Remuneration and Forced Labour – The Impact of Remuneration on the Classification as Forced Labour Victim in European Law

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Abstract

While European regulations prohibiting forced labour do not explicitly address the impact of remuneration on its presence, a closer look at corresponding case law identifies that indeed some specific principles are repeatedly applied by the European Court of Human Rights. As these guidelines seem to approach the problem in an insufficiently engaged manner, the question arises as to how they could be furthered in order to achieve more efficient, victim-oriented protection. A glance at German law reveals that remuneration thresholds, if cautiously applied, could constitute an adequate, indicational directive in the future.

I. Background and Legal Framework for the Prohibition of Forced Labour

Forced labour in the 21st century differs greatly from its manifestations in the past. Classically associated with men and women being constrained to tough, primarily manual labour under strict supervision, these two words, nowadays, encompass far more scenarios in which an individual is forced to accomplish a task against his or her will. With the industrialisation, digitisation, change of working environments and of requirement profiles comes a far larger field susceptible to be used by criminals to exploit and harass individuals.

Nowadays, forced labour can be found nearly anywhere. With this change comes a problem for states and other bodies aiming at criminalising forced labour and human trafficking: The identification and criminalisation of these offences becomes more difficult as compulsory labour bears the face of voluntary work while hidden under the guise of legality. A forced labour victim these days may appear to the inattentive observer no different to the neighbouring, voluntary worker, especially in the service sectors such as gastronomy and seasonal agricultural employment.

In Europe, mainly two sets of norms constitute the legal framework for the prohibition of forced labour:

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- **Art. 4 paragraph 2 of the European Convention on Human Rights** (ECHR) states: "No one shall be required to perform forced or compulsory labour."
- The **Convention on Action against Trafficking in Human Beings**, adopted by the Council of Europe on 16 May 2005 (Human Trafficking Convention), considering that trafficking in human beings constitutes a violation of human rights and an offence to the dignity and the integrity of the human being, defines the term "trafficking in human beings" (in its Art. 4 subparagraph a) 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, […] forced labour […]".[1]

With the change of landscape of forced labour, these victim protection regulations, too, must adapt to the evolving situation in relation to remunerated activities.

- In this regard, Art. 4 paragraph 2 of the ECHR poses no problem as it consists of very open wording, thus leaving a large margin to interpretation.
- In the context of the Human Trafficking Convention, human trafficking is based on three different constituents: action (such as recruitment), means (such as force) and purpose (in our case: forced labour). These three must all occur in combination in order for the requirements of human trafficking to be fulfilled.[2] For the following, only the third, intentional component is of relevance: The purpose must be exploitation in the form of forced labour. The sole intention of forcing the victim suffices in order to constitute human trafficking; the victim does not actually have to have committed the work forced upon him or her.[3] The intended exploitation is therefore relevant, even if the actually exercised exploitation differs.[4]

[1] The Convention entered into force on 1 February 2008, 10 States, among them 8 Member States, having ratified it.
[2] Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings, p. 14 (available at https://rm.coe.int/16800d3812, last accessed 2 June 2020).
[3] Ibid., pp. 16, 35.
[4] This approach de lege lata is criticized by *F. Viganò*, Rethinking the Model Offence, in: R. Haverkamp, E. Herlin-Karnell, C. Lernestedt (eds.), What is Wrong with Human Trafficking? Critical Perspectives on the Law, 2019, p. 239 et seq.

Hence, although the ECHR and the Human Trafficking Convention consist of two different points of reference – the prohibition of *forced labour* as such in the ECHR, and Member States' positive obligation under the Human Trafficking Convention to incriminate *human trafficking*[5] – both articles can be read in parallel as to the definition of forced labour. Also, the European Court of Human Rights (ECtHR) has ruled that human trafficking itself falls within the scope of Art. 4 ECHR.[6]

II. The Element of Remuneration

In this context appears the question of the impact of remuneration on the identification of forced labour victims. If forced labour bears so many different faces nowadays, is remuneration an adequate delimitator between voluntary and forced work? While such a differentiation may, at first view, seem handy, such an approach, as shall be demonstrated, would be too easy and would lack regard for specifics of every individual case. Rather, the ECtHR's approach is more versatile as to the remuneration criterion: The presence of remuneration as such does not necessarily rule out forced labour (1). As remuneration is therefore indeed a viable criterion, the adequacy and amount of remuneration could be a deciding factor for the presence of forced labour (2).

