected to human trafficking and forced labour. The court stated that even though the applicants' claims concerning the alleged forced labour and human trafficking had been sufficiently and repeatedly drawn to the attention of the relevant domestic authorities in various ways, no effective investigation had taken place and, therefore, Azerbaijan had failed to comply with its procedural obligation under Article 4, paragraph 2, of the Convention. Each applicant was awarded compensation for nonpecuniary damage in the amount of 5000 euros. In its decision, the court referred to the findings of GRETA's 2014 report on Azerbaijan, in particular to the fact that law-enforcement officials in Azerbaijan had a tendency to see potential cases of human trafficking for labour exploitation as mere labour disputes between the worker and the employer, and that there seemed to be a confusion between cases of human trafficking for labour exploitation and disputes concerning salaries and other aspects of working conditions.

(1) *Zoletic and Others v. Azerbaijan*, Application No. 20116/12, Judgment (7 October 2021).

(2) *Tibet Menteş and Others v. Turkey*, Application Nos. 57818/10; 57822/10; 57825/10; 57827/10; 57829/10, Judgment (24 October 2017).

(3) *Chowdury and Others v. Greece*; Application No. 21884/15, Judgment (30 March 2017).

(4) *Meier v. Switzerland*; Application No. 10109/14, Judgment (February 2016).

(5) *Chitos v. Greece*; Application No. 51637/12, Judgment (4 June 2015).

(6) *C.N. and V. v. France*, Application No. 67724/09, Judgment (11 October 2012).

(7) *Graziani-Weiss v. Austria*, Application No. 31950/06, Judgment (18 October 2011).

(8) *Stummer v. Austria*, Application No. 37452/02, Grand Chamber Judgment (7 July 2011).

(9) *Rantsev v. Cyprus and Russia* Application No. 25965/04, Judgment (7 January 2010).

(10) *V.T. v. France*, Application No. 37194/02, Judgment (11 September 2007).

(11) *Solovyev v. Ukraine*, Application No. 4878/04, Judgment (14 December 2006).

(12) *Ananyev v. Ukraine*, Application No. 32374/02, Judgment (30 November 2006).

(13) *Roda and Bonafatti v. Italy*, Application No. 10427/02, Judgment (21 November 2006).

(14) *Verkeyenko v. Ukraine*, Application No. 22766/02, Judgment (13 December 2005).

(15) *Siliadin v. France*, Application No. 73316/01, Judgment (26 July 2005).

(16) *Karlheinz Schmidt v. Germany*, Application No. 13580/88, Judgment (18 July 1994).

(17) *van der Mussele v. Belgium*, Application No. 8919/80, Judgment (23 November 1983).

(18) *van den Droogenbroeck v. Belgium*, Application No. 7906/77, Judgment (24 June 1982).

(19) *de Wilde, Ooms and Versyp v. Belgium*, Application No. 2832/66;2835/66;2899/66, Judgment (18 June 1971).

A total of 32 cases have been litigated under Art. 4 ECHR.

²⁹ *Siliadin v. France*, Application No. 73316/01, Judgment (26 October 2005), para. 117. On the ILO standards, see above in Section 4.4.

³⁰ *Siliadin v. France*, Application No. 73316/01, Judgment (26 October 2005), para. 118.

regime of isolation, fear and threat combined with the misuse of positions of power are clear indicators of forced labour (Duffy 2016, p. 380). These indicators and the exploitation of vulnerability are apparent in the Norwegian cases too.

