Statutory Progress and Obstacles to Achieving an Effective Criminal Legislation Against the Modern Day Forms of Slavery: The Case of France

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STATUTORY PROGRESS AND OBSTACLES TO
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Bénédicte Bourgeois*

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“New developments in the Campaigns against Contemporary Slavery: Strategies for
Legislation, Litigation and Research” (University of Michigan Law School, October 2015), to
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porary forms of slavery, servitude, and forced labor by establishing a set of four offenses that criminalize these three types of severe labor exploitation. For lawmakers as well as for many stakeholders in the fight against modern-day slavery, that achievement marked the culmination of a series of piecemeal amendments to criminal law and narrow advances in case law, which gradually enhanced the penal repression of modern-day slavery over the previous decade. This paper demonstrates that, even though the new penal provisions constitute a turning point in the criminal approach to contemporary forms of slavery, the 2013 statute only represents a milestone amid an ongoing process aimed at defining the concepts of slavery, servitude and forced labor. To that end, this essay puts into perspective the defining elements identified under human rights law by the European Court of Human Rights and the elements of the crimes established within the French penal law. It brings out the gaps and inconsistencies that affect the existing European definitions and are likely to impede the efficiency of the new national penal tools. The first section lays out the criminal provisions initially used by French judicial authorities for the repression of contemporary slavery, as well as the causes of their inadequacy. The second section of this article analyzes the legal framework drawn by the European Court of Human Rights as to the prohibition of severe forms of labor exploitation and identifies the features of European Human Rights Law that might hinder the conversion of its definitional standards into domestic criminal offenses. Finally, the third section thoroughly explores the constituent elements of the four newly-adopted crimes and seeks to appraise their ability to efficiently capture this phenomenon. By doing so, it brings to light the theoretical misconceptions that garble the current legal definitions of slavery, servitude and forced labor.

I. THE DEFICIENCIES OF THE CONCEPT OF WORKING AND LIVING CONDITIONS INCOMPATIBLE WITH HUMAN DIGNITY

The phenomenon of modern-day slavery in France has received the attention of public authorities only in relatively recent times. While the first cases appeared during the 1990s, they started to be referred to criminal courts only toward the end of that decade. At that time, judicial authorities generally addressed them under the purview of two existing provisions in the penal code, one of which deals with the imposition of unpaid labor on vulnerable or dependent workers, and the other of which addresses the subjection of vulnerable or dependent persons to working or living conditions that are incompatible with human dignity. These two offenses read:

1. CODE PENAL [C. PEN.] [PENAL CODE] art. 225-13 to 14 (Fr.) (These offenses are still in force, but have been amended through several changes in the wording since then. The different versions amended over the years are available at https://www.legifrance.gouv.fr/affichCodeArticle.do?cidTexte=LEGITEXT000006070719&idArticle=LEGIArtI000021342965).
Art. 225-13 - Le fait d'obtenir d'une personne, en abusant de sa vulnérabilité ou de sa situation de dépendance, la fourniture de services non rétribués ou en échange d'une rétribution manifestement sans rapport avec l'importance du travail accompli est puni de deux ans d'emprisonnement et de 500 000 F d'amende.2 ("It shall be an offence punishable by two years' imprisonment and a fine of 500,000 francs to obtain from an individual the performance of services without payment or in exchange for payment that is manifestly disproportionate to the amount of work carried out, by taking advantage of that person's vulnerability or state of dependence.")

Art. 225-14 - Le fait de soumettre une personne, en abusant de sa vulnérabilité ou de sa situation de dépendance, à des conditions de travail ou d'hébergement incompatibles avec la dignité humaine est puni de deux ans d'emprisonnement et de 500 000 F d'amende.3 ("It shall be an offence punishable by two years' imprisonment and a fine of 500,000 francs to subject an individual to working or living conditions which are incompatible with human dignity by taking advantage of that individual's vulnerability or state of dependence.")

Over the next decade and beyond, the sole criminal framework through which severe forms of labor exploitation were punished has consisted of these two provisions. While the inherent quality of the offenses was challenged by some lawmakers,4 which prompted several amendments,5 the approach enshrined in the provisions was not questioned as such within law-making bodies. At first glance, indeed, the combination of the two offenses might be seen to provide a comprehensive and well-suited scheme to ensure the prohibition of all contemporary slavery-related practices: the absence of or clearly inadequate payment for work characterizes an objective exploitation of a workforce, while outrageous working or living conditions embody the contempt for human dignity which is peculiar to slavery. Thus, the legal response to modern-day slavery was achieved through the penalization of the main common features that flag severe exploitative practices, and therefore distinguishing between and defining the different types of labor exploitation could appear to be unnecessary. However, the two offenses, which were passed as part of the new penal code in 1994, were not designed to target contemporary forms of slavery, strictly speaking. Rather, from the parliamentary debates it appears that:

2. Id. art. 225–13 (In the wording in force from Mar. 1, 1994 to Jan. 1, 2002).
the legislature’s intention was to protect the most vulnerable persons against various forms of exploitation, without broadening and trivializing prosecutions to the point of penalizing, through this means, all the conduct contrary to labor law regulations or to housing, building and town-planning regulations, even in the case when imbalanced contractual relations are at stake. ("[…] la volonté du législateur a été de protéger les personnes les plus vulnérables contre les diverses formes d’exploitation, sans élargir et banaliser les poursuites au point de pénaliser, par ce biais, tous les comportements contraires à la réglementation du travail ou aux règles d’habitation, de construction et d’urbanisme, quand bien même seraient en cause des relations contractuelles déséquilibrées.")6

It can thus be discerned that the offenses were aimed at covering a wider spectrum of exploitative practices beyond mere slavery-like situations. At the same time, the constituent elements of the two crimes trace a gravity threshold across all the targeted exploitative conduct, which acts as the trigger point of penal law:7 for penal sanctions8 to apply, work in particular must be "performed under circumstances that are incompatible with human dignity" ("accompli dans des conditions contraires à la dignité humaine")9 or "inherently incompatible with such a dignity" ("inextricablement contraire à cette dignité").10

This has significantly swayed the way judges have construed the penal prohibition of severe forms of exploitation,11 and ultimately their understanding of human exploitation dynamics. Since the exploitative conduct encompassed in the provisions is not restricted to modern-day forms of slavery, neither the title nor the definition of the offenses explicitly refers to any of the latter. This results in a disconnection of domestic measures from the various international instruments dedicated to some or any types of slavery-related practices,12 which is especially important in the defining

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7. It is worth specifying that the two offenses are gathered in the section of the penal code, C. Pén. Sec. 3, which is titled “On working and living conditions which are incompatible with human dignity” (“Des conditions de travail et d’hébergement contraires à la dignité humaine”).

8. The issue addressed here also engages with the question of moral judgments expressed through the labeling of crimes and their impact on the punishment. See infra II–A, pp. 464–65.

9. Ménotti, supra note 6, ¶ 68.

10. Id.


12. In particular: the 1926 Convention to Suppress the Slave Trade and Slavery (“the Slavery Convention”), signed at Geneva on 25 September 1926 and entered into force on 9
process undertaken by judges. As the offenses do not strictly and directly
govern modern-day forms of slavery, but rather deal with specific condi-
tions surrounding a larger array of exploitative behaviors among human
beings, international law relating to slavery-like practices or forced labor
becomes irrelevant to the judicial definition of the elements of the crime,
including the determination of the gravity threshold, which rests on an
autonomous concept of human dignity.

The latter concept has been substantiated by judges chiefly in light of
the guidelines provided by the parliamentary debates. Relying on the un-
derlying tenet according to which “[. . .] what is incompatible with human
dignity is what abases or demeans the human person by tending towards
the reification of his/her body or by infringing on the fundamental rights of
his/her person” (“ [. . .] est incompatible avec la dignité humaine, ce qui
abaisse ou avilît l'être humain en tendant à la reification de son corps ou
en portant atteinte aux droits essentiels de sa personnalité”), judges on
the whole have delineated a highly stringent standard to be reached for
exploitative practices to fall into the ambit of penal law. In substance,
working or living conditions incompatible with human dignity sanction
breaches of labor or housing regulations whose accumulation and scale
indicate “[. . .] not only a disregard for law, but a genuine disdain for the
rights of the person, testifying to the subjection of the latter to a means of
production” (“ [. . .] non pas seulement une indifférence à la loi, mais un
veritable mépris des droits de la personne [. . .] témoignant de son asservis-
sement en tant qu’objet de production”). In sum, the jurisprudence ren-
dered under these two provisions shows that the notion of “human
dignity” has ultimately directed judges towards a search for dramatic and
impressive situations, in which the impact of exploitation on workers’
physical and moral integrity is only incidentally taken into consideration.

In such a context, the emergence of cases involving slavery-like prac-
tices within the domestic sphere has crucially called into question the stat-
tutory and judicial grasp of modern-day slavery, bringing a different
perspective into the actuality of severe exploitative situations. These cases
concern predominantly migrant domestic workers who were forced into
slavery-like conditions in the households of their employers. The specific

March 1927, which was amended by a Protocol of 7 December 1953, entered into force on 7
July 1955; The Supplementary Convention on the Abolition of Slavery, the Slave Trade, and
Institutions and Practices Similar to Slavery, adopted by a Conference of Plenipotentiaries
convened by Economic and Social Council resolution 608 (XXI) of 30 April 1956, which was
done at Geneva on 7 September 1956 and entered into force on 30 April 1957; The Interna-
tional Labor Organization [ILO] Convention No. 29 adopted in Geneva on 28 June 1930, and
entered into force on 1 May 1932 (A Protocol to the Forced Labour Convention was adopted
in Geneva on 11 June 2014, and entered into force on 9 November 2016); The 1957 ILO
Convention concerning the Abolition of Forced Labour (No. 105), adopted in Geneva on 25
June 1957, and entered into force on 17 January 1959; This list is not exhaustive.

13. MENOTTI, supra note 6, ¶ 64.
14. MENOTTI, supra note 6, ¶ 70.
15. Domestic worker is to be understood here within the meaning of the ILO Conven-
tion Concerning Decent Work for Domestic Workers (No. 189) art. 1(a)–(b) (entered into
features of this type of labor exploitation, as well as the particular profiles of these exploiters, underscored these penal provisions’ shortfalls, and contributed to bringing to light the misconception that undermined the initial approach adopted by judicial authorities.

The first landmark case to raise the issue of the French criminal legislation’s inadequacy with respect to sanctioning all forms of modern-day slavery was initiated by Ms. Siwa-Akofa Siliadin, a fifteen year old Togolese national who had been exploited in domestic work for four years upon her arrival in France. The circumstances of the case can be summarized as follows:

Ms. Siliadin was brought to France by a French national of Togolese origin, following an agreement with her parents. According to the agreement, she would work at that person’s home until the cost of her air ticket had been reimbursed, while her host would take care of her immigration status and send her to school. In reality, the applicant became an unpaid housemaid, first for her host family, and then for another family to whom she had been “lent.” Her passport was taken from her. She worked seven days a week from 7:30 A.M. to about 10:30 P.M. Her tasks included preparing breakfast, dressing her employers’ four children, taking them to nursery school or their recreational activities, looking after the baby, doing the housework, washing and ironing clothes, preparing dinner, looking after the older children and washing up. In addition, she had to clean a studio flat that belonged to her employers in the same building. She wore second-hand clothes and slept on a mattress on the floor in the baby’s room, so she could look after him during the night. Her immigration status was never taken care of, and she did not attend school. She eventually managed to alert a neighbor of her situation, and after the police raided the place, she filed a complaint with the prosecutor’s office.

