



Financed by the Justice Programme of the European Commission

Asociatia
PRO REFUGIU.org

ECPAT Deutschland e.V.
Arbeitsgemeinschaft zum
Schutz der Kinder
vor sexueller Ausbeutung

KOK
German NGO Network against
Trafficking in Human Beings



SCANDINAVIAN
HUMAN RIGHTS
LAWYERS

BGRF
bulgarian gender
research foundation

MANUAL FOR LAWYERS, PROSECUTORS AND JUDGES

**STRENGTHENING LEGAL KNOWLEDGE FOR A BETTER
PROTECTION OF VICTIMS OF HUMAN TRAFFICKING
RIGHTS IN THE JUDICIAL PROCEEDINGS**

April 2017

AUTHORS

Mrs. Alina Petronela Mosneagu, Judge, President of Criminal Section II of the Appeal Court Bucharest, Romania (Chapters 4 and 5)

Mrs. Laura Ecedi Stoisavlevici, Prosecutor, Directorate for Investigating Organized Crime and Terrorism – Central Structure, Bucharest, Romania (Chapter 3)

Mrs. Silvia Antoaneta Berbec, Lawyer, Bucharest Bar, Romania (Chapters 1, 2, 6 and 7)

Mr. Vladimir Nikolov, Prosecutor, Regional Prosecutors Office Pleven, Bulgaria (Chapters 9-15)

Mrs. Daniela Ilieva Gorbunova, Lawyer, Sofia Bar, Bulgaria (Chapters 9-15)

Mrs. Genoveva Tisheva, Lawyer, Sofia Bar, Bulgaria (Chapters 9-15)

Mrs. Henriette Lyndian, Lawyer, Dortmund/Lünen, Germany (Chapters 16-18)

Mrs. Christina Clemm, Lawyer, Berlin, Germany (Chapters 16-18)

Mrs. Ruth Nordström, Senior Legal Counsellor, Scandinavian Human Rights Lawyers Sweden (Chapters 19-23)

Mrs. Crystal Malan, Legal Researcher, Scandinavian Human Rights Lawyers Sweden (Chapters 19-23)

Mr. Gabriel Diaconu, Psychiatrist, Romania (Chapter 8)

Mrs. Gabriela Ionescu, Psychologist, Romania (Chapter 8)

Contributions:

Mr. Thomas Ahlstrand, Deputy Chief Prosecutor, International Prosecutors Office Gothenburg, Sweden (provided information to chapter 22, case studies)

Mrs. Helena Ljunggren, Senior Public Prosecutor, International Prosecutors Office, Malmö, Sweden (provided information to chapter 22, case studies)

The **Legal Manual for Lawyers, Prosecutors and Judges** was developed as part of the transnational project “*Strengthening lawyers’ legal knowledge and cooperation with the prosecutors and judges, to protect victims of human trafficking rights in the judicial proceedings*”. The project is coordinated by Association Pro Refugiu Romania, in partnership with Bulgarian Gender Research Foundation, KOK- The German NGO Network against Trafficking in Human Beings, ECPAT Germany and Scandinavian Human Rights Lawyers Sweden. Associate Partner National Institute for Magistracy Romania.

The authors of the manual are *experts* in the project for the partners’ organizations (Alina Petronela Mosneagu, Laura Ecedi Stoisavlevici, Silvia Antoaneta Berbec, Gabriel Diaconu, Gabriela Ionescu for Association Pro Refugiu Romania), (Vladimir Nikolov, Daniela Ilieva Gorbunova, Genoveva Tisheva for Bulgarian Gender Research Foundation), (Henriette Lyndian, Christina Clemm for KOK- The German NGO Network against Trafficking in Human Beings), (Ruth Norström, Crystal Malan for Scandinavian Human Rights Lawyers Sweden).

This publication has been produced with the financial support of the Justice Programme of the European Union. The contents of this publication are the sole responsibility of the authors and can in no way be taken to reflect the views of the European Commission.

CONTENT

CHAPTER 1

International and European Legal Instruments _____	1
1.1. International Legal Instruments _____	1
1.2. European Legal Instruments _____	1

CHAPTER 2

European Court for Human Rights Decisions on Human Trafficking _____	4
2.1. Rantev v Cyprus & Russia (application no 25965/04) _____	4
2.2. M. and Others v. Italy & Bulgaria (application no. 40020/03) _____	7
2.3. L.E. v. Greece (application no. 71545/12) _____	10
2.4. J. and Others v. Austria (application no. 58216/12) _____	12

CHAPTER 3

The rights of the victims of human trafficking in the prosecution phase in Romania _____	16
3.1. Victim of human trafficking rights as injured party in criminal proceedings _____	16
3.2. Victim of human trafficking rights as civil party in criminal proceedings _____	20
3.3. Victim of human trafficking rights as witness during criminal investigations _____	22
3.4. Case Studies (2 cases) _____	24