A further clarification of the contours of forced labour came with the judgment in *C.N. and V. v. France*. The case dealt with two orphaned sisters, both minors from an Eastern African country, who were forced to engage in unpaid domestic chores in the household of their uncle and aunt in France. Again, the court relied on the ILO Convention of 1930, but broadened its approach to ‘penalty’ as developed in *Siliadin v. France*.³¹ It held that the meaning of penalty ‘may go as far as physical violence or restraint, but it can also take subtler forms, of a psychological nature, such as threats to denounce victims to the police or immigration authorities’ (para. 77). This interpretation conforms with the one for the Council of Europe Convention and is important in its recognition of psychological threats. The presumed victims of forced labour in Oslo, with the exception of Nadim, were all men from Eastern Europe and not illegal immigrants. They did not face expulsion but risked penalties for working without valid work permits. As such, the risk of being denounced to the police was genuine. Even if they had work permits and contracts that appeared to be valid and legal, they still were exposed to threats, mostly of an economic nature.

The case of *Chowdury and Others v. Greece* was the first where the court found that the exploitation of adult irregular migrants’ labour amounted to forced labour.³² In the judgment, the court refers back to its earlier elaborations in *Siliadin* and *Rantsev* for the relevant international law, primarily the ILO Convention, the Palermo Protocol, and the Council of Europe Convention, thereby confirming its cross-fertilisation approach (para. 38). In dealing with forced labour of migrant men, *Chowdury* is highly relevant for the situation of men in Norway. The case deals with Bangladeshi migrants who were employed as strawberry pickers in Greece without work permits. Under the supervision of armed guards, they worked every day from 7 a.m. to 7 p.m. The men lived in makeshift shacks made of cardboard and without toilets or running water. Their employers had warned them that they would only receive their wages if they continued to work for them. While the working conditions and the accompanied threats and humiliation in *Chowdury* resemble the stories of the men in Norway, the safety regime was decisively stricter and the living conditions far worse. Moreover, in *Chowdury*, the workers experienced armed violence and several suffered acute gunshot wounds. Their freedom of movement was significantly curtailed and their right to life threatened, while in the Norwegian cases, the workers faced no threat from guns or other arms. Their freedom of movement was reduced foremost due to economic restraints. The security regimes are therefore not comparable, and *Chowdury* reveals severe, and even irreversible, breaches of human rights of the workers. However, as discussed above in the case of *Siliadin*, the threshold for breaches of Art. 4(2) ECHR and the prohibition of forced labour is probably lower than those of *Chowdury*. It is therefore not excluded that the men in Norway were victims of forced labour, and their treatment was a violation of Art. 4(2) ECHR.

In the judgment, the court reminded the member states of their obligation to adopt a ‘comprehensive approach’—without elaborating on what constitutes the comprehensiveness—to combat the phenomenon of forced labour (para. 87). Furthermore, the states had to ‘assume responsibility for putting in place a legislative and administrative framework providing real and effective protection of the rights of victims of human trafficking’ (para. 87). The implementation of an effective protection is thus part of the positive obligations of the states. For the cases of the men in Oslo, one might question the effectiveness of the protection, especially considering that the Attorney General criticised the police for focusing on expelling rather than identifying—and protecting—potential victims of human trafficking. The Attorney General explicitly mentioned the lack of law enforcement regarding victims of forced labour, especially men, which confirms a lack of their effective protection. All 14 cases were dropped

³¹ *C.N. and V. v. France*, Application No. 67724/09, Judgment (11 October 2012), para. 71.

³² *Chowdury and Others v. Greece*, Application No. 21884/15, Judgment (30 June 2016).

before they reached the trial stage, indicating an inadequate protection regime. The limitation of resources that law enforcement has at its disposal does not exempt the state from its obligation to protect (male) victims of forced labour.

