HUMAN BEINGS TRAFFICKING IN THE EUROPEAN COURT OF HUMAN RIGHTS CASE-LAW

Laura-Cristiana SPĂTARU-NEGURĂ*

Abstract

After last year's analysis regarding the European Union's commitment to fight against the human beings trafficking, we have considered to further explore the human beings trafficking approach in the European Court of Human Rights case-law, the most developped regional jurisdiction on human rights.

Surprisingly, the European Convention for the Protection of Human Rights and Fundamental Freedoms does not make an express reference to the human beings trafficking. However, we have to bear in mind that the Convention is a living instrument, its interpretation being made in the light of the present-day conditions. Thus, taking into consideration the global threat of this phenomenon, it is more obvious than ever that the Convention could not neglect this issue.

Keywords: *human beings trafficking, European Court of Human Rights, Convention, case-law.*

1. Introductive Remarks

Through this study, we propose an analysis to increase the understanding between the protection of human rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the "*European Convention on Human Rights*" or the "*Convention*") and one of the most serious global threats, the human beings trafficking. This is really necessary in order to strengthen human protection at the national level, having in mind that the European Court for Human Rights (hereinafter the "*ECHR*" or the "*Court*") represents the most developed regional jurisdiction on human rights[1]. To attain this purpose, the present study seeks to provide the most relevant examples from the Court's case-law.

Right from the beginning, we underline that the Convention does not make any express reference to the human beings trafficking (although the Convention prohibits "slavery and the slave trade in all forms" under Article 4). This should not surprise us, having in view that the Convention was inspired by the Universal Declaration of Human Rights proclaimed in 1948 by the General Assembly of the United Nations, which does not expressly address the human beings trafficking problem either.

However, as it is stated in the Court's case-law and it is widely recognized in the legal doctrine, the Convention is "a living instrument (…) which must be interpreted in

* Assistant Lecturer, PhD, Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: **negura_laura@yahoo.com**)

[1] For general information on the European system of human rights protection instituted by the Council of Europe, please see Raluca Miga-Besteliu, *Drept international public*, 1st volume, 3rd edition, C.H. Beck Publishing House, Bucharest, 2014, p. 184-185, and Bogdan Aurescu, *Sistemul jurisdictiilor internationale*, 2nd edition, C.H. Beck Publishing House, Bucharest, 2013, p. 211 and following.

the light of present-day conditions"[2], fact that raises many challenges for its judges.

As underlined in the legal doctrine "human rights concern the universal identity of the human being and are underlying on the principle of equality of all human beings"[3], therefore all individuals have the right to complain if the domestic authorities[4], natural or legal persons violate their individual rights under the Convention in certain conditions.

Through time, individuals have filed complaints against the Contracting States of the Convention[5], arguing that a breach of the Convention rights has resulted from human trafficking, among others. As it is easy to imagine, this thing is possible because each individual has the right not to be submitted to slavery.

2. ECHR's Relevant Case-law

It is obvious that the Contracting States have the obligation to protect the victims of trafficking, otherwise their legal responsibility may be invoked[6]. In order to investigate this topic, we will proceed to a chronological analysis of the most relevant cases dealt by the Court during the time.

One interesting case is *Siliadin v. France*[7], in which the Court found that it involved a servitude situation, therefore not exactly slavery. The applicant was a Togo minor citizen brought to France by a relative of her father, where she had been forced to work as a maid for many years, thirteen hours a day, and seven days a week. She was vulnerable and isolated, with her identification papers confiscated, no financial resources and afraid to contact the authorities because of her irregular imigration status. The Court recognized that Ms Siliadin was held in servitude, because of the lack of freedom and of the work hours on every week day. This case represented a significant milestone with regard to the increase of the human beings trafficking phenomenon, the victim being considered to be placed in a state of servitude.

The most relevant case in this respect is the case of *Rantsev v. Cyprus and Russia*[8]. On short, the applicant was the father of a young lady who died in Cyprus, where she went for working as a cabaret "artiste". The applicant complained that the Cypriot authorities had not done everything they could to protect his daughter from trafficking while she was alive, as well as to

[2] *Tyrer v. The United Kingdom*, application no. 5856/72, judgment dated 25.04.1978, para. 31, available at http://hudoc.echr.coe.int/eng?i=001-57587.

[3] Augustin Fuerea, *Introducere in problematica dreptului international al drepturilor omului – note de curs*, Editura ERA, Bucuresti, 2000, p.4.