Unsurprisingly, her employers were prosecuted on charges of “having obtained the performance of services without payment or in exchange for payment that was manifestly disproportionate to the work carried out, by taking advantage of that person’s vulnerability or state of dependence,” as well as of “having subjected an individual to working and living conditions that were incompatible with human dignity by taking advantage of her vulnerability or state of dependence.” However, the criminal proceedings at the end of a series of appeals, one of which reached the Cour de Cassation (the French Supreme Court), resulted in the final acquittal of...
Ms. Siliadin’s employers.\textsuperscript{19} It is worth mentioning that, despite some conflicting judicial analysis and three judgments partly rendered in favor of Ms. Siliadin, trial and appeal courts unanimously came to find that the plaintiff was not subjected to working or living conditions that were incompatible with human dignity. The Versailles Court of Appeal in particular, which issued the final judgment in that case at the domestic level, substantiated its decision as follows:

As the court of first instance correctly noted, carrying out household tasks and looking after children throughout the day could not by themselves constitute working conditions incompatible with human dignity, this being the lot of many mothers; in addition, the civil party’s allegations of humiliating treatment or harassment have not been proved. Equally, the fact that [Ms. Siliadin] did not have an area reserved for her personal use does not mean that the accommodation was incompatible with human dignity, given that [the perpetrators’] own children shared the same room, which was in no way unhygienic. Accordingly, the constituent elements of this second offence have not been established in respect to [the perpetrators]. (“Comme l’ont justement relevé les premiers juges, le fait de s’occuper des tâches ménagères et des enfants pendant la totalité de la journée, ne saurait constituer à lui seul des conditions de travail incompatibles avec la dignité humaine, ce sort étant celui de nombreuses mères de famille ; la preuve d’humiliations ou de vexations qu’aurait subies la partie civile n’est pas rapportée par ailleurs ; De même, le fait de ne pas avoir réservé un espace personnel à [Mme Siliadin] ne caractérise pas un hébergement contraire à la dignité humaine dès lors que les propres enfants [des employeurs] partageaient la même chambre, laquelle ne présentait aucun caractère d’insalubrité ; Les éléments constitutifs de ce second délit ne sont donc pas réunis à l’encontre des [employeurs].”)\textsuperscript{20}

This makes plain that, in such cases where the exploited person performs domestic work and is required to live in the exploiters’ households, even though the exploitative treatment to which he or she is subjected may amount to a slavery-like practice, it is not outlawed since the physical conditions in which the exploitation occurs do not in themselves infringe upon human dignity.

As the existing domestic legislation prevented her from obtaining justice, Ms. Siliadin referred her case to the European Court of Human Rights, thereby initiating an enduring and tricky dialogue between Euro-

\textsuperscript{19} The final acquittal was actually due to both the analysis on the merits and the application of some procedural rules.

\textsuperscript{20} Versailles Court of Appeal’s judgment, issued 15 May 2003, as quoted in \textit{Siliadin, 2005-VII Eur. Ct. H.R.}, ¶ 44.
pean and French national authorities, which would eventually lead to the enactment of the 2013 statute.

II. THE EUROPEAN LEGAL FRAMEWORK SET OUT BY THE EUROPEAN COURT OF HUMAN RIGHTS

Before discussing in detail the criminal provisions adopted by the French Parliament in 2013, this section aims to specify the requirements imposed by the European Convention of Human Rights (ECHR) on contracting states as to the prohibition of severe forms of labor exploitation, which affects criminal definitional issues.

The legal system of the ECHR provides for supranational judicial review over states, which is exercised through specific litigation. This is carried out by the European Court of Human Rights (ECtHR), which at the same time is in charge of the interpretation of the Convention. Thus, "[. . .] the Strasbourg Court not only seeks to settle the particular cases that are submitted to it, but also to elaborate a European human rights law." ("[. . .] la Cour cherche non seulement à régler les affaires particulières qui lui sont soumises mais aussi à élaborer un droit européen des droits de l’homme.").

A. Issues At Stake in the Siliadin Case

The Siliadin case was the first case involving a modern-day form of slavery ever submitted to the Court under Article 4 of the Convention. ECHR Article 4 is divided into three paragraphs, the first two of which provide, respectively, that “[n]o one shall be held in slavery or servitude” and that “[n]o one shall be required to perform forced or compulsory labour.” Thus, three distinctive types of exploitation are addressed in the Convention: slavery, servitude and forced or compulsory labor.

As to the litigation brought before the Court, a first dispute arose between the applicant and the defending state regarding the classification of the facts (the facts were not themselves challenged as such). The applicant deemed that the exploitation to which she had been subjected constituted a situation of servitude, while the state argued that the factual circumstances of the case described forced labor within the meaning of the Convention, and that the imposition of the payment of damages had accorded sufficient redress. Yet the set of obligations upon states that flow from Article 4 do not differ depending on the classification of the factual circumstances into one of the three concepts contained in the provision,

22. Id. art. 32(1) (“The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols [. . .]”).
and the control of their compliance is triggered as soon as Article 4 is found applicable. In the instant case, the conduct of the perpetrators, irrespective of how it was termed, had remained unpunished at the end of the national criminal proceedings. Therefore, as the stance adopted by the French state regarding the qualification could have only a symbolic impact without any substantial effect on the outcome of the case, it can be considered as reflecting the interpretation of the state regarding the concrete situations to which the concepts of servitude and forced labor refer. However, the Court ruled in favor of the position defended by the complainant, stating that:

Sight should not be lost of the Convention’s special features or of the fact that it is a living instrument which must be interpreted in the light of present-day conditions, and that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies [...].

In this way, in order to determine and impose the European standard of servitude on states, the Court applies here a widely-used method, relying on the “fundamental values of democratic societies.” This approach is favored in that, “[...] rather than to cause concern to states” (“[...], plutôt que d’inquiéter les Etats”)26, it ensures that “[...] all of [the European] standards advantageously and legitimately contribute to the construction of a common European law, and that they do not result from the willingness of judges who would abusively seek to impose to states some role models chosen at their own discretion.” (“[...] tous ces standards participent utilement et légitimement de la construction d’un droit européen commun, et qu’ils ne résultent pas de la volonté du juge qui chercherait abusivement à imposer aux Etats parties des modèles de comportements discrétionnairement choisis.”).27 However, by referring at the same time to the increasingly high standard required, which warrants a greater firmness in the assessment of the breaches of these values, the Court also introduces a changing set of definitions. Within the European legal framework, defining exploitation-related concepts is a dynamic process, and the identification of the behaviors covered by the notions of slavery, servitude or forced labor is contingent upon the level of exigency with which the assessment is conducted.28

In addressing the core claim and the alleged violation of Article 4, the Court first agreed with the applicant29 as to the existence of an obligation,

\[25. \text{Id.} \ S 121.\]
\[26. \text{Eudes, supra note 23, at 436.}\]
\[27. \text{Id. at 437.}\]
\[28. \text{See also infra II–B pp. 467.}\]
\[29. \text{The defending state primarily argued that “the proceedings before the criminal courts which led to the payment of damages were sufficient under Article 4 in order to com-}\]
under Article 4 of the Convention, for member states to penalize and effectively prosecute “any act aimed at maintaining a person in such a situation.”

Then it assessed both the offenses of taking advantage of a person’s vulnerability or dependent state to obtain services without payment or any adequate payment and of subjecting such a person to working or living conditions incompatible with human dignity. The Court found that these criminal provisions failed to meet the above obligation, emphasizing in particular that they “do not deal specifically with the rights guaranteed under Article 4 of the Convention, but concern, in a much more restrictive way, exploitation through labor and subjection to working and living conditions that are incompatible with human dignity.”

In other words, the European judges were critical of the tangible difference in the respective scopes of the exploitative practices prohibited by the ECHR and the corresponding domestic offenses. Hence, the Court pointed to the key obstacle to making criminal provisions an effective tool in the repression of severe forms of labor exploitation: their failure to target contemporary slavery as such and thereby to focus on the very essence of the phenomenon through the constituent elements of the offenses.

This crucial facet of the European stance on the prohibition of modern-day slavery implicitly brings to light that what is traditionally considered from the perspective of the rights of the defense, through the principle of “fair labeling,” may also constitute a major guarantee for the effectiveness of the victim’s right “to see those responsible for the wrongdoing convicted under the criminal law.” In light of the protection of the rights of defense, “[t]he principle of ‘fair labeling’ requires that the label of the offense should fairly express and signal the wrongdoing of the accused, so that the stigma of conviction corresponds to the wrongfulness of the act. Labeling reflects the moral judgments that the public makes about the relevant conduct.” From the view of effective protection of victims of exploitative abuses by domestic criminal law, however, the label of the crime, by bringing about the constituent elements of the offense, is also meant to provide judges with clear guidance as to the corresponding conduct, enabling them to identify in a classification the case they have to

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30. Id. ¶ 112.
31. Id. ¶ 142.
32. This line of reasoning has been confirmed and reinforced by the Court in its subsequent case-law, in particular C.N. v. The United Kingdom, App. No. 4239/08, 2012-XI Eur. Ct. H.R. For a review of the latter case, see Vladislava Stoyanova, Human Trafficking and Slavery Reconsidered: Conceptual Limits and States’ Positive Obligations in European Law, 245 (2017).
decide.\textsuperscript{35} Hence, both the capacity of judges to acknowledge the accurate seriousness of severe forms of exploitation, and a sentencing that reflects the moral judgments of a given society towards these conducts depend on the penal labeling of modern-day situations of slavery. The French National Consultative Commission on Human Rights does bring this linkage out when, commenting on the quantum of the sentences imposed on perpetrators of modern-day slavery who were found guilty under Article 225-13 and Article 225-14 of the French penal code, it noted that “nothing says to judges through the wording of these offenses that they face a serious conduct which not only breaches the standards of labor and housing, but also can constitute a forced labor, a form of servitude or slavery as condemned by international law. What is not named forced labor, servitude or slavery cannot be sentenced as such.” (“rien ne vient rappeler au juge dans l’énoncé de ces infractions qu’il fait face à un comportement grave violent non seulement les standards du travail ou de l’hébergement, mais pouvant aussi constituer un travail forcé, une forme de servitude ou d’esclavage tels que condamnés par le droit international. Ce qui n’est pas nommé travail forcé, servitude ou esclavage ne peut être condamné comme tel.”).\textsuperscript{36}

B. Features Of The European Legal Framework

Besides the determination of the specific dispute that was brought before it, the Court on a more general level outlines the legal framework under which states are required to take action to secure the prohibition of slavery, servitude and forced labor. Two significant features of this framework will be highlighted here: the connection that is established between the three concepts of slavery, servitude and forced labor, as well as the prominent role given to national criminal law to ensure the effectiveness of the right not to be held in a form of contemporary slavery.

The path followed by the Court\textsuperscript{37} when discussing the question of the classification of the facts in \textit{Siliadin} makes it clear that it adopts an approach like the one well established under Article 3 of the Convention.\textsuperscript{38} In interpreting the provision, the Court relies on a hierarchy introduced into the three phenomena, in accordance with the degree of severity of their harmful effect on victims. This is not surprising inasmuch as the early

\begin{itemize}
\item \textsuperscript{35} See Florence Massias, \textit{L’arrêt Siliadin: L’esclavage domestique demande une incrimination spécifique}, \textit{1 Revue de Science Criminelle et de Droit Penal Comparé} 153 (2006) (Fr.).

\item \textsuperscript{36} Commission nationale consultative des droits de l’homme, \textit{supra} note 11, at 81.

\item \textsuperscript{37} See \textit{Siliadin}, 2005-VII Eur. Ct. H.R., ¶¶ 120–21 (“In these circumstances, the Court considers that the applicant was, at the least, subjected to forced labour within the meaning of Article 4 of the Convention at a time when she was a minor”; “It remains for the Court to determine whether the applicant was also held in servitude or slavery” (emphasis added)).

\item \textsuperscript{38} ECHR, \textit{supra} note 21, art. 3 (“No one shall be subjected to torture or to inhuman or degrading treatment of punishment.”); See Frédéric Sudre, \textit{Esclavage domestique et Convention européenne des droits de l’Homme}, \textit{JCP}. Ed. G. 19 Oct. 2005, no. 42, II, 10142.
\end{itemize}
case law regarding the Convention had already read the structure of the provision as indicating that

"[t]here is [. . .] a difference of degree between the situations covered by the two separate paragraphs of Article 4, inasmuch as slavery and servitude involve the person’s position as a whole, which is not generally the case for forced or compulsory labor. Indeed, in contrast to slavery and servitude, the former usually is temporary and occasional. (‘‘[i] existe [. . .] une différence de degré entre les situations envisagées par ces deux dispositions, dans la mesure où l’esclavage et la servitude investissent le statut d’une personne dans sa totalité, ce qui n’est en général pas le cas du travail forcé ou obligatoire. En effet, contrairement à l’esclavage et à la servitude, celui-ci revêt normalement un caractère temporaire ou occasionnel.’’)