1. No Forced Labour in Case of Remuneration?

Firstly, it is important to note that the wording of Art. 4 subparagraph a of the Human Trafficking Convention is very broad. Forced labour is only one of the multiple forms "exploitation" as prescribed purpose of human trafficking can take ("include", "at a minimum"). Therefore, even if forced labour is not applicable in case of remunerated work, another, unnamed form of exploitation could be pertinent.[7]

[5] As to the positive obligations as stated in *ECtHR*, *Siliadin v. France*, Application no. 73316/01, Judgment 26 July 2005, margin nos 77, 89, cf. *B. Huber*, in: J. Meyer-Ladewig, M. Nettesheim, S. von Raumer (eds.), Handkommentar Europäische Menschenrechtskonvention, 4th ed., 2017, Art. 4, margin no 8; *H. Cullen*, Siliadin v. France: Positive Obligations under Article 4 of the European Convention on Human Rights, Human Rights Law Review 2006, p. 585 et seq.

[6] *ECtHR*, *Rantsev v. Cyprus and Russia*, Application no. 25965/04, Judgment 7 January 2010, margin no 282.

[7] Cf. fn. 2, p. 16. This approach is identical to that of Art. 3 paragraph a of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, adopted and opened for signature,

Moreover, the Human Trafficking Convention itself does not define "forced labour", as does not Art. 4 of the ECHR. The model envisaged by the ECHR is that of the International Labour Organisation (ILO) Convention concerning Forced or Compulsory Labour (No. 29) of 29 June 1930.[8] This Convention does not include in its definition of forced or compulsory labour the criterion of lack of payment.

ECtHR judgments, likewise, do not exclude remunerated work from forced labour. One specific paragraph in an ECtHR judgment may serve as a key reference in this regard. The Court expressly stated that

"[…] remunerated work may also qualify as forced or compulsory labour […]".[9]

In global comparison, this broad, "remuneration-neutral" approach to the definition of forced labour is by no means the only conceivable one. For example, in Taiwan, for there be forced labour, there is a condition of incommensurate remuneration: Taiwanese regulation defines human trafficking – in its sub-category of forced labour – as the action of forcing a victim to work duty which is not remunerated in a commensurate manner (Art. 2 paragraph 1 subparagraph 1 of the Taiwanese Human Trafficking Prevention Act[10]). Only if an individual is forced to work under incommensurate payment conditions – and *a fortiori* complete absence of remuneration – is he or she regarded as a human trafficking victim; adequately paid work does not constitute forced labour. The Taiwanese approach may therefore seem significantly different to the European one. However, this difference is probably due only to the reality of the employment structure in Taiwan, forced work and underpayment going hand-in-hand as a result of the enormous amount of immigrant workers being lured into the country.[11] The

ratification and accession by General Assembly resolution A/RES/55/25 of 15 November 2000, entered into force on 15 December 2003.

[8] Ibid.; *A.-L. Spitzer*, Strafbarkeit des Menschenhandels zur Ausbeutung der Arbeitskraft, 2017, p. 15.

[9] *ECtHR, Van der Mussele v. Belgium*, Application no. 8919/80, Judgment 23 November 1983, margin no 40.

[10] "To recruit, trade, take into bondage, transport, deliver, receive, harbor, hide, broker, or accommodate a local or foreign person, by force, threat, intimidation, confinement, monitoring, drugs, hypnosis, fraud, purposeful concealment of important information, illegal debt bondage, withholding important documents, making use of the victim's inability, ignorance or helplessness, or by other means against his/her will, for the intention of subjecting him/her to sexual transactions, labor to which pay is not commensurate with the work duty, organ harvesting; or to use the above-mentioned means to impose sexual transactions, labor to which pay is not commensurate with the work duty, or organ harvesting on the victims."

[11] This is especially the case in rural areas, where fishermen and other low-skilled workers are the primary victims, cf. United States Department of State Trafficking in Persons Report, June 2017, p. 384 (available at https://state.gov/wp-content/uploads/2019/02/271339.pdf, last accessed 2 June 2020). A 2017 research concerning only female victims came to the conclusion that labour trafficking was in fact only reported among

Taiwanese Human Trafficking Prevention Act hence was not intended to expressly exclude adequately remunerated work from its scope of application. Rather, it did not see any necessity to do so in light of its aim of protection.