[4] The domestic authorities can breach individual rights trough juridical acts, material and juridical facts, material and technical operations or political acts; in this respect, please see Marta Claudia Cliza, *Drept administrativ*, Partea a 2-a, Pro Universitaria Publishing House, Bucuresti, 2011, p. 14 and following, and *Marta* Claudia Cliza, *Revocation of administrative act*, in the Proceedings of CKS eBook, 2012, Pro Universitaria Publishing House, Bucharest, 2012, p. 627.

[5] On the other side, it is important to have in mind also the European Union. For an interesting study on the European Union law infringements that caused damages to individuals, please see Roxana-Mariana Popescu, *Case-law aspects concerning the regulation of states obligation to make good the damage caused to individuals, by infringements of European Union law*, in the Proceedings of CKS eBook, 2012, Pro Universitaria Publishing House, Bucharest, 2012, p. 999-1008.

[6] For general information on the legal responsability of states, please see Raluca Miga-Besteliu, *Drept international public*, 2nd volume, 3rd edition, C.H. Beck Publishing House, Bucharest, 2014, p. 29-56.

[7] Case of *Siliadin v. France*, application no. 73316/01, judgment dated 26.07.2005, available at http://hudoc.echr.coe.int/eng?i=001-69891.

[8] Case of *Rantsev v. Cyprus and Russia*, application no. 25965/04, judgment dated 07.01.2010, available at http://hudoc.echr.coe.int/eng?i=001-96549.

punish the responsible persons for her ill-treatment and death. Moreover, Mr Rantsev complained that the Russian authorities failed to protect his daughter, Ms Rantseva, from trafficking, as well as to investigate her trafficking and death.

As underlined in *Rantsev v. Cyprus and Russia*, in 2010, the Court recognized that the global phenomenon of trafficking in human beings "has increased significantly in recent years"[9], fact that determines the Court to be very cautious. In the same judgment, the Court appreciated 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 (…)"[10].

Moreover "[t]here can be no doubt that trafficking threatens the human dignity and fundamental freedoms of its victims and cannot be considered compatible with a democratic society and the values expounded in the Convention"[11].

The ECHR held that human beings trafficking was prohibited by Article 4 of the Convention (the prohibition of slavery and forced labour), therefore Cyprus was found guilty for violating its positive obligations set under this article for two aspects: (i) its failure to set up an appropriate legal and administrative framework to combat trafficking and (ii) the failure of the police to take operational measures to protect Ms Rantseva from trafficking, although there was a credible suspicion that she might have been a victim of trafficking in human beings. Cyprus was also found guilty for violating Article 2 of the Convention (the right to life), as a result of the authorities to effectively investigate Ms Rantseva's death.

Additionally, the Court held that Russia also violated Article 4 of the Convention (the prohibition of slavery and forced labour) because it failed to investigate how Ms Rantseva had been recruited and to take steps to identify the recruiters and the recruitation methods.

In 2011, the Court ruled in the case *V.F. v. France*[12], which concerned the applicant's procedure for deportation to country of origin, Nigeria. The applicant underlined that if she were deported to Nigeria, she would be at risk of being forced back to prostitution that she managed to escape very hardly, being also subject to reprisals, and without being protected by the Nigerian authorities, she considered that the French authorities were not allowed to expel potential victims of human trafficking. Although the Court was aware of the high level of Nigerian women trafficked to France and acknowledged their difficulties for obtaining protection from the authorities, the Court declared the application inadmissible because it was manifestly ill-founded. The reason, for which the Court did that, was because the applicant did not manage to prove that the police knew or, at least, should have known, that she was a human trafficking victim. As for the risk of being forced into prostitution once arrived in Nigeria, the judges considered that she would have received assistance from the Nigerian authorities on her return, despite

[9] *Idem*, para. 278.
[10] *Idem*, para. 281.
[11] *Idem*, para. 282.
[12] *V.F. v. France*, application no. 7196/10, judgment dated 29.11.2011, available at http://hudoc.echr.coe.int /eng?i=001-108003.

the fact that the specific domestic legislation had not fully achieved its aims.