The ECtHR emphasised that ‘forced labour’ went beyond just any form of legal compulsion or obligation and had to include the idea of physical or mental coercion. The court exemplifies that carrying out work based on a ‘freely negotiated contract cannot be regarded as falling within the scope’ of Art. 4 ECHR. By implicit reference to the ILO Convention and explicit reference to its earlier case law, the court held that work must be exacted under the menace of a penalty and also performed against the will of the person concerned, hence ‘work for which he has not offered himself voluntarily’ (para. 90). In a narrow reading of the law, the work of most interviewed men would not be considered forced labour. With a few exceptions, such as Nadim, they worked to agreed contracts and offered their work voluntarily. Arguably, this arrangement was not based on freely negotiated contracts because the men were made to work for much longer hours and lower pay than anticipated. This alone would, however, not suffice to reach the threshold of forced labour, yet, taking into consideration the totality of the physical and psychological circumstances, including their vulnerability and the coercion, the required threshold is probably reached. Later in the judgment, the court clarified that ‘where an employer abuses his power or takes advantage of the vulnerability of his workers in order to exploit them, they do not offer themselves for work voluntarily’ (para. 96). Based on this clarification, one might reasonably conclude that the men in Norway were victims of forced labour in the sense of Art. 4(2) ECHR.

7.4. *Zoletic and Others v. Azerbaijan (2021)*

The judgment in *Zoletic and Others v. Azerbaijan* was rendered in October 2021. It deals foremost with the procedural limb of Art. 4(2) ECHR. This section presents the case and examines it in light of the material conditions of the forced labour and compares it with the situation of the interviewed men in Norway. The case concerns 32 male applicants from Bosnia and Herzegovina who were recruited as temporary construction workers to Azerbaijan. They arrived on tourist visas, without work or residence permits or individual contracts. Upon arrival, their passports and travel documents were seized. They were accommodated in houses with overcrowded shared rooms for twelve to twenty-four people and unsanitary conditions, without enough toilets. Under threats of physical violence, they were not allowed to leave their accommodation. Because they were not given adequate food, they lost a lot of weight. The men had to work 12-h shifts, sometimes even up to 36-h shifts in construction (paras. 62 and 106–8). For several months, the applicants did not receive any wages, deprived of approximately 10,000 US dollars. Later, upon intervention of humanitarian organizations, parts of the accrued wages were paid. ‘An atmosphere of fear and dependency was created (. . .) with the intention of fraudulently depriving the victims of their wages through deductions, fines and denial of adequate accommodation, food and healthcare in order to misappropriate the money transferred to the account’ of the construction company (para. 62).

The facts of the case show a remarkable resemblance to the situation of the men in Norway: although no one had his passport taken away, they lived in similar accommodation with overcrowded dormitories and inadequate sanitary and cooking facilities. The men worked long shifts, did not receive their wages on time, the money was in inaccessible accounts, and they experienced fraudulent deprivation of their wages through deductions. The atmosphere of fear and dependency that the court describes reverberates in the cases of the 14 men in Oslo.

By reference to the international treaty obligations of Azerbaijan and following the principle of harmonious interpretation of the convention and other instruments of international law, the ECtHR confirmed the cross-fertilisation and streamlining of the different legal regimes, in particular with ILO Convention No. 29 and the Palermo Protocol. It

thereby followed the path laid out in *Siliadin*, *Rantsev*, *Chowdury*, and *S.M.*, thus settling the jurisprudence on the matter (paras. 96–98 and 155).

The judgment also refers to a report by the Council of Europe Group of Experts on Action against Trafficking in Human Beings (GRETA), according to which Azerbaijan has been fighting trafficking in human beings ‘for the purpose of sexual exploitation of Azerbaijani women abroad and not enough attention has been paid to [trafficking] for labour exploitation, particularly occurring in Azerbaijan’ (para. 118). This reference confirms the focus of states on combating trafficking for the purpose of sexual exploitation of women, thereby placing (male) victims of labour exploitation in a subordinate position. The unfortunate signal sent by such government policies is that sexual exploitation of women is not accepted and will be met by sanctions, while labour exploitation of men is granted impunity. As discussed above, the policies of the Norwegian authorities have a similar focus, which has had disadvantageous consequences for the male victims concerned.