Therefore, the definition of forced labour differs between Taiwanese regulations and the ECHR. The latter aims at protecting every individual's right to decide for him- or herself whether he or she wants to work voluntarily. The fact of whether the work is remunerated or not does not have any impact on this goal of protection.[12] For example, in a situation in which work is remunerated, but only after the work has been accomplished, the victim is pressurised and in an equally distressing circumstance as if remuneration was promised, but never granted. The fact that payment is not effectuated immediately is the psychologically challenging aspect for the victim. In proceedings before German courts, this circumstance is often taken into account as a specifically aggravating factor for sentencing purposes, for example in the 2007 case of Romanian seasonal harvest workers who were promised an hourly wage of 5.50 EUR, but not paid immediately in order to maintain their dependence.[13] Over the whole course of their work in Germany, the workers did not possess even the most basic means and were therefore under the constant threat of not being able to afford return to their Romanian homeland. Absence of remuneration is thus no prerequisite for forced labour.

2. Amount of Remuneration as "Relevant Factor" for Determining Forced Labour

Even if remunerated work may indeed be considered forced labour, nothing has yet been said about the relevance or irrelevance of remuneration as to the finding of lack of consent and therefore forced labour *in concreto*, the impact it can have on the case-by-case assessment of a situation as a human trafficking scenario.

migrant workers, cf. *L. Huang*, The Trafficking of Women and Girls in Taiwan: Characteristics of Victims, Perpetrators, and Forms of Exploitation, BMC Women's Health 2017, 104, p. 10.

[12] Concerning in detail the Rechtsgut of the criminalisation of human trafficking and including alternative approaches cf. *C. Lernestedt*, What Does the Trafficker Do Wrong and Towards What or Whom?, in: R. Haverkamp, E. Herlin-Karnell, C. Lernestedt (eds.), What is Wrong with Human Trafficking? Critical Perspectives on the Law, 2019, p. 141 et seq.

[13] *LG Augsburg*, Judgment 18 February 2008, 9 KLs 507 Js 121451/07, p. 57.

The ECtHR has on numerous occasions had the opportunity to specify the scope of relevance it attributes to the remuneration criterion (a), but some questions remain as to possible remuneration thresholds which could be guidelines for future judgments (b).

a) Relevance of the Element of Remuneration

For the ECtHR, remuneration and its absence remain important parameters for defining forced labour and therefore constitute important criteria in its rulings. In fact, the lead quotation *supra* under II.1. from the famous *Van der Mussele v. Belgium* judgment continues as follows:

"[While remunerated work may also qualify as forced or compulsory labour,] the lack of remuneration and of reimbursement of expenses constitutes a relevant factor when considering what is proportionate or in the normal course of affairs."[14]

The key notion is that of "relevant factor" for determining proportionality. The ECtHR has ruled that what shall constitute forced labour is work that is not remunerated at all, whilst the specific type of work is typically only provided against adequate remuneration.[15]
However, this line of argumentation ceases to remain fruitful in the case of remunerated illegal practices, such as criminal offences, a sector not to be underestimated.[16] As only legal labour commitments with market value constitute relevant groups of comparison, the value of criminal activities is, as such, indeterminable.[17] But illegal labour is equally worthy of protection as work that is in itself legal, the aim of preventing human trafficking being the protection of freedom of will and not primarily the prevention of criminal enterprises.[18] The European Union's Directive 2011/36/EU on preventing and combating trafficking in human beings and

[14] *ECtHR, Van der Mussele v. Belgium* (fn. 9).
[15] *ECtHR, Siliadin v. France* (fn. 5), margin no 113 et seq.
[16] Cf. *S. Rodríguez-Lopéz*, Telling Victims from Criminals: Human Trafficking for the Purposes of Criminal Exploitation, in: J. Winterdyk, J. Jones (eds.), The Palgrave International Handbook of Human Trafficking, 2020, p. 303 et seq.
[17] *A.-S. Ritter*, Art. 4 EMRK und das Verbot des Menschenhandels, 2015, p. 463.
[18] Cf. *O. Ofosu-Ayeh*, Die Strafbarkeit des Menschenhandels und seiner Ausbeutungsformen: §§ 232-232b StGB, 2020, p. 94.

protecting its victims[19] has expressly included in its Art. 2 paragraph 3 the exploitation of criminal activities as one of the possible purposes of human trafficking.
Furthermore, the difficulty lies in the fact that such victims of human trafficking are often identified not as victims, but only as offenders themselves, by others and, most importantly, by themselves.[20] This failure of self-victim-identification leads to such cases being infrequently litigated, and as a result, basically no present case law. On a national level, Germany has introduced – in transposition of the aforementioned Directive – a specific criminal offence concerning exploitation for criminal purposes (§ 232 I 1 no 1 d) German Criminal Code [German StGB]) in order to shed light onto this category.