Additionally,

"[. . .] servitude is a specific form of slavery, which differs from it less in character than in degree. Although it constitutes a condition and it entails a ‘‘particularly serious form of denial of freedom’’, it indeed does not include the powers attached to the right of ownership that labels slavery. Unlike forced labor, servitude however presumes more than the obligation to perform certain services under coercion. (‘‘[. . .] la servitude est une forme particulière d’esclavage, qui s’en distingue moins par la nature que par le degré. Bien qu’elle constitue un état, et qu’elle implique une « forme particulièrement grave de négation de la liberté » , elle ne comprend en effet pas les attributs du droit de propriété caractéristiques de l’esclavage. À la différence du travail forcé, la servitude suppose en revanche plus qu’une obligation de prêter des services sous l’empire de la contrainte.’’)

Still, this approach informs the definitions of the three concepts, since it articulates “an escalating continuum” from “most to least abusive practices”, with slavery forming the gravest abuse, servitude less so, and forced labor by comparison the least abusive. Therefore, beyond the specific definition assigned to each of the concepts, the latter is to be understood through the underlying premise that all slavery encompasses servitude and all servitude encompasses forced labor.


41. For an analogous assertion by the former European Commission of Human Rights under Article 3, see Greece v. The United Kingdom, App. Nos. 176/56 and 299/57, Eur. Comm’n H.R. 175, referred to by Frédéric Sudre, Article 3, in supra note 38, at 159.
Furthermore, such a scheme is linked to a specific methodology for the Court to determine whether specific factual circumstances should be classified as one or another form of contemporary slavery. When assessing a given situation, the Court typically follows a step by step process, starting with the examination of the submitted facts with respect to the lower threshold – which triggers the applicability of Article 4 – before ascertaining, subject to the terms of the dispute between the parties, whether the factual circumstances reach the higher thresholds of severity.\footnote{See, e.g., Massias, supra note 35, at 142.}

Last, and importantly, the abundant case law generated under Article 3\footnote{ECHR art. 3 prohibits torture as well as inhuman or degrading treatment or punishment; see supra note 38.} demonstrates that the Court has made use of this “gradation model”\footnote{S TOYANOVA, supra note 32, at 286.} to exercise its progressive interpretation of the Convention’s provisions. Indeed, from its early case law onwards, the Court has shown a “deliberate intent [. . .] to provide \textit{effective protection of human rights}, in accordance with the principle of \textit{effectiveness} and reiterating that the Convention, which must be interpreted “in the light, among others, of changes in science and society,” is intended to guarantee “not theoretical or illusory rights, but rights that are practical and effective” (“[. . .] volonté délibérée [. . .] d’assurer une \textit{protection efficace des droits de l’homme}, conformément au principe de l’\textit{effet utile} et en rappelant que la Convention qui doit être interprétée « à la lumière, notamment de l’évolution de la science et de la société », a pour but de protéger des droits, « non pas théoriques et illusoires, mais concrets et effectifs. »”).\footnote{Olivier Jacot-Guillarmod, \textit{Règles, méthodes et principes d’interprétation dans la jurisprudence de la Cour européenne des droits de l’homme}, in supra note 39, at 62.} As a result of this constant concern to make the Convention a living and dynamic instrument and adaptable, where necessary, to present-day living conditions in Europe, the Court has adopted a principle of evolutive interpretation that it combines with a range of other principles of interpretation depending on the specific case.\footnote{This principle of interpretation is consistent with the Court’s assertion that it is not bound by its previous decisions (see Olivier Jacot-Guillarmod, \textit{Règles, méthodes et principes d’interprétation dans la jurisprudence de la Cour européenne des droits de l’homme}, in supra note 39, at 62 (quoting the Cossey case)): For the limitations of this principle, see e.g. François Ost, \textit{Originalité des méthodes d’interprétation de la Cour européenne des droits de l’homme}, in RAISSONNER LA RAISON D’ÉTAT, VERS UNE EUROPE DES DROITS DE L’HOMME, 443–5 (Mireille Delmas-Marty ed., 1989).} Regarding the gradation model, through which it ensures the right not to be subjected to torture or to inhuman or degrading treatment, the Court, relying on the premise that the standards it sets can develop over time, has in the late nineties and after a decade of voluminous case law lowered the threshold required for conduct to be classified as torture.\footnote{Selmouni v. France, App. No. 25803/94, 1999-V Eur. Ct. H.R., ¶ 101.}

Therefore, one should consider that the realm of each concept enshrined in Article 4 – and consequently the factual situations that they cover – is alterable and might evolve in the future.
Turning to the measures required for states to fulfill their obligations under Article 4, beginning with Siliadin, the Court clearly focused on criminal law: it not only rejected the defending state’s argument that civil proceedings could represent an effective framework to secure the rights protected by Article 4, but also held explicitly that the positive obligations under this provision encompass an obligation to penalize the practices and acts that fall into the scope of the provision, as well as to prosecute effectively the perpetrators of such acts.48 Thus, the Court expanded what an author has termed [its] “repressive function” (“l’office répressif de la Cour”)49 to Article 4, and plainly set national penal law up as the chief tool to achieve effective enforcement of the right not to be subjected to a severe form of exploitation. It has embraced thereby the view of a complementarity between criminal and human rights law, beyond the somewhat opposed logics that underlie the two fields of law.50 Within the framework set out by the Court, the two assertions according to which a phenomenon is a “violation of human rights” and is to be considered a crime are complementary and intrinsically linked.51

However, it should not be overlooked that in the Court’s view, what must especially be considered are national criminal provisions together with national judicial authorities’ practices. This stems from the elaboration it provides that “[e]ffective deterrence is indispensable in this area [where fundamental values are at stake] and it can be achieved only by criminal-law provisions.”52 Therefore, the very obligation incumbent on states is a duty to implement the relevant penal framework in a way that demonstrates an ability to provide an effective protection to potential victims from being subjected to modern-day slavery.53 It is thus implied that the states could be accountable, indirectly, for their criminal policy on the matter. The French National Consultative Commission on Human Rights has incidentally acknowledged this finding when observing that “[. . .] it would be appropriate to forthwith address the lack of penal policy regarding [. . .] exploitation. Failing that, only undeclared work or illegal residence, for instance, tends to be punished while they could be perceived as an indicator of [. . .] exploitation.” (“[. . .] il conviendrait de remédier au plus vite à l’absence de politique pénale relative [. . .] à l’exploitation. A défaut, seuls le travail illégal et le séjour irrégulier tendent, par exemple, à

50. See generally STOYANOVA, supra note 34, at 407–43.
53. See Damien Roets, L’article 4 de la Convention européenne des droits de l’homme une nouvelle fois violé par la France, 1 REVUE DE SCIENCE CRIMINELLE ET DE DROIT PÉNAL COMPARE151 (2013) (Fr.).
être réprimés alors même qu’ils pourraient être considérés comme un possible symptôme de faits [. . .] d’exploitation.”).  

C. Shortcomings Inherent in the European Legal Framework

Following from these developments, we can identify several of the challenges to which the system of the ECHR gives rise when national authorities, particularly those operating under a civil law system, engage in the setting up of criminal provisions meant to bring their domestic law into conformity with their international commitments. Since the contracting states have to fulfill an obligation to make each of the three forms of exploitation contained in Article 4 an offense, they might be inclined to model the national penal definitions on the European standards as defined by the case law of the ECtHR.

However, against the backdrop of the civil law systems and their tradition of written, codified law, the principle of legality and its inherent lex certa principle demand that the lawmakers describe precisely the action, attributable to the offender, which is punishable under the law. Therefore, a first mismatch arises in that the Court draws the outlines of the three distinct phenomena through indications that describe the situation of victims, since they are the ones entitled to the right enshrined in Article 4. In contrast, the penal law is drafted from the perspective of the behavior of offenders, which necessarily requires that domestic lawmakers reformulate all of the definitional parameters identified at the European level into precise acts that depict the corresponding criminal conduct. Moreover, the assessment method associated with the gradation model – and its premise that all slavery includes servitude and all servitude includes forced labor – contributes to scrambling the European template insofar as it implies the use of the same set of facts to characterize, in a given case, several of the three concepts. Regarding the demands of criminal law, an additional difficulty lies in the prospectively changing thresholds delineated by the Court. Since it is established under the principles of interpretation used by the Court that the latter might raise the standards in the future by lowering the thresholds for meeting a determination of each one of the three concepts, national lawmakers should accordingly


55. It is generally held that Continental legal systems give a substantial role to Parliament in precisely defining penal offenses, while in Common Law jurisdictions, judges bear a greater responsibility in defining the constitutive elements of offenses. However, this approach must be nuanced, as first there are significant variations in States’ constitutional organization within each system, and second the practical reality may lead to different developments that erase such a clear distinction. For instance, for a comparative analysis of approach in Italy and Anglo-American systems, see Daria Sartori, The lex certa principle – From the Italian Constitution to the European Convention on Human Rights (2014) (Ph.D. dissertation, University of Trento, Italy), http://eprints-phd.biblio.unitn.it/1172/1/TESI.pdf.

56. We return to this below, see infra III-E pp. 492–93.

57. See, e.g., Massias, supra note 35, at 154.
make sure to inject into the definition of the penal offenses the factor of flexibility (through the definitional elements as well as the wording) that would enable judges to follow these European developments by interpreting fittingly the constituent elements of the crimes.\textsuperscript{58} This goes far beyond what is commonly expected from lawmakers and judges in order to keep national criminal provisions adjusted to the potential evolution of both criminal conduct and international law. In the present case, indeed, the \textit{lex cetera} principle requires legislators to envision legal definitions that are precise enough to clearly distinguish between behaviors that constitute forced labor, servitude and slavery. At the same time, the degree of flexibility should make it possible to qualify conduct that must undoubtedly be prosecuted and sentenced as servitude today as slavery in the future.

Furthermore, and crucially, the existing definitions of the European standards are far from complete, as the sparse case law under Article 4 has not allowed the Court to remove all of the uncertainties regarding the distinctions between and the meanings of the three types of exploitative situations. Two major issues will be discussed in further detail below: the distinction between servitude and slavery under European law and the realm of the three types of exploitation enshrined by the ECHR regarding the widespread distinction between sexual and economic exploitation.

The European Court of Human Rights has to date found two contracting states in violation of Article 4 of the ECHR regarding an economically exploitative situation that it has classified as servitude. As a result, it has provided some comprehensive indications as to the scope of this form of exploitation.\textsuperscript{59} Further, most scholars who have published on the definition(s) of contemporary slavery set out that the Court has reached a definition of slavery within the regional system of the Council of Europe\textsuperscript{60} in two major cases,\textsuperscript{61} which show an evolving approach of the concept by European judges. The present section does not aim to trace in detail the stance adopted by the Court through its case law as to the legal meaning of slavery. Rather, it takes as ruled in the most recent judgments of the

\textsuperscript{58} Commenting on \textit{Selmouni}, an author has expressed the issue in the following terms: “The refinement of the standard (the norm), which is made more demanding for states, must entail another classification policy” (\textit{« L'affinement du standard (la norme), rendu plus exigeant pour les Etats, doit determiner une autre politique de qualification »}). Jacques Leroy, \textit{La qualification du fait et l'interprétation de la loi}, in \textsc{Histoire et méthodes d'interprétation en droit criminel}, 45 (Dalloz, 2015). However, a move in the classification policy requires that the definitions of the offenses technically allow for it.