Confirming its earlier case law, the ECtHR elaborated on the notion of ‘forced or compulsory labour’ under Art. 4 and held that it aims to protect against serious exploitation, irrespective of whether it is related to a specific human trafficking context (para. 148). The court also confirmed the reasoning of *Chowdury* whereas the concept of ‘consent’ is nullified if an employer abuses his power or takes advantage of the vulnerability of his workers in order to exploit them (para. 149). It reiterated the requirement of ‘disproportionate burden’ to distinguish forced labour from work which can reasonably be expected based on family assistance or cohabitation (para. 150). The ‘penalty’ notion is to be interpreted in a broad manner to include physical violence or restraints as well as threats and other psychological pressure exerted upon the victim (para. 151).

‘The court considers that trafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership. It treats human beings as commodities to be bought and sold and put to forced labour, often for little or no payment, usually in the sex industry but also elsewhere’ (para. 152). By using the terminology of the right to ownership, the ECtHR makes a connection to the historical definition of slavery from the 1926 Convention. [McAdam \(2019, p. 30\)](#), however, points out that nowadays, the legal right of ownership cannot be exercised by one person over another, thereby rendering this notion inadequate to address a contemporary problem. Another issue is that, by reverting to the analogy of the trade of human beings, the ECtHR reinforces the understanding of trafficking as a notion of modern slavery, despite the above-discussed definitional vagueness and lack of legal validity of the term. This parallel, although certainly effectful, is unfortunate from a legal perspective. In connecting the discussion of forced labour to the selling of humans under the right of ownership, the court does not contribute to disentangling the legal concepts of slavery, human trafficking, and forced labour from the nonlegal concept of modern slavery.

Notwithstanding, there is no doubt that trafficking threatens the human dignity and fundamental freedoms of its victims and is incompatible with a democratic society and the values expounded in the ECHR. The court interpreted the convention dynamically and held that trafficking in human beings, although not explicitly mentioned, falls within the scope of Art. 4 (paras. 153–54). It thereby confirms the reasoning of *S.M. v. Croatia*.

The judgment in *Zoletic* was clear in its conclusion that the allegations of punishments, retention of documents and restrictions of movement were indicative of coercion. In the view of the court, the absence of work and residence permits as well as the non-payment of wages and deductions disclosed a vulnerability of the migrant men (para. 166). These considerations hold equally valid for the men in Norway. The court is also clear that even if the workers offered themselves for work voluntarily, the situation might have changed because of the employer’s conduct (para. 167). The same holds true for the interviewed men: they applied for the jobs voluntarily and believed in good faith that they would receive their wages, but their situation changed shortly after their arrival to Norway. If an employer takes advantage of the vulnerability of the workers to exploit them, they do, in the view of the ECtHR, no longer offer themselves voluntarily (para. 167). The situation of the

men in Oslo and Azerbaijan was very similar with forced, excessively long work shifts, lack of proper housing and sanitary conditions, and a coercive and intimidating atmosphere, based on an abuse of the alien status of the workers and their lack of knowledge of the local language. The ECtHR concluded that, taken together, their situation amounted to an arguable claim of forced within the meaning of Art. 4(2) ECHR. The same conclusion should be reached for the interviewed men.

7.5. Summing Up

The most recent judgment in *Zoletic* confirms much of the ECtHR's earlier jurisprudence. Despite the scarcity of judgments on Art. 4(2) ECHR, the court has gradually managed to create a jurisprudence on forced labour, which starts to take consistent and coherent form. However, there remain a few legal issues, which have not been fully resolved yet. At the same time, the scarcity also leaves the European domestic courts with few guidelines for their interpretation of forced labour.