Although there have been many ECtHR rulings which deal with cases in which there has been no remuneration *at all*[21] – as opposed to *merely disproportionate* remuneration –, the case law has not established a general rule that absence of remuneration always constitutes forced labour. Rather, the Court always centres its reasoning around the notion of proportionality, searching for a "disproportionate burden"[22] in each specific case. Its approach may be summarised as follows: Presence of remuneration alone is unable to negate forced labour; though on the contrary, absence of remuneration is a strong indicator of forced labour. But while this reasoning may encompass the most prominent situations of human trafficking, it is not sufficient to cover all of them.

b) Remuneration Thresholds as Guidelines?

The ECtHR has so far not had to establish precise guidelines as to the amount of remuneration and its impact on the presence of forced labour. On the contrary, the ECtHR stresses its approach of taking into account many different factors, thus creating an overall impression of the victim's situation. Strict payment thresholds would counter this case-by-case approach.

[19] 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, and replacing Council Framework Decision 2002/629/JHA, OJ L 101, 15 April 2011, p. 1–11.
[20] *C. Villacampa, N. Torres*, Human Trafficking for Criminal Exploitation: The Failure to Identify Victims, European Journal on Criminal Policy and Research 2017, pp. 394, 405.
[21] I.e. *ECtHR, Van der Mussele v. Belgium* (fn. 9), margin no 34, *Graziani-Weiss v. Austria*, Application no. 31950/06, Judgment 18 October 2011, margin no 23 et seq.
[22] *ECtHR, Adıgüzel v. Turkey*, Application no. 7442/08, Judgment 6 February 2018, margin no 30 et seq.

Appropriately, the lead quotation from *Van der Mussele v. Belgium* only expressly mentions complete lack of remuneration, not its inadequacy. All the same, following the ECtHR's reasoning, the amount of remuneration must also constitute a "relevant factor". The question is just as to how the Court might establish such a relevance in future.

The ECHR's impact and legal consequences can only be examined in combination with national regulations aiming at its implementation. Likewise, the ECtHR, whilst *in fine* only deciding on the violation of the provisions of the ECHR and its Protocols (cf. Art. 19 ECHR), is unable to do so without keeping in view national regulations when interpreting the articles of the ECHR.[23] The ECHR, the Human Trafficking Convention, the ILO Convention, European Union Directives[24] and national regulations all aim at penalising the same behaviour.[25] Moreover, it is the ratifying and Member States' duty to fulfil their positive obligations under the ECHR, amongst others by putting in place appropriate criminal legislation.[26] Only in analysing national legislation, the ECtHR is able to identify whether these obligations – as specified in more detail in the Human Trafficking Convention – have been appropriately fulfilled.

Hence, guidelines in German law may prove useful for finding thresholds for adequate and inadequate remuneration as to the definition of forced labour. It cannot be ruled out that the ECtHR may use national reasoning and standards as indicators for its own judgments, and even eventually adopt them as own legal standards.

Over time, German case law has resulted in indicational thresholds to answer the question whether a certain work obligation meets the condition of "exploitative employment" (§ 232 I 2 German StGB). While this term is not synonymous with forced labour, it constitutes the term of reference for many different regulations, *inter alia* the criminal offences of forced labour

[23] *ECtHR, Van der Mussele v. Belgium* (fn. 21), margin no 27: "[…] the appointment complained of cannot be reviewed from the standpoint of the Convention without putting it in the general context both of the relevant [national] legislation applicable at the time and of the practice followed thereunder".
[24] Such as Directive 2011/36/EU, cf. fn. 19.
[25] Cf. Art. 39, 40 Human Trafficking Convention; *M. Böse*, Menschenhandel – konturlose Tatbestände dank EU-Vorgaben?, Kriminalpolitische Zeitschrift 2018, p. 17; *S. Zimmermann*, Die Strafbarkeit des Menschenhandels im Lichte internationaler und europarechtlicher Rechtsakte, 2010, p. 53.
[26] Cf. fn. 5.