Court,\textsuperscript{62} that the latter, relying on both the 1926 Slavery Convention and the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY), understands slavery within the meaning of the ECHR as including \textit{de facto} situations of slavery as well as \textit{de jure} slavery.\textsuperscript{63} Nevertheless, this assertion does not exhaust the questions related to the border between slavery and servitude. On the contrary, close scrutiny of all existing defining elements throughout the case law confirms the lack of clear indication of what kind of \textit{de facto} modern-day exploitation falls within the scope of slavery as opposed to servitude. The main issue here arises from the reference by the Court alternately to “the exercise of a genuine right of ownership” and to the “the exercise of powers attaching to the right of ownership,”\textsuperscript{64} as well as to the jurisprudence of the ICTY, according to which “[i]n assessing whether a situation amounts to a contemporary form of slavery, [. . .] relevant factors includ[ed] whether there was control of a person’s movement or physical environment, whether there was an element of psychological control, whether measures were taken to prevent or deter escape and whether there was control of sexuality and forced labor.”\textsuperscript{65} Hence, the Court unequivocally follows the 1926 Convention’s definition of slavery and ensures the translation of its param-


\textsuperscript{63} Siliadin is the first case in which the Court has considered the scope of “slavery” under Article 4 ECHR. The wording it then used to define slavery, referring to a “genuine right of legal ownership over [a person], reducing thus [the latter] to the status of an “object”” (Siliadin, 2005-VII Eur. Ct. H.R., ¶ 122, (emphasis added)), has prompted an almost unanimous criticism by scholars, who stressed a “truly narrow interpretation of the provisions of Article 1(a) of the 1926 Convention” (Allain, \textit{supra} note 60, ¶ 37), which in practice, “[b]y requiring the actual exercise of legal ownership, [.] denuded the prohibition on slavery of any utility” (Cullen, \textit{supra} note 60, at 309). However, while puzzled by the formulation adopted by the Court, a few authors have read the Court’s statement in a more cautious way (see, \textit{e.g.}, Massias, \textit{supra} note 35, at 143, \textit{Stoyanova, supra} note 32, at 230, and Antonin Crinon, \textit{La servitude domestique en France et au Royaume-Uni au regard de la Convention européenne des droits de l’homme}, \textit{Revue Trimestrielle des Droits de l’Homme}, 466 (2016)), which is consistent with the fact that a literal interpretation of the word “legal”, precisely by depriving the concept of slavery of any possible practical application in the European area, run counter to the major and constant principle of interpretation used by the Court, according to which the ECHR’s provisions must “be interpreted and applied so as to make its safeguards practical and effective” (see \textit{e.g.}, \textit{M. and Others}, Eur. Ct. H.R. (2012), ¶ 148.) This more nuanced interpretation of what seems to be a clumsy turn of language is also corroborated by the fact that this Court’s first consideration on what constitutes “slavery” was treated in a very short paragraph, which aimed to set aside an issue that was beyond the terms of the litigation submitted rather than fully dealing with it in order to settle two conflicting argumentations. Finally, it is worth noting that the Court, while clearly referring to a \textit{de facto} slavery in \textit{Rantsev} (51 Eur. H. R. Rep. ¶¶ 280–281), has changed the wording of its own quotation of \textit{Siliadin} in \textit{Rantsev} as well as in \textit{M. and Others}, holding that it had “referred to the classic definition of slavery contained in the 1926 Slavery Convention, which required the exercise of a genuine right of ownership and reduction of the status of the individual concerned to an “object”” (\textit{Rantsev}, 51 Eur. H. R. Rep. ¶ 276; \textit{M. & Others}, Eur. Ct. H.R. (2012), ¶ 149; see also \textit{Stoyanova, supra} note 32, at 247.)

\textsuperscript{64} See, \textit{e.g.}, \textit{Rantsev}, 51 Eur. H. R. Rep. ¶¶ 276, 281.

eters into the features of modern forms of slavery by referring to international criminal justice with respect to the crime of “enslavement”. Yet, the different frameworks in which the notions are defined are not designed identically, and this impacts the definitions themselves: the presence of a sole concept leads to an inclination to interpret it broadly, while the gathering of several concepts in a treaty instrument results in an effort to differentiate between them, and therefore to narrow each of the concepts. Thus, the Trial Chamber of ICTY has specified that its definition of “enslavement” as a crime against humanity “may be broader than the traditional and sometimes apparently distinct definitions of either slavery, the slave trade and servitude or forced or compulsory labour found in other areas of international law.”66

Unlike the ICTY regarding the notion of enslavement, the Court at the same time is required by the European legal framework – and its specific “three-levels scale” model – to draw out and provide substance to the intermediate category of servitude. In this regard, by referring to the 1926 conventional definition and its criterion of “powers attached to the right of ownership,” the Court seemingly keeps within the above-mentioned line initially delineated by the Strasbourg organs, according to which servitude “does not include the powers attached to the right of ownership that labels slavery.”67 In addition, the definition of servitude set forth by the Court68 apparently distinguishes the parameters of the notion from the powers attached to the right of ownership. However, when focusing on the factual elements that the Court put forward in order to substantiate its conclusion that the type of exploitation it had to deal with amounted to servitude (as opposed to slavery) in its relevant case law, it emerges that the Court has actually failed to delimit a separate category of exploitation which would encompass some specific features of severe forms of exploitation that do not characterize a power attached to the right of ownership.

*Siliadin* provides an illustration of this. The judgment’s relevant part reads:

In addition to the fact that the applicant was required to perform forced labour, the Court notes that this labour lasted almost fifteen hours a day, seven days per week. She had been brought to France by a relative of her father’s, and had not chosen to work for [the perpetrators].

As a minor, she had no resources and was vulnerable and isolated, and had no means of living elsewhere than in the home of [the

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68. The Court defines servitude as a “particularly serious form of denial of freedom” which includes “in addition to the obligation to perform certain services for others . . . the obligation for the ‘serf’ to live on another person’s property and the impossibility of altering his condition.” Siliadin, 2005-VII Eur. Ct. H.R., ¶ 123.
perpetrators], where she shared the children’s bedroom as no other accommodation had been offered. She was entirely at [the perpetrators’]s mercy, since her papers had been confiscated and she had been promised that her immigration status would be regularised, which had never occurred.

In addition, the applicant, who was afraid of being arrested by the police, was not in any event permitted to leave the house, except to take the children to their classes and various activities. Thus, she had no freedom of movement and no free time. As she had not been sent to school, despite the promises made to her father, the applicant could not hope that her situation would improve and was completely dependent on [the perpetrators].

In those circumstances, the Court concludes that the applicant, [. . .], was held in servitude within the meaning of Article 4 of the Convention.69

A quick review of that factual material by the yardstick of the 1926 conventional definition, notably as it has been unpacked by the Research Network on the Legal Parameters of Slavery,70 reveals that the described exploitation meets at least two powers attaching to the right of ownership. First, a combination of several elements tangibly substantiates the existence of a control tantamount to possession71 that was exercised over the applicant. Indeed, the Research Network has underscored that:

[w]hile the exact form of possession might vary, in essence it supposes control over a person by another such as a person might control a thing. Such control may be physical, but [. . .][m]ore abstract manifestations of control of a person may be evident in attempts to withhold identity documents; or to otherwise restrict free movement or access to state authorities [. . .]; or equally in attempts to forge a new identity through compelling a [. . .] place of residence [. . .].72

Additionally, through the use of its specific assessment methodology, the Court had come to the conclusion beforehand that the applicant was required to perform forced labor, before stressing, in the subsequent stage of its review, that it “lasted almost fifteen hours a day, seven days per week”.73 There is therefore no doubt that the perpetrators were also using

71. The Research Network makes a control equivalent to a control exercised over a thing the major parameter of slavery, as “[i]t is foundational in that, not only is it a power attaching to the right of ownership, it also creates the factual conditions for the exercise of any or all of the powers attaching to the right of ownership [. . .].” Id. at guideline 3.
72. Id.
her through “the derived benefit from [her] services or labor [. . .].” Yet the definitional reference to “any or all of the powers attaching to the right of ownership” logically leads to the inference that “[h]aving established control tantamount to possession, the act of using that person [is] an act of slavery.” A similar comparative exercise brings to light that Ms. Siliadin, whose movement and physical environment were both controlled by the perpetrators, who was held unlawfully on French territory and therefore in fear of arrest by the police, whose identity documents were confiscated, whose sexuality was controlled inasmuch as she was not allowed to freely leave the perpetrators’ house while being required to share the bedroom of her employers’ children, and who was subjected to forced labor, was therefore enslaved under the ICTY criteria.

The ECtHR’s intent to give full effect to the intermediary notion of servitude, however, cannot reasonably be questioned. As Frédéric Sudre has argued, “[by] [d]eclining a globalizing interpretation of Article 4§1, that would have led to equate “servitude” to the outdated notion of “slavery”, the European Judges develop the potential of the notion of “servitude” and makes it an operative concept, [. . .].” (“[en] [r]efusant une lecture globalisante de l’article 4§1, qui aurait conduit à assimiler la « servitude » à la notion datée d’ « esclavage », le juge européen libère les potentialités de la notion de « servitude » et en fait un concept utile, [. . .].”) As such an approach entails that “servitude” is likely to capture a significant part of slavery-related practices, it becomes clear that the process of defining slavery as set out in the ECHR is still ongoing.

75. Id.
77. As previously mentioned, the ICTY refers to the phrase “control of sexuality”. Strictly speaking, the latter might go beyond cases of sexual exploitation in the strict sense of the term, in that it also includes all of the situations in which the curtailment of freedom imposed by the offender entails a de facto significant deprivation of sexuality for workers.
78. For a similar finding that the exploitative situation experienced by the applicant amounted to slavery within the meaning of International Law, see, e.g., Cullen, supra note 60, at 309, and Allain, supra note 60, at ¶ 37; For a comparison between the applicant’s situation and the historical American slavery, see Rebecca J. Scott, Under Color of Law – Siliadin v. France and the Dynamics of Enslavement in Historical Perspective, in The Legal Understanding of Slavery – From the Historical to the Contemporary, 152–64 (Jean Allain ed., 2012).
79. Sudre, supra note 38, at 1959.
80. See Massias, supra note 35, at 144.
81. The Court has supplied some additional clues in M. & Others, expressing the view that “[. . .] in relation to the events as established by the authorities, [. . .], there is not sufficient evidence indicating that the first applicant was held in slavery. Even assuming that the applicant’s father received a sum of money in respect of the alleged marriage, the Court is of the view that, in the circumstances of the present case, such a monetary contribution cannot be considered to amount to a price attached to the transfer of ownership, which would bring into play the concept of slavery.”, adding that “[t]he Court [do not] consider that the sole payment of a sum of money suffices to consider that there had been trafficking in human beings.” Eur. Ct. H.R. (2012), ¶¶ 161, 163 (emphasis added).
accordingly the scattered existing guidance of the Court should be read cautiously. Indeed, having in mind the two-fold function undertaken by the Court, it appears likely that it is not until the submission of a dispute that would oppose claims for a classification as slavery/servitude that the European judges fully elaborate on the very meaning of slavery “in the light of present-day living conditions.” Furthermore, it is to be expected that, instead of incorporating all of the behaviors that reflect the exercise of “any powers attaching to the right of ownership,” the Court would instead narrow the latter concept and restrict the practical scope of slavery, thereby building a legal definition specific to the European framework.