The limited number of judgments on forced labour points to an overarching challenge: few cases are reported, investigated, prosecuted, judged, appealed, and finally reach the ECtHR. The cases that reach Strasbourg are only the tip of the iceberg—or, in the words of Helen Duffy, a snapshot of a phenomenon (Duffy 2016, p. 400). She makes the compelling argument that the limited jurisprudence on the regional level reveals that law exists on paper but is not understood or given effect in practice, thereby confirming the claim this paper made above. The lack of effectiveness of the provisions is, in the view of Duffy, owing to a variety of reasons such as lack of capacity and knowledge of prosecutors and judges, or insensitive and ineffective handling of investigations (Duffy 2016, p. 401). The latter was an issue in Norway too: police officers neither prioritised nor understood the seriousness of the respective case and allegation of forced labour, in part because the alleged victims were men. This fact is confirmed by research, according to which authorities and agencies operate under a conception of a trafficked person as a woman or girl exploited for prostitution (Mapp 2021, p. 62; Berket 2015, p. 359). Instead, the image of a trafficked person must include men such as the 14 interviewed, all of whom suffered an abuse of their labour and human rights by exploitation of their vulnerability through poor working conditions, inadequate remuneration, and threats, among other factors. While, in Norway, both labour exploitation in general and the exploitation of men in particular are commonly written about as important targets of anti-trafficking policies of the authorities, research has demonstrated that very few concrete steps have been taken to assist these victims in practice (Paasche et al. 2018, p. 39).

8. Conclusions

Globalisation and communication have contributed to an increase in trafficking of vulnerable people who come from low-income countries in search for work in wealthier countries like Norway. All 14 interviewed men confirmed their traveling to Norway voluntarily, where an employment opportunity awaited them. Despite this voluntariness, their situation changed once they started working: salaries were withheld, payments reduced, living conditions were poor, and psychological coercion was significant. With a few exceptions, they found themselves in increasingly restrictive and unforgiving employment and living conditions. 'I was trapped in the car wash', one man admitted.

Unclear practices and definitions of human trafficking and forced labour have resulted in a low number of judgments on the domestic and regional level. By delimitating and clarifying the different forms of human trafficking, this paper contributed to closing the legal gap in the protection of vulnerable individuals. Legal scholarship and jurisprudence have conclusively determined that vulnerability is a precondition for coercion. The emergence of a judicial and scholarly understanding of vulnerability as a core element of forced labour is an important development in the untangling of different forms of human trafficking.

The situation of the men—presumed victims of forced labour—is complex. Despite experiences of coercion and threats that clearly reach the legal threshold of forced labour,

they did not receive the necessary and required protection. The men were not on the legal radar as victims of a criminal act. Instead, they were met with stereotypical understandings by the authorities. Due to competing legal regimes, as foreigners without work or residence permits, their human rights were played down while their status under immigration or labour law was foregrounded. ‘[The police] talked away the problem of human trafficking’, one man concluded. Moreover, the men neither considered themselves as victims nor appreciated their victimisation: in their view, they were simply deceived. Pride and shame held back any admission of exploitation.

This reluctance has serious consequences: as long as their stories remain unknown, there will be no investigation, prosecution, and conviction for grave crimes that also breach the human rights of the men. Research and activism have largely focused on human trafficking for prostitution, leading to a knowledge gap about forced labour and its legal and factual characteristics, especially regarding migrant men. This gap is reinforced by the fact that alleged cases are dealt with under immigration or labour law, thus foregrounding the illegality of the victims’ residence or employment rather than the perpetrators’ criminal acts. In the battle of competing legal regimes, human rights and state responsibility seemingly lose out. This loss entails that there is little advancement of the interpretation of the law on forced labour, and the respective provisions, especially of Art. 4(2) ECHR, remain elusive.

By providing a legal analysis of international legal instruments, foremost the Palermo Protocol and the Council of Europe Convention on Action against Trafficking in Human Beings as well as the case law on forced labour of the ECHR—this paper has examined how the legal definitions are understood and how they apply to the situation of the interviewed men. In doing so, the paper directed the legal focus onto male victims of forced labour whose vulnerability might not be discernible at first sight. It showed that although the law does not require victims to be migrant workers to experience forced labour, their status as migrants adds to their vulnerability, which is exploited once they are abroad.

A real and effective protection of the rights of victims of forced labour, including men, demands clearly determined legal thresholds and correspondingly stringent legislative and administrative practice.

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