and labour exploitation (cf. the references in § 232b I no 1 German StGB and § 233 I no 1 German StGB to § 232 I 2 German StGB).[27]

The key characteristic of such "exploitative employment" are working conditions which are "strikingly disproportionate" to those of voluntary workers undertaking the same or comparable type of work. As a general rule, a deviation of remuneration of 20 – 33 % is regarded as exploitative in German case law.[28] Accordingly, a payment of 67 % permits a presumption of absence of exploitation. All the same, such deviation is but an indication and may not be applied in an inflexible manner.[29]

But to which extent could the ECtHR make use of such thresholds in its own rulings? A simple transfer is by no means appropriate. Even on a national level, the scope of indicational value of remuneration tables and of their transferability is heavily disputed, primarily due to more or less severe threats of punishment for the different offences in question.[30]

Rather, the ECtHR must integrate the indicational value into its global approach of identifying forced labour victims. In our opinion, the primary objective needs to remain the individualistic approach of both national courts and the ECtHR with regard to forced labour qualification and penalisation. Even more so, this objective needs to be reinforced with the aim of even more effective victim protection:

Up until now, the ECtHR may have identified many different factors for localising forced labour. One factor, though, needs to be paramount amongst these: the lack of consent, the involuntary character of the work enacted. While forced labour cannot occur if the work is enacted voluntarily, the victim's consent as such may not rule out forced labour.[31] On the contrary, the consent criterion needs to be evaluated in the light of all of the circumstances of the case.[32]

The ECtHR insists on its research of "proportionality". But who says that it is disproportionality that indicates forced labour? Rather, is it not conceivable – and more realistic than hypothetical – that forced labour victims are such individuals who are obliged

[27] The German legislator also expressly wanted to include findings of precedent case law concerning § 291 German StGB, § 15a AÜG and § 10 SchwarzArbG, cf. BT-Drs. Nr. 18/9095, p. 27.
[28] *Ritter* (fn. 17), p. 461 et seq. (fn. 1192); *Spitzer* (fn. 8), p. 167 with reference to the case law: *BGHSt* 43, 53, 60; *BAG* NZA 2009, 837, 838; *OLG Köln* NStZ-RR 2003, 212, 213.
[29] *Spitzer* (fn. 8), p. 169.
[30] Ibid.
[31] Cf. Art. 4 b of the Human Trafficking Convention. "Consent" in this sense means "agreement" rather than "voluntariness".
[32] *ECtHR, Van der Mussele v. Belgium* (fn. 9), margin no 36 et seq.

to labour that is, at first sight, proportionate in light of the working conditions, but enacted against all freedom of will? To a certain degree, considerations based upon proportionality and therefore comparison are hence inadequate. The usage of remuneration thresholds – which are nothing else than a prefabricated comparison – must therefore have only one value alone: Compensate the ECtHR's inability to read the mind of the most vulnerable, and aid in identifying the involuntary nature in the specific situation. Proportionality and consent are not two different, unconnected parameters. They must rather result in one, overall impression of the victim's situation.

III. Conclusions

We have analysed in depth the impact remuneration aspects can have on forced labour and human trafficking. The following remarks conclude the findings:

The ECtHR has dealt with such situations in which remuneration has an impact, but these cases remain relatively one-sided: Situations in which work is remunerated may fall in the ambit of human trafficking, and absence of remuneration is a "relevant factor" and therefore a strong indicator for forced labour. Cases in which inadequate remuneration prevails have not yet been an issue for the Court. The attempt at exploring possible future tendencies resulted in the necessity to examine what exactly guides the ECtHR: comparative proportionality considerations.

We rather favour an approach that encompasses first and foremost the consent criterion, as protection of the free will is the underlying objective. This approach may not be unassailable and the only conceivable one. Other legally protected interests could be the protection of the public and state as such, or even – as far as exploitation of immigrants is concerned – the protection of European Union borders.[33] However, abstracting the human being as such from human trafficking would result in a too moralistic approach to criminalisation and counter the core itself of the ECHR's intention. Human trafficking is a crime committed against an individual person and needs to be treated as such.

[33] Cf. the approach of *C. Lernestedt* (fn. 12), especially pp. 140, 155: The leading argument is the one discussed supra (fn. 3, 4) that the intention of exploitation suffices, human trafficking thus being criminalised long before an individual actually has to have been subjected to labour against his or her will.