The second outstanding question to be addressed concerns the application of Article 4 to forms of severe non-economic exploitation of the individual. At first glance, this point may not seem to raise crucial difficulties. First, the set of basic principles of interpretation established by the Court helps tackle the evolving nature, and thus the variety, of exploitative conduct. Moreover, the three-level grading scheme, by focusing on the variable degrees of infringement on personal freedom, allows in principle for the assessment of any form of exploitation, whatever the kind of services an individual is obligated to perform or the sector in which the exploitation occurs. It is worth noting that the International Labour Conference, which emphasizes that “[a] forced labor situation is determined by the nature of the relationship between a person and an “employer”, and not by the type of activity performed, (. . .),” considers in particular that the scope of the 1930 Forced Labour Convention encompasses forced prostitution. Nevertheless, the Court has notably dodged the discussion in the two cases involving sexual exploitation in which it has rendered a judgment on the merits. Rather, in both cases, the Court has

82. See supra, Part II-B, p. 467.
85. As well as forced begging, forced criminal activity, forced use of a person in an armed conflict, ritual or ceremonial servitude, forced use of woman as surrogate mothers, forced pregnancy and illicit conduct of biomedical research on person. See J. & Others, Eur. Ct. H.R. (2017), ¶ 9 (Pinto de Albuquerque, J., concurring) and references. Likewise, Frédéric Sudre continues in the above-mentioned quotation, supra note 79, stating that “[. . .] the European Judges develop the potential of the notion of “servitude” and makes it a useful concept, permitting to provide the victims of abhorrent contemporary forms of enslavement and exploitation of persons (prostitution, domestic slavery, exploitation of begging, organ removal) with the safeguard of the convention.” (“ [. . .] le juge européen libère les potentialités de la notion de « servitude » et en fait un concept utile, permettant d’offrir la garantie de la convention aux victimes des détestables formes contemporaines d’asservissement et d’exploitation de la personne (prostitution, esclavage domestique, exploitation de la mendicité, prélèvement d’organes.”) (emphasis added).
discarded the assessing methodology associated with the gradation model and has resorted instead to an outside notion to find Article 4 applicable, classifying the factual circumstances submitted as human trafficking. This notion, which is absent from the text of the ECHR, is defined by several specific international and regional instruments in a way that makes plain that the concept of trafficking, while related to the notions of forced labor, servitude and slavery, is not synonymous with them.87 Indeed, trafficking does not designate exploitation itself, but a series of specific actions that aim to result in severe exploitation of human beings.88 Interestingly, however, the reasoning followed by the European judges to bring human trafficking within the ambit of Article 4 relies on the exercise of powers attaching to the right of ownership:

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 [. . .]. It implies close surveillance of the activities of victims, whose movements are often circumscribed [. . .]. It involves the use of violence and threats against victims, who live and work under poor conditions [. . .]. 89

Thus, the underlying logic that the ECtHR attributes to trafficking implies that the latter would equate to slavery.90 Therefore, some authors have

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87. For a comprehensive presentation of the articulation of these concepts, see, e.g., J. & Others, Eur. Ct. H.R. (2017), ¶¶ 17–21 (Pinto de Albuquerque, J., concurring).


unsurprisingly read the gravest type of exploitative situations prohibited by Article 4 as systematically covering sexual exploitation, which is to be labeled “trafficking.”\(^91\) and not slavery.

Furthermore, in the subsequent case \textit{C.N. and V. v. France}, the Court denied the classification of a domestic servitude situation in terms of trafficking, stating that:

\[\text{[i]t is true that in the case of Rantsev v. Cyprus and Russia [. . . ] the Court affirmed that human trafficking itself falls within the scope of Article 4 of the Convention insofar as it is without doubt a phenomenon that runs counter to the spirit and purpose of that provision. However, it considers that, above all, the facts of the present case concern activities related to “forced labour” and “servitude,” legal concepts specifically provided for in the Convention. Indeed, the Court considers that the present case has more in common with the Siliadin case than with the Rantsev case.}\(^92\)

The European jurisprudence thus appears to outline a system in which the three “legal concepts specifically provided for in the Convention” would be meant to exclusively capture economic forms of modern-day slavery, while all other aspects of contemporary slavery, including sexual exploitation,\(^93\) would benefit from the protection of Article 4 through the external concept of trafficking.

However, several arguments rebut this conclusion. First, the Court repeatedly refers to \textit{Siliadin} in its subsequent case law as involving “treatment associated with trafficking.”\(^94\) Second, the approach adopted by the Court in \textit{Rantsev} as well as in \textit{L.E.} may have been driven by other considerations: in the latter, indeed, no dispute was raised as to the qualification of the factual circumstances of the case, with both the applicant and the state agreeing that they constituted trafficking.\(^95\) Also, in the former, the Court was practically unable to determine whether the situation to which the victim had been subjected to amounted to forced labor, servitude or slavery\(^96\) because of a lacking investigation by the domestic authorities.\(^97\)


\(^93\). The above international definition of trafficking also includes, as forms of exploitation, exploitation of begging, exploitation of criminal activities and organs removal. Accordingly, a similar question as to the one developed here might arise in the future regarding these three latter types of exploitation.


\(^96\). See, e.g., Stoyanova, supra note 90, at 167, 172.

\(^97\). Admittedly, the Court in \textit{M. and Others} has explicitly mentioned a similar difficulty (¶ 152), whereas in \textit{Rantsev} such argument is not put forward. However, it is important to note that in the former case the Court came to a decision of inadmissibility in that the complaint was deemed manifestly ill-founded, while in the latter it found one of the defending states in violation of Article 4. Therefore, highlighting at the same time that it was unable,
Most importantly, such an understanding of Article 4 would not be strictly consistent with international law: as mentioned above, the international definition of trafficking lists several specific actions – recruitment, transportation, transfer, harboring or receipt of persons – that become outlawed when executed in a way that facilitates or arranges the exploitation of human beings, and it necessarily entails that a victim of severe exploitation within the economic area might be legally considered as a victim of trafficking for the purpose of forced labor, servitude or slavery. Indeed, since the international definition of trafficking explicitly refers to forced labor, servitude, and slavery as possible forms of human exploitation, economic exploitation that amounts to forced labor, servitude or slavery and meets the other elements in the definition constitutes trafficking: therefore it cannot be held that the two series of concepts are mutually exclusive.98

The recent case of J. and Others v. Austria,99 which concerns three applicants allegedly exploited in domestic chores, seems to confirm this reading: while the Court succinctly concluded that the factual circumstances of the case fall within the scope of Article 4 without further classifying them,100 the whole legal debate explicitly centered on the criminal phenomenon of trafficking.101

Having brought to light the main patterns that characterize the European legal framework applicable to the prohibition of severe forms of human exploitation, as well as some of its unresolved legal issues, I now turn to the French legislature, to review how it has addressed the challenges in shifting from the European requirements to a specific domestic criminal statute.

without using an external notion, to assess whether the threshold for applicability of Article 4 was reached would certainly have weakened its ultimate finding.

98. See, e.g., J. & Others, Eur. Ct. H.R. (2017) (Pinto de Albuquerque, J., concurring) (noting in ¶ 40 that: “Not ‘all forced labour is trafficking’, just as not ‘all trafficking is slavery’. . . The trafficking process itself is a preparatory stage of the ensuing exploitation and therefore is attached to each of the three proscribed conducts in Article 4. But there can be trafficking in human beings without subsequent exploitation and there can be exploitation without previous trafficking.” (emphasis added)).


100. Id. ¶ 108.

101. Id. ¶ 109. While this paper was under its editing process, the ECtHR issued a judgment in which it provides a strong clarification on this issue, by stating that “[a]dmittedly, the present case does not concern sexual exploitation as in the Rantsev case. However, exploitation through work also constitutes an aspect of human trafficking [. . .]”. Additionally, it relies on the trafficking definition in the Council of Europe Anti-Trafficking Convention to conclude that “[. . .] 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 labor and human trafficking,” (reference omitted) Chowdury & Others v. Greece, App. No. 21884/15, Eur. Ct. H.R. (2017), ¶ 93. However, it still remains to be clarified whether the three concepts of slavery, servitude, and forced labor are confined to economic forms of exploitation, or if they could potentially cover other exploitative forms.
III. The Law No. 2013-711 of 5 August 2013 and the French Definitions of Slavery, Servitude, and Forced Labour

Following a somewhat garbled adoption process, the French state, with the enactment of law no. 2013-711 of 5 August 2013, supplemented its criminal legislation by inserting into its penal code a set of four offenses, in part to respond to prior condemnations by the ECtHR. Records of the debates make plain that by so doing, the French authorities finally tackled the grounds of the flaw that undermined the existing criminal provisions and that ultimately had led to a sanctioning by international judges. While admitting that what these provisions captured were some manifestations of modern-day slavery, significant attention was given to the view that defining the new offenses required grasping the essence of these criminal phenomena. However, the task to be undertaken was not limited to such an approach. Rather, it was three-fold: not only had the national legislature to embed the ECtHR’s indications throughout its jurisprudence to ensure compliance with human rights standards, but it also had to consider the requirement, imposed at the European level, to formu-

102. For further details on this law’s adoption, see, e.g., Olivier Pluen, Le crime de réduction en esclavage Ou l’incrimination du “Cœur de l’esclavage moderne” en droit pénal interne par la loi du 5 août 2013, 1 REVUE DE SCIENCE CRIMINELLE ET DE DROIT PÉNAL COMPARÉE 29 (2015) (Fr.).


106. See, e.g., Axelle Lemaire, compte-rendu intégral des débats, Assemblée Nationale., lecture après CMP, 1ère séance du 23 juillet 2013 [Full Report of the Debates, National Assembly, 1st Sitting of July 23, 2013], 95 JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [Official Gazette of France], 8362, http://www.assemblee-nationale.fr/14/pdf/cr/12-2013-extra/20131026.pdf (Fr.); “[a] complex reality by nature, slavery [. . .] should not be reduced to an addition of the elements that compose it: very high restless workload, absence of or inadequate payment, withholding of identity documents, threats, bullying, [. . .], control of personal links, discriminatory living conditions in the household, deprivation of liberty of movement, [. . .]. Beyond the fact that it is difficult to bring evidence of these components, they are not sufficient to define slavery [. . .]” ("Réalité complexe par nature, l’esclavage [. . .] ne se résume pas à l’addition des éléments qui le constituent: charge exorbitante de travail sans repos, absence ou insuffisance de rémunération, rétention des documents d’identité, menaces, brimades, [. . .], contrôle des liens personnels, conditions de vie discriminatoires au sein du foyer, privation de liberté d’aller et venir, [. . .]. Au-delà du fait qu’il est difficile d’apporter la preuve de ces éléments constitutifs, ils ne suffisent pas à définir l’esclavage [. . .]").
late an efficient repressive tool. Furthermore, and crucially, the significant place that international law occupies in that area should not “[. . .] detract from [the] quality requirements inherent in the penal norm that becomes internal through the effect of transposition.” (“[. . .] faire oublier [les] critères de qualité inhérents à la norme pénale devenue interne par le jeu de la transposition.”).

The four offenses read:

Art. 225-14-1. – Le travail forcé est le fait, par la violence ou la menace, de contraindre une personne à effectuer un travail sans rétribution ou en échange d’une rétribution manifestement sans rapport avec l’importance du travail accompli. Il est puni de sept ans d’emprisonnement et de 200 000 € d’amende. (“Forced labor is the act of constraining a person, by threat or violence, to perform unpaid work or work against which a payment is made which clearly bears no relation to the amount of work performed. It is punishable by seven years’ imprisonment and a fine of 200 000 €.”)

Art. 225-14-2. – La réduction en servitude est le fait de faire subir, de manière habituelle, l’infraction prévue à l’article 225-14-1 à une personne dont la vulnérabilité ou l’état de dépendance sont apparents ou connus de l’auteur. Elle est punie de dix ans d’emprisonnement et de 300 000 € d’amende. (“Reduction to servitude is the act of habitually subjecting a person whose vulnerability or dependence is obvious or known to the offender to the offense provided for in Article 225-14-1. It is punishable by ten years’ imprisonment and a fine of 300 000 €.”)

Art. 224-1 A. - La réduction en esclavage est le fait d’exercer à l’encontre d’une personne l’un des attributs du droit de propriété. La réduction en esclavage d’une personne est punie de vingt années de réclusion criminelle. [. . .]. (“Reduction to slavery is the act of exercising over a person one of the powers attaching to the right of ownership.

Reducing a person to slavery is punishable by twenty years’ criminal imprisonment. [. . .].”)

Art. 224-1 B. – L’exploitation d’une personne réduite en esclavage est le fait de commettre à l’encontre d’une personne dont la réduction en esclavage est apparente ou connue de l’auteur une agression sexuelle, de la séquestrer ou de la soumettre à du travail


108. Marie-Hélène Gozzi, La loi du 5 août 2013: quand l’importance du texte n’emporte pas qualité normative, 41 RECUEIL D’ALLAX 7272 (2013) (Fr.).
forcé ou du service forcé. L’exploitation d’une personne réduite en esclavage est punie de vingt années de réclusion criminelle. (“Exploitation of a person reduced to slavery is the act of committing against a person whose reduction to slavery is obvious or known to the offender a sexual assault, of confining him/her illegally or of subjecting him/her to forced labor or forced service.

Exploitation of a person reduced to slavery is punishable by twenty years’ criminal imprisonment. [. . .].”)

