



Organization for Security and Co-operation in Europe

Keynote addresses by Ms. Päivi Hirvelä, Judge at the European Court of Human Rights

**“SUCCESSFUL PROSECUTION OF HUMAN TRAFFICKING –
CHALLENGES AND GOOD PRACTICES”**

Conference in Helsinki, 10-11 September 2008

The States positive obligations to protect the victims of human trafficking in the light of ECHR judgments

Ladies and gentlemen,

Trafficking in human beings is a grave Human Rights' violation. The scope of this problem is major and serious concern. The scale of trafficking in human beings in Europe has long been underestimated. It is a modern form of slave trade where different countries in Europe are the countries of origin, transit countries and the countries of destination. Every year, hundreds of thousands of women, men and children are trafficked into conditions amounting to their exploitation. Trafficking in human beings has many forms: sexual or labour exploitation, forced marriages, domestic servitude, forced organised begging, petty crime or even trafficking in organs. Trafficking in human beings has become extremely profitable branch of criminality. It is estimated that trafficking is the third largest source of criminal profit after drugs and arms trafficking.

The main measures in combating trafficking in human beings are often described as “the 3 Ps” which stand for Prevention of trafficking, Prosecution of criminals and Protection of their victims.

The European Convention on Human Rights and Fundamental Freedoms (1950) primarily guarantees civil and political rights. It has been ratified by 47 member states of the Council of Europe. In the first Article of the Convention the contracting States are bound to secure everyone within their jurisdiction the rights and freedoms defined in the Convention.

The fundamental rights guaranteed by the Convention are for example the right to life in Article 2, prohibition of torture in Article 3, prohibition of slavery and forced labour in Article 4 and right to respect for private and family life in Article 8. Most of these rights are formulated as prohibitions directed to the State. Thus, primarily the obligations are so called “negative obligations” and they imply the States to abstain from violating the fundamental rights of individuals.

The Strasbourg Court interprets the Convention in concrete cases. Thus, the guidelines of the Convention become apparent in the case law of the Court. The Court has in its case law often expressively entailed certain positive duties for the States to protect individuals from interferences by other persons. This so called “positive obligation” requires the State to take measures by adopting legislation and providing procedural guarantees to protect the rights secured in the Convention.

In the following I make a short review of the Court’s case law concerning the positive obligations of the States **in cases which would be helpful concerning trafficking in human beings.**

The Council of Europe’s main aim is to safeguard and protect human rights, fundamental freedoms, human dignity and democracy. Trafficking in human beings without doubt undermines these values. However, there are not many cases in the case law of the Strasbourg Court which concern trafficking in human beings in

particular. Nevertheless, many cases which concern vulnerable victims, violations against children or sexual abuse may be useful in this respect.

Article 2, Right to life

Article 2, right to life, is luckily rarely applied in cases of trafficking in human beings. The Court has a well established case law concerning Article 2 which recognizes not only the State's obligation to refrain from the intentional and unlawful taking of life, but also creates an obligation to the States to take appropriate steps to safeguard the lives of those within their jurisdiction. The obligation entails a duty to put in **place legislation** to provide effective deterrence against unlawful killing. The other side of this obligation is the procedural duty **to investigate** suspicious deaths. The investigation must fulfil certain requirements: the authorities must act on their own initiative once the matter has come to their attention and they must take all the reasonable steps available to them to secure the evidence concerning the incident. Furthermore, the investigation must be carried out promptly. In order to maintain public confidence the investigation must, to certain degree, be open to public scrutiny, and the relatives of the deceased must have an opportunity to become involved. (*LCB v. UK, 1998; McCann and others v. UK, 1996; Öneriyildiz v. Turkey, 2004; Kilic v. Turkey, 2001; Osman v. UK, 1998*)

Article 3, Prohibition of torture

While Article 2 is rarely useful in trafficking cases I assume that Article 3 – prohibition of torture, inhuman and degrading treatment – could often be applicable. The Court has in many Article 3 cases emphasised the state's obligation to safeguard vulnerable victims and to prevent degrading treatment of persons.