CHAPTER 4

The rights of the victims of human trafficking in the court phase in Romania _____	30
4.1. Right to Information _____	30
4.2. Right to legal assistance and representation _____	31
4.3. Right not to cooperation with law enforcement bodies _____	32
4.4. Right to privacy and safety _____	33
4.5. Right to witness protection and to be treated with respect and dignity _____	34
4.6. Right to protection of physical integrity _____	36
4.7. Case Studies (4 cases) _____	37

CHAPTER 5

Financial compensation for victims of human trafficking in Romania _____	44
5.1. Initiation of civil action in criminal proceedings _____	44
5.2. Settlement of civil actions in civil courts _____	47
5.3. Financial compensation granted by the government to victims of certain crimes _____	48
5.4. Case Studies _____	51

CHAPTER 6

Victims of human trafficking foreign citizens in Romania _____	57
6.1. The applicability of the 1951 Geneva Convention on refugees' status to victims of human trafficking _____	57
6.2. Analyze of the Romanian national legal framework on combating human trafficking & the foreigners' legal regime _____	62
6.3. Case Study _____	65

CHAPTER 7	
The Romanian Identification and Referral Mechanism for victims of human trafficking ____	77
CHAPTER 8	
Trauma impact on victim ability to participate in the criminal trial _____	79
CHAPTER 9	
Trafficking in human beings as a criminal phenomenon in Bulgaria _____	87
CHAPTER 10	
Bulgarian policy for combating trafficking in human beings _____	89
CHAPTER 11	
Bulgarian Legal Framework _____	91
CHAPTER 12	
The legal status of the victims of human trafficking in Bulgaria _____	94
12.1. Profile of the victims of human trafficking in Bulgaria _____	95
12.2. Non-liability of victims of human trafficking _____	96
12.3. Special protection of victims under the Act for Combatting Human Trafficking _____	97
12.4. Special protection of children _____	97
12.5. Identification documents and residence permits _____	98
12.6. Criminal Procedure Rights _____	98
12.7. Case Study (victims' rights in the criminal trial) _____	100
CHAPTER 13	
Law and practices related to legal assistance and legal aid to victims of human trafficking in Bulgaria _____	103
13.1. Primary legal aid _____	103
13.2. Legal representation in pre-trial phase of criminal proceedings _____	104
13.3. Legal representation before court _____	104
13.4. Legal aid to children _____	104
CHAPTER 14	
Specialized services to the victims of human trafficking in Bulgaria _____	107
CHAPTER 15	
Financial compensation for victims of crimes in Bulgaria _____	108
15.1. Legal Framework _____	108
15.2. Case Study _____	109
CHAPTER 16	
Facts and numbers on human trafficking in Germany _____	112
CHAPTER 17	
German legislation on human trafficking _____	115
17.1. Criminal law _____	115
17.2. Financial compensation for victims _____	117

CHAPTER 18

Dealing with victims of human trafficking in Germany _____	118
18.1. Psychological-social criminal proceeding companionship _____	119
18.2. Social support _____	119
18.3. Legal support _____	119
18.4. Case Studies _____	120

CHAPTER 19

Strategies in Sweden to combat human trafficking and protect victims rights _____	135
---	-----

CHAPTER 20

Sweden National Referral Mechanism _____	136
--	-----

CHAPTER 21

Swedish Legislation on human trafficking _____	139
--	-----

CHAPTER 22

The victims' rights in the prosecution and court phases in Sweden _____	141
22.1. Legal framework _____	141
22.2. Case studies _____	144

CHAPTER 23

Financial compensation for victims of human trafficking in Sweden _____	148
---	-----

CHAPTER 1

INTERNATIONAL AND EUROPEAN LEGAL INSTRUMENTS

This chapter provides an overview of the most important European and international instruments governing the fight against trafficking in human beings, the protection of the rights of victims of this phenomenon.

1.1. INTERNATIONAL LEGAL INSTRUMENTS

United Nations Convention against Transnational Organized Crime, adopted in New York, November 15, 2000

Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, adopted on 15 November 2000. It is considered a basic international instrument for the first time assigning by definition trafficking in human beings a legally binding feature internationally agreed. The Convention and its additional Protocols are primarily law enforcement instruments promoting cross-border cooperation between governments and ensuring an adequate legal framework that addresses these crimes in all states.

Romania ratified by Law No. 565 of 16 October 2002 the United Nations Convention against Transnational Organized Crime, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime and Protocol against the Smuggling of migrants by land, air and sea, supplementing the United Nations Convention against transnational organized crime, adopted in New York on 15 November 2000.