Despite lawmakers’ real concern to follow the ECtHR’s prescriptions as closely as possible, a thorough assessment of the four provisions shows that several flaws are likely to severely undermine the prosecution of offenses thus defined, impeding the effective punishment of the perpetrators of contemporary forms of slavery. This rebuts the quasi-unanimous assertion that these provisions have brought the French legislation into conformity with relevant international law.109 Two series of shortcomings are further analyzed here: the articulation between servitude and forced labor and the definition of reduction into slavery through partial reference to the 1926 convention’s definition.

D. The Problematic Linkage of Servitude with Forced Labour

The French penal code defines servitude through reference to the offense of forced labor. It thereby translates literally the specification given by the ECtHR in C.N. and V., according to which “servitude corresponds to a special type of forced or compulsory labor or, in other words, ‘aggravated’ forced or compulsory labor.”110 The French Senate’s Rapporteur on the draft law has explained the option finally chosen in the following words:

Slavery differs from servitude in that the latter fully falls within the labor sphere. [. . .]. Our impression was, particularly after a close reading of the European convention for the protection of


human rights, that the field of exercise, if I may say, of servitude is confined to the one of labor - that is the reason that explains that we have so to speak extracted or extended the definition of servitude from the offense of forced labor -, whereas slavery implies the perpetration by the dominator of an exploitation that goes beyond labor, including exploitation of persons in general by depriving them of all freedom and by committing sexual abuses against them. (“L’esclavage diffère de la servitude en ce que celle-ci relève entièrement du domaine du travail. [. . .]. Il nous a semblé, notamment à la lecture attentive de la convention européenne de sauvegarde des droits de l’homme, que le domaine d’exercice, si j’ose dire, de la servitude se cantonnait à celui du travail – c’est la raison qui explique que nous ayons donc en quelque sorte extrait ou prolongé la définition de la servitude à partir du délit de travail forcé -, alors que l’esclavage implique l’exercice par le dominateur d’une exploitation qui va au-delà du travail, notamment l’exploitation de manière générale de la personne en la privant de toute liberté et en pratiquant des abus sexuels à son encontre.”)111

Hence, within the labor sphere that gathers them, forced labor and servitude are distinguished from each other by “[t]wo degrees, [. . .], in this set of similar character, which consists in prohibiting the fraudulent obtaining of one or several tasks. When it is no more than a particular task, this is a kind of extortion which is thus criminalized, except that what is remitted is not an asset in the strict sense of the term, but someone’s work effort. [. . .]. When, further, a person’s entire labor capacity is, unwillingly, wholly assigned to another person, what is fraudulently appropriated is no longer so much the work itself but the worker. He or she is, says the statutory language, “reduced to servitude”, which is revealed by, on the one hand the repeated and habitual character of the provision of his/her work capacity to others and, on the other hand, his/her situation of vulnerability to the one for whom he/she works.” (“[d]eux degrés, [. . .], dans cet ensemble de même nature, qui consiste à prohiber l’obtention frauduleuse d’un ou de plusieurs travaux; s’il ne s’agit que d’un travail précis, c’est une sorte d’extorsion qui se trouve ainsi incriminée, à cette différence près que ce qui est remis n’est pas un bien au sens restrictif du terme, mais la force de travail de quelqu’un. [. . .]. Si, au-delà, la force de travail d’une personne est, contre son gré, totalement affectée à une autre personne, ce n’est plus tant le travail lui-même qui est approprié frauduleusement, que le travailleur. Il est, dit le texte, « réduit en servitude », ce que révèlerait, d’une part, le caractère habituel de la fourniture de ses travaux à autrui, et d’autre part, sa situation de vulnérabilité vis-à-vis de celui pour qui il travaille.”)112

111. See Richard, supra note 107, at 7710.
112. Guillaume Beaussonie, Loi n° 2013-711 du 5 août 2013 portant diverses dispositions d’adaptation dans le domaine de la justice en application du droit de l’Union Européenne et
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From this accurate analysis of the meaning of the two offenses flows the theoretical failure that taints the penal definition of servitude: if servitude describes a situation where “what is fraudulently appropriated is no longer so much the work itself but the worker,” then servitude goes precisely beyond the labor sphere: exploitation affects not only the labor performed by a worker, but rather the person as a whole.\(^{113}\) Such an understanding of the concept of servitude is actually consistent with the initial and widely-shared elaboration on the meaning of the three concepts contained in Article 4, according to which

\[\ldots\] servitude seems to be a special type of *slavery* differing from it less by nature than by degree. Unlike forced labour, servitude presumes more than the obligation to perform certain services under coercion. It implies a “particularly serious form of denial of liberty.” But while servitude constitutes a condition, this condition does not totally equate the powers attaching to the right of ownership that slavery postulates. (\[\ldots\] la servitude paraît constituer une forme particulière d’esclavage, s’en distinguant moins par la nature que par le degré. A la différence du travail forcé, la servitude suppose plus qu’une obligation de prêter des services sous l’empire de la contrainte. Elle implique « une forme particulièrement grave de négation de la liberté » Seulement, bien que la servitude constitue un état, cet état ne s’identifie pas totalement aux attributs du droit de propriété que postule l’esclavage\)^{114}

This reveals that the premise on which the definition has been built – namely, that servitude, like forced labor, is restricted to exploitation of labor capacity – is incorrect. Moreover, it significantly jeopardizes the application of the provision in practice, as developed below.

The issue at stake here is as follows: by defining servitude as “the act of habitually subjecting a person whose vulnerability or dependence is obvious or known to the offender to the offense provided for in Article 225-14-1,” the provision necessarily imposes on judges, in order to reach a determination of guilt, a duty to establish simultaneously the existence of the constituent elements specific to the offense of servitude and the existence of those specific to the offense of forced labor. In other words, for a perpetrator to be found guilty of servitude and forced labor, he must have subjected a person at the same time to servitude and forced labor. True, this is what the gradation model adopted by the ECtHR as well as the associated assessment methodology actually presume and imply. Nevertheless, this runs counter to the underlying logic of penal procedure, which assumes that prosecutors

\(^{113}\) See supra, II-C, pp. 472–74.

and judges select the one offense that fits each distinctive behavior most accurately, by using a set of rules aimed at this purpose. Admittedly, the use of one offense as a constituent element of another is theoretically possible. In such a case, prosecutors are required to charge the perpetrator only with the latter offense, as “charging with two offenses in these instances would result in reality in punishing twice the same misconduct.” (“[r]etenir deux incriminations en ces occurrences équivaudrait en réalité à punir deux fois la même faute.”). Therefore, this approach to defining an offense requires that the felony or misdemeanor to which it refers describes a behavior that is completely absorbed into the broader crime. We return to this argument in the following paragraphs. Furthermore, in the end the issue in question directly affects the efficiency of the newly-defined offense. Indeed, the latter’s application implies that a constraint by threat or violence and a known or obvious vulnerability or dependence, inter alia, are proven. However, when considering the reality of exploitative situations, it is clear that where a victim is obviously vulnerable or dependent (bearing in mind that dependency stems from exploitation in terms of absence of payment), perpetrators make full use of it in order to exploit the person, and therefore resort to threat or violence only incidentally – making it difficult to prove.

Far from being a mere insignificant question of gathering evidence, this point raises a crucial issue that the ECtHR has thus far disregarded, thereby blurring the meaning of the concepts embedded in Article 4. It is indeed important to note that the Court itself seems to have been confronted with the above practical issue in the two cases against France. Thus, in Siliadin, before concluding that the factual circumstances of the case amounted to servitude, the Court, in accordance with its specific methodology, had to ascertain whether the applicant’s work had been “exacted . . . under the menace of any penalty” and “performed


117. In the recent report published by the monitoring body of the Council of Europe Anti-Trafficking Convention (The Group of Experts on Action against Trafficking in Human Beings (GRETA)), regarding the implementation of this Convention by France, the French Government stressed that threat and violence here are to be understood within their meaning in criminal law, and that French jurisprudence construes the concept of violence, in particular, extensively (see GRETA (2017) 17, Rapport concernant la mise en œuvre de la Convention du Conseil de l’Europe sur la lute contre la traite des êtres humains par la France § 228 (Jul. 6, 2017)). However, the fact that the criminal notion of violence covers all acts or behaviors causing physical or mental harm through an emotional shock or a psychological disturbance does not alleviate the burden of proof.

118. In this regard, it is worth noting that the international definition of trafficking, when listing the means that vitiate or force victims’ consent, makes the “means of the threat or use of force”, and the “abuse of a position of vulnerability” two alternative constituent elements. See supra, note 88.
against her will.” However, to determine that the first criterion was met, the Court had to step away from the original requirement, considering that “in the instant case, although the applicant was not threatened by a “penalty”, the fact remain[ed] that she was in an equivalent situation in terms of the perceived seriousness of the threat.” The latter assertion was based on the facts that “[s]he was an adolescent girl in a foreign land, unlawfully present on French territory and in fear of arrest by the police,” a fear that the perpetrators “nurtured.” In other words, the Court reached its finding without identifying any specific threat committed by the offenders. More interestingly, the factual circumstances supporting the finding rather describe a situation of obvious vulnerability that the perpetrators used in order to appropriate the applicant’s labor capacity. In C.N. and V., the question was addressed slightly differently, as the Court discerned the existence of a threat under which the first applicant performed work, namely the regular “threat of being sent back to her country of origin,” “which [. . .] represented death and abandoning her younger sisters.” As a result, the Court first held that the factual circumstances submitted constituted forced labour. As to the existence of servitude, however, the Court only demonstrated additionally that several elements of the exploitative situation established “the victim’s feeling that [her] condition [was] permanent and that the situation [was] unlikely to change” – a criterion that under French criminal law is expressed in terms of the usual character of the provision of work to the offenders. Consequently, it appears that in the view of the Court, servitude is nothing more than a sustained situation where work is performed unwillingly and under the effect of a feeling of threat. It flows from this approach that the Court regards the nature of the control that exploiters exercise upon victims to be similar in situations of forced labor and servitude. This is advanced by the Court’s constant assertion that “for Convention purposes ‘servitude’ means an obligation to provide one’s services that is imposed by the use of coercion, and is to be linked with the concept of ‘slavery’[. . .].”

In this respect, by linking servitude to forced labor, French lawmakers have rightly followed the Court’s stance. However, the issue under consideration brings to light that the victim’s impossibility of altering his/her condition, which is set up by the Court as the key feature to distinguish servitude from forced labor, necessarily corresponds to a shift in the na-

121. *Id.*
123. *Id.* ¶ 91.
124. *Id.* ¶ 92 (“The Court [. . .] considers that the [. . .] applicant had the feeling that her condition – that of having to do forced or compulsory labour at the home of Mr. and Mrs. M. – was permanent and could not change, especially as it lasted four years) (emphasis added) (reference omitted).
ture of the control exercised upon him/her: such control is then no longer one of mere coercion, but rather one tantamount to possession. There is indeed an essential difference between a direct compulsion, closely pertaining to the work that is sought, which is exercised upon an individual in order to temporarily benefit from his/her labor, and a system of wide and persistent control which aims to permanently deprive an individual from his/her autonomy and liberty of choice. In the first case, the control exercised by the exploiter is one of direct coercion, which is the specificity of forced labor, while in the second case the control involved is equivalent to the type of control exercised upon a thing owned – in other words, a control tantamount to possession. Thus, the Members of the Research Network on the Legal Parameters of Slavery have highlighted that “[f]undamentally, where such control operates, it will significantly deprive that person of his or her individual liberty for a period of time which is, for that person, indeterminate.”126

In reviewing the existing case law related to slavery in all of the relevant international legal systems, Holly Cullen has convincingly stressed that “[j]udicial attention to the nature of control, and whether it equates to possession or merely to coercion, is the key element which is often lacking or under-developed.”127 However, in the case of the ECtHR, judges have not only overlooked this very question, but they have furthermore set up a scheme that comprises an intrinsic contradiction. When the Court articulates the guideline principle according to which “‘servitude’ means an obligation to provide one’s services that is imposed by the use of coercion, and is to be linked with the concept of ‘slavery’ [. . .],”128 it adopts a self-contradictory formulation, in that a use of coercion differs in nature from the key power attaching to the right of ownership that characterizes slavery (namely a control tantamount to possession),129 and consequently it is, as such, de-linked from slavery. Therefore, it is not surprising that Siliadin has encountered the criticism that the factual elements withheld by the Court to establish the existence of servitude revealed a control of a nature of possession.130

Similarly, the seeming consistency of the reasoning in C.N. and V. fails to convince of the soundness of the Court’s approach. Indeed, a threat that is uttered towards a worker as a direct compulsion to obtain the immediate performance of specific work should not be mistaken for a general

127. Cullen, supra note 60, at 305.
128. Siliadin, 2005-VII Eur. Ct. H.R., ¶ 124. The phrase must be construed in the light of the wording adopted in the English version of C.N. & V., which reads: “[w]hat servitude involves is “an obligation to provide one’s services that is imposed by the use of coercion.” As such it is to be linked with the concept of “slavery” within the meaning of Article 4 §1 of the Convention.” C.N. & V., Eur. Ct. H.R. (2012), ¶ 89 (emphasis added) (quotations omitted).
129. See Bellagio-Harvard Guidelines, supra note 70, at guideline 3.
130. The criticism lies in the fact that this should have consequently led to a classification as slavery instead of servitude; see supra II-C, pp. 472–74.
atmosphere of fear, where threats are used once in a while in order to make a person know that he/she is entirely at someone’s mercy. In that sense, when read together with the other factual elements listed by the Court in the judgment, the type of threats identified indicated that the applicant had been subjected to a control that was tantamount to possession.