One of these cases is *A. v. UK (1998)*, which was the first case concerning corporal punishment of a child by his or her parents. The applicant was a boy who had been repeatedly beaten by his stepfather. Violence caused him significant bruising. The

stepfather was prosecuted for causing actual bodily harm but was found not guilty on the grounds that the punishment was “reasonable chastisement”. The Court found that the punishment violated Article 3 of the Convention. In the judgment it was stated that children and other vulnerable individuals are entitled to State protection against serious breaches of personal integrity in the form of effective deterrence.

One aspect of the positive obligation is **prevention** of the violations of the Convention. For instance in the case of *Z. and Others v. UK (2001)*, the applicants were four siblings who suffered severe neglect and emotional abuse in the hands of their parents despite continuous monitoring and reporting by social services. The Strasbourg Court found that the obligation to secure everyone the rights and freedoms defined in the Convention requires States to take measures to ensure that individuals are not subjected to inhuman or degrading treatment. These measures should provide effective protection, in particular, to children and other vulnerable persons. The protection includes reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge.

Similar issue arose in the case of *E. and Others v. UK (2002)*. In the case the Court found that the local authorities ought to have been aware of the continuation of sexual abuse of the children in the family and the risk of future ill-treatment to them. However, the social services failed to take steps which would have enabled them to discover the problem and to prevent further abuse. The lack of investigation, communication and co-operation by the relevant authorities had a significant influence in the course of the events. The proper and effective management of their responsibilities might have prevented or, at least, minimised the risk of the damage suffered by the children. The Court held that there had been a breach of Article 3.

Article 4, Prohibition of slavery and forced labour

The only case in the case law of the Court which clearly concerns trafficking in human beings is *Siliadin v. France* (2005). The applicant arrived in France from Togo at the age of 15 with a relative who had agreed with the child's father that she would work until her flight ticket had been reimbursed. The relative also promised that the child's immigration status would be regularized and she would be sent to school in France. However, in reality the child worked for this person only some months and after that she was "lent" to the family of Mr. and Mrs. B. In their family the girl worked 15 hours per day, with no days off, for several years, without receiving salary or being sent to school. She was accommodated in the family's home where she slept in the children's bedroom. The Court noticed that the applicant was in serious threat as being an adolescent girl in a foreign country, unlawfully present in France and in fear of arrest by the police. Mr. and Mrs. B. nurtured that fear and led her to believe that her status would be regularized. The Court found that at the time she was a minor she was subject to *forced labour* within the meaning of Article 4 of the Convention. The Court also found that the girl was held in *servitude* since she had no hope that her situation would improve as she was not sent to school despite the promises and she was completely dependent on Mr. and Mrs. B. The French criminal code at the relevant time did not afford the applicant effective protection against the actions of which she was a victim since slavery and servitude were not as such classified as offences under French criminal law. Thus, there was a violation of the State's positive obligations under Article 4 of the Convention.

Article 8, Right to respect for private and family life

Article 8 guarantees right to respect for private and family life. What is clear in the light of the Court's case law is that Article 8 does not merely require the State to abstain from interferences but it also includes a positive element of protection. The protection requires the existence of rules in the national legislation protecting the essential features of private and family life. Several cases where the Court has found

a violation of Article 8 have dealt with some defect in the existing law or insufficient protection of the legislation.

The case *X. and Y. v. the Netherlands (1985)* indicated the need to have sufficient procedural provisions to protect victims irrespective of their legal capacity. In that case a mentally disabled 16-year-old girl was raped in a privately run home. The domestic law expected a complaint made by the victim in person. Since the applicant lacked the legal capacity and could not lodge the complaint in person, the criminal law could not be applied to the offence. The domestic court found that there was a gap in the law, but it could not be filled by means of interpretation to the detriment of the suspect. The Strasbourg Court found a violation of Article 8 and that the protection afforded by the civil law was insufficient to satisfy the positive obligation to protect the victim. The Court noted that effective deterrence is indispensable in this kind of cases and it can be achieved only by criminal-law provisions.