Another interesting case dealt by the Court is *M. and Others v. Italy and Bulgaria*[13]. The applicants, M. and her parents, Bulgarian citizens of Roma origin, arrived to Italy in order to find work, following a promise of work in the villa of a Roma man of Serbian origin. They alleged that six days later, beaten and threaten with death, they were forced to leave the Italian village and to return to Bulgaria, leaving their daughter there. They complained that their daughter was detained at gunpoint, forced to work and to steal, as well as sexually abused by the respective Roma family, claiming that the Italian authorities failed to investigate the case in an adequate manner. More specifically, they complained that Italy had breached Article 3 of the Convention (prohibition of torture and inhuman or degrading treatment) because it did not prevent M.'s ill-treatment by securing her speedy release, Article 4 of the Convention (prohibition of slavery), based on human beings trafficking, as well as Article 14 of the Convention (prohibition of discrimination) for racial discrimination. Although the Court agreed that the circumstances could have amounted to human trafficking, the Court rejected all the complaints (except on Article 3 found as a violation on the grounds of ineffective investigation) because the evidence submitted was not enough to prove the truthfulness of their allegations. Thus, the Court did not accept that the respective circumstances had amounted to the recruitment, transportation, transfer, harbouring or receipt of persons for the purpose of exploitation, forced labour or services, slavery, servitude or the removal of organs.

Another case that could have been interesting is *F.A. v. the United Kingdom*[14], which raised the question of human beings trafficking of a Ghanaian national to United Kingdom. Unfortunatelly the Court found the complaints inadmissible because they had not been raised in an appeal to the Upper Tribunal, fact that drove to the failure of meeting the admissibility criteria set in the Convention.

In a very recent case, *L.E. v. Greece*[15], the Court had to deal again on human beings trafficking. The case concerned a complaint made by a Nigerian citizen who was forced into prostitution in Greece. Although she was recognized as a human trafficking victim for sexual exploitation, the applicant had been required to wait almost one year after informing the authorities about her situation, before she was granted the status of a victim. The Court found that there had been a violation of Article 4 of the Convention because the effectiveness of the preliminary inquiry and subsequent investigations of the case had been compromised by several shortcomings and it found several delays and failings of the Greek State's procedural obligations. Moreover, the Court held that in the case there were also violated (i) Article 6 paragraph 1 of the Convention (because the length of the proceedings had been excessive and did not meet the "reasonable time" requirement) and (ii) Article 13 of the Convention (because of the absence in the Greek legislation of a remedy by which the

[13] *M and Others v. Italy and Bulgaria*, application no. 40020/03, judgment dated 31.07.2012, available at http://hudoc.echr.coe.int/eng?i=001-112576.

[14] *F.A. v. the United Kingdom*, application no. 20658/11, decision dated 10.09.2013, available at http://hudoc.echr.coe.int/eng?i=001-127061.

[15] *L.E. v. Greece*, application no. 71545/12, judgment dated 21.04.2016, available at http://hudoc.echr.coe.int/eng?i=001-160218.

applicant could have enforced her right to a reasonable time hearing).

Another relevant case dealt very recently by the Court is *J and Others v. Austria*[16], which concerned the investigation made by the Austrian authorities into a human trafficking allegation (human trafficking and forced labour). Two Filipino nationals who were working as maids or au pairs in the United Arab Emirates were the applicants in this case. They alleged that their employers confiscated their passports and exploited them, facts that reminded us about the *Siliadin* case. The applicants claimed that this treatment continued during a short trip to Vienna, where they managed to escape. Following a criminal complaint against their employers, the Austrian authorities found that they do not have jurisdiction over the alleged offences commited abroad, deciding also to discontinue the investigation in this case concerning the events in Vienna. The applicants argued that the Austrian authorities had failed to protect them and to carry out an effective and exhaustive investigation based on their allegations, especially that they had a duty under international law to investigate also those events which had occurred abroad. The Court found that there had been no obligation under the Convention for the Austrian authorities to investigate the foreign elements (the recruitment made in Philippines or the exploitation in the United Arab Emirates), because the States are not held under Article 4 of the Convention to provide for universal jurisdiction over the human trafficking cases commited abroad. As for the Austrian events, the Court noted that the authorities were diligent, taking all the reasonable steps in the respective situation: supported the applicants through a Government funded NGO, interviewed them by special police officers, granted them residence and work permits, imposed a personal data disclosure ban for their protection. Since no mutual legal assistance agreement existed between Austria and the United Arab Emirates, no further steps in this case were possible. For these reasons, the Court found that the Austrian authorities had complied with their duty to protect the applicants; therefore there had been no violation of Articles 4 and 3 of the Convention.

Although not finalized, two other cases against Greece are interesting for our research and we are waiting for the Courts' judgments.