True, contemporary exploitative practices often include a wide range of means of control, combining elements of possession and coercion. However, when qualifying the type of exploitation to which an individual was subjected during a given period of time, one must consider the nature of control that this person experienced as a result of all of the means used by the offender. By retrieving the elements characterizing coercion in order to establish a qualification as forced labour in the first stage of its assessment, the Court takes a contrived approach that distorts the understanding of modern-day forms of slavery, and ultimately obfuscates the meaning of the concepts. Finally, it is worth noting that in addition to the gradation model and the related assessment methodology, which to a certain extent traps the ECtHR’s view, the ILO’s position also contributes to generating this kind of confusion, in that it is based on a similar foundational misunderstanding.

E. The Inappropriate Use of the 1926 Convention’s Definition of Slavery

We turn now to the penalization of slavery. This type of human exploitation is broken down into two distinctive offenses: the reduction to slavery and the exploitation of a person reduced to slavery. For the purposes of this study, the latter will not be further analyzed as such, as our

131. In particular, the ECtHR partly bases its reasoning on the ILO’s elaboration on forced labor, according to which “[t]he penalty does not need to be in the form of penal sanctions, but may also take the form of a loss of rights and privileges. Moreover, the menace of a penalty can take many different forms. Arguably, its most extreme form involves physical violence or restraint, or even death threats addressed to the victim or relatives. There can also be subtler forms of menace, sometimes of a psychological nature. Situations examined by the ILO have included threats to denounce victims to the police or immigration authorities when their employment status is illegal, or denunciation to village elders in the case of girls forced to prostitute themselves in distant cities. Other penalties can be of a financial nature, including economic penalties linked to debts. Employers sometimes also require workers to hand over their identity papers, and may use the threat of confiscation of these documents in order to exact forced labour.” Extracts from “The cost of coercion: global report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work”, adopted by the International Labour Conference in 1999; quoted by the ECtHR in C.N. & V., Eur. Ct. H.R. (2012), ¶ 52; See also J. & Others, Eur. Ct. H.R. (2017), ¶ 9 (Pinto de Albuquerque, J., concurring) and reference.

132. The French Commission nationale consultative des droits de l’homme [National Advisory Commission on Human Rights] in its 2010 report on trafficking and exploitation of human beings has precisely pointed out the specific difficulties that stemmed from international bodies, including the ILO supervisory bodies, which adopt varying definitions of the same-named concepts with the view of indirectly expanding their respective mandates. See Commission nationale consultative des droits de l’homme, supra note 11, at 47.
focus is instead directed to the definition of slavery. However, it must be emphasized that the definition of the “exploitation of a person reduced to slavery,” by referring explicitly to “sexual assault” as well as “forced labor or forced service,” engages with the issue of the scope’s boundaries of the notion of slavery in a way that makes the concept cover both economic and sexual exploitation. Therefore, in light of the Rapporteur’s statement that “[s]lavery differs from servitude in that the latter fully falls within the labor sphere,” it appears that within the meaning of the French definitions, concepts of both forced labor and servitude are confined to economic exploitation, while slavery is meant to include other areas in which exploitative practices occur.

When defining the offense of reduction to slavery, “[. . .] French lawmakers have opted for a prudent approach, at the expense of the willingness to set themselves up as innovators in a renewed definition of slavery.” Indeed, the Rapporteur on the draft law has elaborated on that “[t]he reference to the “powers attaching to the right of ownership” is directly built upon Article 1 of the Convention on Slavery of 25 September 1926 [. . .], which provides that “slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.”” Nevertheless, this does not mean that the 1926 Convention’s definition was merely copied into the domestic criminal law. First, the general scheme of the statute channels the meaning of the offense. In this regard, dividing slavery-related acts into two offenses has been driven by considerations that substantially skew the meaning of the 1926 definition. Relying notably on the words of the Rapporteur, “slavery is a condition, and what is criminal, is evidently to subject someone to it” (“l’esclavage est un état, et ce qui est criminel, c’est évidemment le fait d’y contraindre autrui”), Olivier Pluen has thus stated that through the distinct criminalization of the exploitation of a person reduced to slavery,

[the notion of reduction to slavery has been thus brought down to its core [. . .], whereas the exploitation of a slave has been given its own definition and penalty. One of the consequences of this differentiation, [. . .], is that slavery henceforth is referred to as a “condition”, independently of any other activity to which the per-
son concerned is unwillingly subjected. ("[l]a notion de réduction en esclavage a donc été ramenée à son noyau [. . .], tandis que l’exploitation de l’esclave a reçu ses propres définition et sanction. L’une des conséquences de cette distinction, [. . .], est que l’esclavage se trouve aujourd’hui désigné comme un « état », indépendamment de toute autre activité à laquelle est soumis contre son gré l’intéressé.")\textsuperscript{138}

In practice, this implies that the offense of reduction to slavery is not expected to encompass every incident of ownership, as some of them – such as, for instance, the use or benefit from the services or the labor of a person\textsuperscript{139} – are meant to be sanctioned under the qualification of "exploitation of a person reduced to slavery."\textsuperscript{140} At the same time, the 1926 definition has not been reproduced unaltered: in particular, the expression "any or all of the powers [. . .]" has been discarded in favor of "exercising [. . .] one of the powers attaching to the right of ownership." The variation leads to an expanded practical scope of the provision because it accentuates the sufficiency of one single incident of ownership to prosecute and condemn an offender for having reduced an individual to slavery. Thus, the legislature has adopted wording that counteracts the stated aim of the statute, which is to narrow the offense of slavery to what is perceived as its very core, by repressing some powers attaching to the right of ownership through an associated offense. Therefore, it falls to judges to bring substance to the core of the notion by identifying which attributes of ownership define a “condition” as such, and by thereby delimiting acts that constitute slavery. Within such a legal context, this inevitably involves some unpredictability and implies some degree of subjectivity as to the understanding of slavery.

\textsuperscript{138} Id. (emphasis added).

\textsuperscript{139} See Bellagio-Harvard Guidelines, supra note 70, at guideline 4. This example relies on the reference to forced labor within the offense of exploitation of a person reduced to slavery, together with the definition of forced labor in domestic law through an absence of remuneration of the work performed. On a conceptual level, however, the question whether the work performed in a context forced labor systematically constitutes a use of a person’s labor that equates a power attached to ownership is subject to discussion, but this goes beyond the scope of this study.

\textsuperscript{140} The purpose of this paper is not to provide a comprehensive analysis of all of the foreseeable difficulties that judges may face when enforcing the statute compliantly to the intention of the legislator. However, the premise on which lawmakers have set up the penalization of slavery surely raises numerous challenges, and in this respect it is worth noting that two authors have understood the offence of exploitation of an enslaved person as prohibiting a “concealment” of enslaved persons, thus reading it as requisitely involving a third person (see Le Coz, supra note 109, at 514; Beaussonie, supra note 112, at 868). Still, the then-Minister of Justice, commenting on that provision, has made it clear that the distinction rather concerns the kind of behavior involved, mentioning that “the perpetrator of the crime, knowing that the person is reduced to slavery, adds to it sexual exploitation, illegal confinement and reduction to forced labor.” ("l’auteur du crime, sachant que la personne est réduite en esclavage, y ajoute l’exploitation sexuelle, la séquestration, la réduction au travail forcé.") (emphasis added). Taubira, supra note 109.
However, beyond these theoretical and practical issues regarding the application of the provision, the latter application more fundamentally questions the capacity of the “powers attaching to the right of ownership” to pinpoint, from a penal standpoint, the concrete behaviors to which the concept of slavery refers. Commenting on the reason why French lawmakers have not itemized these powers, an author has noted that “[f]aithful to the international text, which we regret, just this once, the legislature has probably deemed that the incidents bestowed to this right, which are fully characterized under a property law perspective, namely the *usus, fructus* and *abusus*141(including the right to transform the thing), were transposable to the qualification of a crime related to the infringements of persons’ integrity.” (“[f]idèle au texte international, ce que nous regrettons, une fois n’est pas coutume, le législateur a sans doute estimé que les attributs conférés à ce droit, et parfaitement caractérisés dans une conception civiliste, soit l’*usus, le fructus et l’abusus* (y compris le droit de transformer la chose), étaient transposables à la qualification d’un crime relevant des atteintes aux personnes.”)142 Yet, to take for granted the transferability and adaptability of the powers attaching to the right of ownership to acts committed in respect of persons is far from straightforward.

Indeed, a thorough unpacking of all the incidents of ownership,143 along with their very meaning, shows that some of them at least are unsuitable to the underlying logic of human exploitation. I will first illustrate this with two examples regarding the right to dispose of one’s property. To that end, the work of the Members of the Research Network on the Legal Parameters of Slavery provides an appropriate starting point, since they have explored the meaning of slavery using fact patterns involving “powers attaching to the right of ownership” in the context of exploitation among persons. They have substantiated that, “[h]aving established control over a person tantamount to possession, the *act of disposing of a person* w[ould] be an act of slavery.”144

Turning now to the criminal law rationale, it must be clarified what *conduct* would be classified as an “act of disposing of a person.” From a property law perspective, it has been acknowledged that “[. . .] the right to

141. French property law generally refers to the incidents of ownership through the three Latin words *usus, fructus* and *abusus*. While *Usus* and *fructus* describe, respectively, “the right to use” (“le droit d’usage”) and “the right of enjoyment” (“le droit de jouissance”) strictly speaking, *abusus* means more broadly “the right for an owner to dispose of a thing through any acts [. . .] of transformation, consumption, destruction, alienation or abandon-ment” (“le droit pour le propriétaire de disposer d’une chose par tous actes [. . .] de transformation, de consommation, de destruction, d’aliénation ou d’abandon”). Gérard Cornu, *Vocabulaire juridique*, 1058, 483, 9 (Presses Universitaires de France, 11th ed. 2016).
142. Adding the Latin phrase “*Summum jus summa injuria!*”, Gozzi, supra note 108, at 2722; see also Le Coz, supra note 109, at 514 (internal citations omitted).
144. See *Bellagio-Harvard Guidelines*, supra note 70, at guideline 4 (emphasis added).
dispose is the most abstract of the rights over a thing. It may continue to exist regardless of any outward manifestation, because it lies entirely in the owner’s will. An ancient judgment has thus asserted that property is preserved by the sole effect of intention. [. . .]. Jurisprudence logically concludes that property is not lost through lack of use.” (“[. . .] le droit de disposer est le plus abstrait des droits sur une chose. Il peut subsister indépendamment de toute manifestation extérieure, car il loge tout entier dans la volonté du propriétaire. Un arrêt ancien a pu ainsi affirmer que la propriété se conserve du seul fait de l’intention. [. . .]. La jurisprudence en conclut très logiquement que la propriété ne se perd pas par le non-usage”).145 Following this reasoning in a criminal modern-day slavery case would thus lead to the prosecution and punishment of a person for the mere intent to dispose of an individual, without any concrete external action substantiating it. Moreover, “[the right to dispose] culminates in the ability of the owner to transfer his/her asset to others, with or without any economic counterbalance, distant or immediate, as well as to simply abandon it: French law allows for that latter possibility, which nonetheless requires a certainty as to the owner’s intend to irrevocably get rid of his/her asset.” (“[Le droit de disposer] culmine dans la faculté que détient le propriétaire de céder son bien à autrui, avec ou sans contrepartie économique, médiate ou immédiate, ainsi que de l’abandonner purement et simplement : le droit français admet cette dernière possibilité, qui suppose néanmoins une certitude quant à l’intention du propriétaire de se défaire irrévocablement de son bien.”)146 When applied to exploitative practices against a person, it stems from these guiding rules that an offender’s act of ending the situation of slavery, committed with a clear intention to stop the crime, would in itself be a criminal conduct, materializing an attribute of ownership, and classifiable as such as a “reduction to slavery.”