The same approach was in the case of *M.C. v. Bulgaria (2003)*. The applicant complained that the law in Bulgaria did not provide effective protection against rape and sexual abuse, since only in the cases where the victims had resisted actively the perpetrators were prosecuted. The victim was a 14-year-old girl who was allegedly raped by two men. In the end of the investigation the prosecutors ordered the criminal investigation to be closed down in the absence of sufficient evidence and in view of the impossibility of collecting further evidence. The Strasbourg Court criticised the quality of the investigation and the failure to assess sufficiently the credibility of the conflicting statements made. The Court criticised also the national authorities for having attached little weight to particular vulnerability of a young person and the psychological factors involved in cases concerning rape of minors. The Court considered that States have positive obligations inherent in Articles 3 and 8 to enact legislation effectively punishing rape. The Court emphasised also the procedural side

of the obligation to apply the legislation through effective investigation and prosecution.

The Court has also under Article 8 emphasised the prevention aspect. In an Italian case *Scozzari and Giunta*, (2000) the prevention of abuse of children was at stake: The Court considered that the temporary placement of children in a residential institution whose leaders had been previously convicted for abuse of children violated Article 8. The Court estimated that the national authorities had failed to show the degree of prudence required in such a delicate and sensitive situation and had thus failed to protect the interests of the children.

Article 6, Right to a fair trial

The Court has, furthermore, in many cases concerning sexual offences struck a balance between the aspects of Article 8 - right to respect for the private life of the victim - and Article 6, right to a fair trial and the protection of the rights of the defendant. The Court has accepted that in criminal proceedings certain measures may be taken in the purpose of protecting the victim, provided that such measures can be reconciled with adequate and effective exercise of the rights of the defence. In many countries videoconferencing has been used when hearing vulnerable witnesses in the court in order to protect them from *vis a vis* confrontation with the defendant and threats of reprisal. The Court has accepted this measure providing that the defendant be given an adequate and proper opportunity to challenge and question the witness *via* the investigator at the pre trial stage or at a later stage of the proceedings (*Saidi v. France*, 1993, *Doorson v. the Netherlands*, 1996, *A.M. v. Italy*, 1999, *P.S. v. Germany*, 2001, *S.N. v. Sweden*, 2002).

Ladies and gentlemen,

This little survey to the case law of the Strasbourg Court indicates the State's obligation

- to take preventive measures by enacting appropriate legislation to protect the life and the physical and sexual integrity of an individual
- to effectively investigate any allegation of ill-treatment and
- where appropriate to prosecute the perpetrators.

The European Convention on Human Rights is a general agreement which by definition does not give any detailed approach for the substance of the preventive measures. During the last years the International organisations have been active in combating trafficking in human beings and offered effective mechanisms for prevention. The United Nations Protocol to the Convention against transitional organised crime (the Palermo Protocol) in 2000, the European Union Framework Decision on combating trafficking in 2002 and the Directive on issue of residence permits to victims of trafficking who co-operate with the authorities in 2004 and OSCE's Action Plan and efficient work in this field in obliging the States to take measures in prevention of trafficking and in protection of the victims of trafficking give practical tools against this terrible phenomenon.

The Council of Europe has also made the fight against human trafficking one of its top priorities. The Council of Europe Convention on Action against Trafficking in Human beings entered into force on 1 February 2008. To this date 17 states have ratified the convention that has a clear added value to the former instruments because of its binding character and comprehensive approach. It applies to all forms of trafficking, whether it takes place within the country or across national borders, whether it is related or unrelated to organised crime and whether its victims are children, women or men, and regardless of whether the victims are trafficked with the aim of sexual exploitation, forced labour or any other motive.

All these instruments make the 3 essential "Ps" - prevention of the crime, prosecution of the criminals and protection of the victims - concrete and indicate the united

readiness among the countries to work together against this serious threat of human rights and human dignity.

Thank you very much for your attention.