The first case is the *Chowdury and Others v. Greece*[17], in which the applicants, 42 Bangladesh nationals, were recruited in Greece, without having a Greek work permit, in order to work at the main strawberry farm in Manolada. They alleged that the respective work amounted to forced or compulsory labour. In the application, the claimants argued that Greece failed to comply with its positive obligation to prevent them from being subjected to human trafficking, to adopt preventive measures to that end or to penalize their employers.

The second case is *T.I. and Others v. Greece*[18], in which the three applicants, Russian nationals, who were recognized as victims of human trafficking, complained of the Greek State's failure to discharge its obligations to penalize and prosecute acts relating to human trafficking in their case. The applicants invoked the violation of Articles 4, 6 and 13 of the Convention.

[16] *J and Others v. Austria*, application no. 58216/12, judgment dated 17.01.2017, available at http://hudoc.echr.coe.int/eng?i=001-170388.

[17] *Chowdury and Others v. Greece*, application no. 21884/15, communicated to the Greek Government on 09.09.2015.

[18] *T.I. and Others v. Greece*, application no. 40311/10, communicated to the Greek Government on 06.09.2016.

We look forward to discover the Court's approach in those two cases.

But in the Court's case law there were times when the Court had to analyse the respect of the Convention as for the measures taken by the Contracting States against traffickers, for instance *Kaya v. Germany*[19] and *Tas v. Belgium*[20].

In the *Kaya* case, the applicant, a Turkish national living in Germany for thirty years, was convicted for attempted aggravated trafficking in human beings and battery. After he has served two thirds of his prison sentence, he was expelled from Germany to Turkey, because the courts considered that he could continue to pose a serious threat to the public. The applicant alleged that his deportation to Turkey had breached Article 8 of the Convention (the right to respect his private and family life). Having in mind that the applicant's expulsion was based because he had been sentenced for serious offences in Germany and that he had been eventually able to return to Germany, the Court held that the German authorities' actions were in conformity with the Convention and that no violation of Article 8 could be retained.

In the *Tas* case, which concerned the confiscation of the premises used in the connection with human trafficking, the Court declared the application as inadmissible, being manifestly ill-founded. The arguments held by the Court were that taking into account the States' margin of appreciation in controlling the use of property in combating criminal activities, then the interference with the applicant's right to the peaceful enjoyment of his possessions had not been disproportionate to the legitimate aim pursued, *i.e.* to combat human trafficking.

3. Concluding Remarks

After the analysis of the Court's case-law we can conclude that, although the Convention does not mention if there is a formal hierarchy of the human rights enshrined in it, it is recognized the fact that "a balance has to be achieved between conflicting interests, usually those of the individual balanced against those of the community, but occasionally the rights of one individual must be balanced against those of another"[21]. As it is stated in the legal doctrine, "the human being is the central area of interest for the lawmaker"[22].

The doctrine divides the rights set out in the Convention into *unqualified rights* (some of which are non-derogable) and *qualified rights*[23].

In the category of *unqualified rights* we can include the human beings trafficking under the umbrella of prohibition of slavery and forced labour as defined in Article 4 (prohibition of torture), which is also an absolute right, because no derogations under Article 15 (derogation in time of an emergency) are permitted. Other unqualified rights are the right of life in Article 2 (subject to some exceptions), prohibition of torture,

[19] *Kaya v. Germany*, application no. 317532/02, judgment dated 28.06.2007, available at http://hudoc.echr.coe.int/eng?i=001-81338.

[20] *Tas v. Belgium*, application no. 44614/06, decision on the admissibility dated 12.05.2009, available at http://hudoc.echr.coe.int/eng?i=002-1551.

[21] Robin C.A. White and Clare Ovey, *The European Convention on Human Rights*, fifth edition, Oxford University Press, 2010, p. 9, *Evans v. United Kingdom*, application no. 6229/05, judgment dated 10.04.2007, available at http://hudoc.echr.coe.int/eng?i=001-80046.

[22] Elena Anghel, *The notions of "given" and "constructed" in the field of the law,* in the Proceedings of CKS eBook, 2016, Pro Universitaria Publishing House, Bucharest, 2016, p. 341.

[23] Robin C.A. White and Clare Ovey, *The European Convention on Human Rights*, 5th edition, Oxford University Press, 2010, p. 10.

inhuman or degrading treatment in Article 3, the right to liberty and security in Article 5, the right to a fair trial in Article 6, the prohibition of punishment without law in Article 7, the right to marry in Article 12, the right to an effective remedy in Article 13, the prohibition of discrimination in Article 14, the right to education and the right to free elections in Article 3 of Protocol 1; and the prohibition of the death penalty in Protocols 6 and 13.