In addition, some incidents of ownership do not refer to any specific acts but rather cover an undefined range of behavior. This is especially so for the right to freely use one’s asset. Robin Hickey has insisted that “[i]n the context of property, these freedoms are not precisely defined: law does not precisely demarcate or dictate the range of an owner’s permissible actions or dealings in respect for her thing. [He/she] might make whatever use of her thing she likes just because she is free to do so.”147 This remark resonates with comments that have commended the Law of 2013 in that it “updates judiciously the definition [. . .] of slavery” (“modernise fort opportunément la définition [. . .] de l’esclavage”)148 by enacting an offense that might encompass “the most contemporary and radical forms [. . .] of human exploitation” (“les formes les plus contemporaines et les plus radi-

146. Id. ¶ 87.
147. Hickey, supra note 143, at 231 (emphasis added).
148. Muriel Fabre-Magnan, Les nouvelles formes d’esclavage et de traite, ou le syndrome de la ligne Maginot, 8 Recueil Dalloz 491 (2014) (Fr.).
cales [ . . ] d’exploitation des êtres humains”)

Such stance precisely relies on property law’s tenets, further making the argument that the offense is thus applicable to the “[ . . .] forms of human exploitation [that] do not require to [ . . .] appropriate the whole person” (forme d’exploitation des êtres humains [qui] ne nécessitent pas [ . . .] de s’approprier la personne dans son entier” ) as “[i]t suffices to appropriate [its] use (the use of the surrogate mother’s body for instance) or [its] fruits (organs, gametes, and even children in surrogate motherhood).” (“[i]l suffit de s’en approprier l’usage (usage du corps de la mère porteuse, par ex.) ou les fruits (organes, gamètes, et même les enfants dans la gestation pour autrui.”)

These points are of particular relevance against the benchmark of criminal law principles, especially the principle of legality. Admittedly, “even in criminal law, where language aims at being as accurate as possible, some level of indeterminacy is unavoidable.” Therefore, lex certa requirements do not preclude the role of judges in clarifying the terms of penal dispositions, thereby delineating the precise border between lawful and criminal acts, and, within this latter category, between criminal acts that must be qualified as one or the other. However, this task must be strictly confined to interpreting, as opposed to law-making that would equate and thereby infringe on the power of the legislature.

Yet in the French legal context, the legislature takes a leading role in defining the elements of these offenses. This means that an approach like the one adopted by the Australian High Court judges is unsustainable in France because judges would thereby exceed their powers. In a civil law country like France, it is incumbent upon the legislature to elaborate on the 1926 definition of slavery and identify on a general level, regardless of any specific circumstances, concrete actions that are to be labeled as slavery. This requires first isolating the only manifestations of powers attaching to the rights of ownership that are relevant in the context of

149. Id. at 492.
150. Id. at 491.
151. Id.
152. Id.
154. The Queen v. Tang, [2008] HCA 39 (Austl.). See also Jean Allain & Robin Hickey, Property Law and the Definition of Slavery, in THE LAW AND SLAVERY PROHIBITING HUMAN EXPLOITATION, 485 (Jean Allain ed., 2015) (pointing out that the determination whether slavery exists is made through analysis of facts amounting to the exercise of “powers attaching to the rights of ownership”. [...], bringing[ing] [thus] to that [element of] definition the substance necessary to give it workable contemporary relevance” (emphasis added)).
human exploitation; second, connecting these manifestations with the range of existing exploitative practices in order to determine which are slavery; and ultimately, using these identified acts to formulate the definitional elements of the crime of slavery. It is worth noting that in regard to the rights of the defense, the principle of legality also embodies the principles of legal predictability and legal security. Consequently, it appears that the reference to “one of the powers attaching to the right of ownership” as a constituent element of the offense strongly jeopardizes the provision’s compliance with the principle of legality. To provide an example of penal offenses that have been formerly struck down by the French Conseil Constitutionnel, as a result of their failure to comply with the lex certa requirements,156 the provision that defined sexual harassment as “[t]he act of harassing a person for the purpose of obtaining favors of sexual nature” (“[l]e fait de harceler autrui dans le but d’obtenir des faveurs de nature sexuelle”)157 has been censured for not “defining precisely the elements constituting this misdemeanor” (“définir précisément les éléments constitutifs de ce délit”).158 Likewise, the specific penal qualification of “incestuous sexual behaviors” (“agissements sexuels incestueux”) has been declared unconstitutional for not “further specifying what persons should be regarded, within the meaning of the provision, as family members” (“désigner précisément les personnes qui doivent être regardées, au sens de cette qualification, comme membres de la famille”).159

To that extent, Guillaume Beaussonie has emphasized that

As to these “attributes”, while classical legal thought have so well caricatured them, [. . .], as usus, fructus and abusus160, it must be realized as well that they aim, in reality, to designate all forms of a control to which a slave is subjected. [. . .]. Since here lies the gist,

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156. In reviewing the compliance of offenses with the legality principle, the Conseil constitutionnel also acts “as the guardian of the legislative power” (“en tant que gardien de la compétence législative”). See Bertrand de Lamy, Le principe de la légalité criminelle dans la jurisprudence du Conseil constitutionnel, 26 LES CAHIERS DU CONSEIL CONSTITUTIONNEL 20 (2009).


158. Id. ¶ 2.

159. Le Conseil Constitutionnel, Décision no 2011-163 QPC du 16 septembre 2011, ¶ 4, http://www.conseil-constitutionnel.fr/decision/2011/2011-163-qpc/decision-n-2011-163-qpc-du-16-septembre-2011.99681.html. In view of the issue at stake, it is worth citing the text of the penal provision in full: “Rapes and sexual assaults shall be qualified as incestuous when they are committed within the family over a minor by a relative in the ascending line, a brother, a sister or by any person, including a partner a member of family, having legal or de facto authority over the victim” (“Les viols et les agressions sexuelles sont qualifiés d’incestueux lorsqu’ils sont commis au sein de la famille sur la personne d’un mineur par un ascendant, un frère, une sœur ou par toute autre personne, y compris s’il s’agit d’un concubin d’un membre de la famille, ayant sur la victime une autorité de droit ou de fait.”).

160. See supra, note 141.
which is maybe not sufficiently visible when reading the existing wording of Article 224-1 A – even if this clarification had emerged during the parliamentary debates: through the exercise of attributes of ownership over a person is effectuated an outright subjection of him/her. By reducing too much the definition in order to reach the essential points, have we not done today regarding slavery what was done yesterday as regards sexual harassment? (“Quant à ces « attributs », si la pensée juridique classique les a si bien caricaturés, [...], en usus, fructus et abusus, il faut tout aussi bien prendre conscience qu’ils ont, en réalité, vocation à designer toutes les formes d’une emprise qui va être subie par l’esclave. [...]. Car l’essentiel est là, qui n’apparaît peut-être pas suffisamment à la lecture de la rédaction actuelle de l’article 224-1 A – la precision était pourtant apparue au cours des débats parlementaires: il se produit, par l’entremise de l’exercice d’attributs de la propriété à son encontre, une véritable sujétion de la personne. A trop réduire la définition pour parvenir à l’essentiel, n’a-t-on pas fait aujourd’hui pour l’esclavage ce que l’on avait fait hier pour le harcèlement sexuel?”)161

This might be what French lawmakers sought to express when dividing the penalization of slavery into two separate offenses in order to capture and punish, as such, the fact of imposing a “condition” on a person. Through what the Rapporteur termed as a “condition,” stating that subjecting someone to it was, in itself, criminal,162 might be ultimately denoted this very feature of slavery: the overall control exercised by an offender over all aspects of a person’s life. Indeed, several authors have concluded that “[c]ontrol will almost certainly be a factual pre-requisite for any de facto exercise of the powers attaching to ownership. A person can only be sold, lent, used or discarded if first she is within the realm of control of the seller, user, lender or discarder.”163 Therefore, control could be understood as the “core” of slavery, which is to be prohibited “independently of any other activity to which the person concerned is unwillingly subjected.”164

**Concluding Remarks**

Ironically, while French lawmakers intently addressed the very causes of the two violations handed down by the ECtHR against France, closely adhered to the main definitional indications given by the Court through

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163. Hickey, supra note 143, at 239; see also Allain & Hickey, supra note 154, at 491, 495, and Bellagio-Harvard Guidelines, supra note 70, at guidelines 2–3.

164. Pluen, supra note 102, at 41.
relevant cases, and this bearing explicitly in mind the concern of the legislation’s efficiency requested by the ECtHR, the penal statute that has been passed contains several structural flaws, which directly impact its effectiveness and are likely to hinder its implementation to various degrees. Notably, despite provisions couched in terms that seemingly pertain to objective situations, the domestic definitions of forced labor, servitude and slavery ultimately fail to allow judges, law enforcement bodies and potential offenders to clearly recognize which factual exploitative behaviors each notion refers to. This is all the more detrimental in that these concepts not only conveyed a strong symbolic connotation, but are also intrinsically linked, in the collective unconscious, to a historical past that is poorly understood and most often reduced to the erroneous image of permanently unchained and highly mistreated persons.

However, the benefits of this worthwhile endeavor are not to be underestimated. By striving to tailor the existing human rights definitional standards to the shape of penal offenses in a civil law system, French authorities’ work reveals some significant issues that had not emerged throughout the reflection carried out at the European level on the occasion of the very few modern-day cases determinated to date. In the context of a legal area that is still, in many ways, under construction, this is certainly the French statute’s greatest credit, as it has thereby fully contributed to the dialogue established between member states and the Strasbourg Court towards an optimum enforcement of human rights’ standards. It appears in particular that the application of the gradation model to Article 4 is a significant source of confusion in defining the three types of human exploitation prohibited by the ECHR. The difference in character that opposes forced labor on the one hand to servitude and slavery on the other hand appears to make such a model unfit for determining the applicability of the provision, in that it contradicts the assumption on which the model relies that all slavery encompasses servitude and all servitude encompasses forced labor. Similarly, the premise initially brought out at the European level, that servitude involves a condition that does not equate the powers attaching to the right of ownership that slavery postulates, shall be discarded. Indeed, it stemmed from both factual circumstances submitted and ECtHR’s evaluations that, by referring to a “condition,” servitude, like slavery, rather implies the existence of a control tantamount to possession exercised over an individual: both concepts, therefore, involve a foundational incident of ownership. This seems to be precisely what intrinsically distinguishes them from forced labor, the latter pertaining to a control confined to elements of coercion. The very features that define servitude as opposed to slavery, which would help draw a clear dis-

165. Richard, supra note 107, at 7709.
167. See Malinverni, supra note 39; Siliadin, supra note 16; Ergec & Vela, supra note 114.
tinction between these two forms of severe exploitation, remain to be figured out.

In that respect, the French authorities’ stance to promptly conclude to a compliance of recent French penal provisions with European requirements is of great concern, as it presages a similar enduring reluctance as to the one encountered over the last decade to objectively question the quality and efficiency of the relevant statute in order to make any appropriate amendments and adjustments.