Qualified rights are the ones which are mentioned in the Convention, but the Contracting States may interfere with it for the purpose of securing certain interests: the right to respect for private and family life enshrined in Article 8, together with the freedom of thought, conscience and religion in Article 9, freedom of expression in Article 10, freedom of assembly and association in Article 11, protection of property in Article 1 of the Protocol 1, freedom of movement in Article 2 of Protocol 4.

Any interference with a qualified right will require that the Contracting State prove that the interference was justified: the interference was according to law, the aim was to protect a recognized interest and the interference was necessary in a democratic society.

Despite the concerted efforts of the national public authorities[24] with the international organizations, in the following years we will still encounter many varieties of the human beings trafficking (from prostitution to organ harvesting), and many States that do not act with responsibility[25] towards their nationals or other categories of individuals found on their territory[26].

As a response to the importance of trafficking in human beings, international organizations try to move forward. For instance, the Council of Europe had also adopted the Convention on Action against Trafficking in Human Beings in 2005 which was the first convention to recognize in an express manner the fact that the human beings trafficking represents a violation of human rights and an offence to the dignity and integrity of each human being.

But the question related to the present paper is how will the Court deal those cases? The answer is simple: TIME will answer this question.

References

- Elena Anghel, *The notions of "given" and "constructed" in the field of the law*, in the Proceedings of CKS eBook, 2016, Pro Universitaria Publishing House, Bucharest, 2016;
- Elena Anghel, *The responsibility principle*, in the Proceedings of CKS eBook, 2015, Pro Universitaria Publishing House, Bucharest, 2015;
- Marta Claudia Cliza, *Revocation of administrative act*, in the Proceedings of CKS eBook, 2012, Pro Universitaria Publishing House, Bucharest, 2012;

[24] For more details on public authorities, please see Elena Emilia Stefan, *Disputed matters on the concept of public authority*, in the Proceedings of CKS eBook, 2015, Pro Universitaria Publishing House, Bucharest, 2015, p. 535 and following.

[25] For more details regarding the responsibility principle, please see Elena Anghel, *The responsibility principle*, in the Proceedings of CKS eBook, 2015, Pro Universitaria Publishing House, Bucharest, 2015, p. 364 and following. For more details regarding responsibility in general, please see Elena Emilia Stefan, *Raspunderea juridica. Privire speciala asupra raspunderii in Dreptul administrativ*, Pro Universitaria Publishing House, Bucharest, 2013, p. 25-39.

[26] Please see Nicolae Popa coordinator, Elena Anghel, Cornelia Beatrice Gabriela Ene-Dinu, Laura-Cristiana Spataru-Negura, *Teoria generala a dreptului. Caiet de seminar*, 2nd edition, revised and enlarged, C.H. Beck Publishing House, Bucharest, 2014, p. 129-130.

- http://echr.coe.int;
- Augustin Fuerea, *Introducere in problematica dreptului international al drepturilor omului – note de curs*, Editura ERA, Bucuresti, 2000;
- http://hudoc.echr.coe.int;
- Raluca Miga-Besteliu, *Drept international public*, 1st volume, 3rd edition, C.H. Beck Publishing House, Bucharest, 2014;
- Raluca Miga-Besteliu, *Drept international public*, 2nd volume, 3rd edition, C.H. Beck Publishing House, Bucharest, 2014;
- Nicolae Popa coordinator, Elena Anghel, Cornelia Beatrice Gabriela Ene-Dinu, Laura-Cristiana Spataru-Negura, *Teoria generala a dreptului. Caiet de seminar*, 2nd edition, revised and enlarged, C.H. Beck Publishing House, Bucharest, 2014;
- Roxana-Mariana Popescu, *Case-law aspects concerning the regulation of states obligation to make good the damage caused to individuals, by infringements of European Union law*, in the Proceedings of CKS eBook, 2012, Pro Universitaria Publishing House, Bucharest, 2012;
- Elena Emilia Stefan, *Disputed matters on the concept of public authority*, in the Proceedings of CKS eBook, 2015, Pro Universitaria Publishing House, Bucharest, 2015;
- Elena Emilia Stefan, *Raspunderea juridica. Privire speciala asupra raspunderii in Dreptul administrativ*, Pro Universitaria Publishing House, Bucharest, 2013;
- Robin C.A. White and Clare Ovey, *The European Convention on Human Rights*, fifth edition, Oxford University Press, 2010.