Convention no. 182 / 1999 on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, adopted at its 87th session of the General Conference of the International Labour Organization held in Geneva on 1 June 1999. It defines what is meant by the *worst forms of child labour*, in all forms of slavery or similar practices, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict; the use, procuring or offering of a child for prostitution, production of pornography or pornographic performances; the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in relevant international treaties; work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.

1.2. EUROPEAN LEGAL INSTRUMENTS

Council of Europe Convention on Action against Trafficking in Human Beings, adopted on 3 May 2005, which entered into force on 1 February 2008 aims to prevent trafficking, protect victims and to criminalize traffickers. It covers all forms of trafficking (national or transnational, whether or not related to organized crime) and covers all types of victims (women, men and children) and all forms of exploitation. The Convention also includes measures to promote partnerships with civil society and to promote international cooperation. The main added value of the Convention is the emphasis on human rights and protection of victims. The Convention defines trafficking as a violation of human rights and an offense to human dignity and integrity. This means that national authorities

should be held accountable if they do not take action to prevent human trafficking, to protect victims and effectively to investigate trafficking cases.

Romania ratified by Law No. 300 of 11 July 2006 the Council of Europe Convention on Action against Trafficking in Human Beings, adopted on 3 May 2005, opened for signature and signed by Romania in Warsaw on 16 May 2005

The 1950 European Convention on Human Rights and Fundamental Freedoms (ECHR). According to the European Court of Human Rights (ECHR), human trafficking is a violation of Article 4 of the Convention which prohibits slavery, servitude and forced labor without having to determine whether they should be classified as slavery, servitude or forced (ECHR Rantsev versus Cyprus and Russia, application no. 25965/04, 7 January 7 2010).

Romania ratified by Law No. 30/1994 the Convention for the Protection of Human Rights and Fundamental Freedoms and the additional protocols to the Convention.

The Commission Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims. The Directive recognizes trafficking as a serious violation of human rights and aims to adopt an integrated, holistic, human rights-based approach. The Directive pays particular attention to issues relating to the identification, legal aid and other assistance, protection, non-prosecution of victims and compensation of victims, including child victims.

The Council Directive 2004/81/EC on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities. It provides for victims who cooperate with the authorities a period of reflection and a temporary residence permit during the course of the judicial proceedings, including material, medical, legal and other assistance, access to education and labor market, situations that may lead to the withdrawal of the residence permit. The residence permit must be valid for at least six months period with the possibility of renewal subject to the following conditions: whether is opportune to extend the stay of that person in the Member State for the investigations or the judicial proceedings; if the person concerned will show a clear intention to cooperate; if he/she severed all ties with the alleged perpetrators of acts that might be included among the offences related to facilitation of illegal immigration and human trafficking.

The Council Directive 2004/80/EC relating to compensation to crime victims. The Directive refers to the compensation to be granted in cross-border situations (when the crime was committed in a Member State other than that in which the applicant (victim) resides. The Directive also states that Member States must ensure the existence of a national system of compensation for victims of violent intentional crimes committed in their territory, and compensation of victims shall be fair and appropriate.

The 2009/52/EC Directive of the European Parliament and Council providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals. The directive provides for criminal penalties for exploitative working conditions, where the employer knows that the worker is a victim of trafficking or a minor. The Directive also requires Member States employers' obligation to provide retroactive payments to workers such as outstanding salaries.

The 2011/92/EU Directive of the European Parliament and Council on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing the Council Framework Decision 2004/68/JHA. The Directive establishes minimum rules concerning the definition of criminal offenses and sanctions regarding child sexual abuse and sexual exploitation of children, child pornography and solicitation of children for sexual purposes. The Directive also introduces provisions to ensure a better prevention of the offenses concerned and a better protection of victims.

The 2012/29/EU Directive of the European Parliament and Council establishing the minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA. The directive addresses a wide range of victims' rights, including the right to treatment in terms of respect and recognition of the condition of the victim, protection from intimidation, protection against victimization and further harm from the accused during criminal proceedings, the right to accessible and easy understand information at the first contact with the authorities, including in the criminal proceedings; the right to specialized care, the right to compensation, the right to damages in compensation for the loss, and the right to individual assessment to determine the vulnerability degree and taking of special protection measures. The Directive also addresses the rights of the victim's family members.

CHAPTER 2

EUROPEAN COURT FOR HUMAN RIGHTS DECISIONS ON HUMAN TRAFFICKING

2.1. Rantsev v Cyprus & Russia (application no 25965/04)

The Court pronounced its Decision on 7 January 2010.

Principal facts

The applicant, Mr Nikolay Rantsev, is a Russian national who was born in 1938 and lives in Svetlogorsk, Russia. He is the father of Ms Oxana Rantseva, also a Russian national, born in 1980, who died in strange and unestablished circumstances having fallen from a window of a private home in Cyprus in March 2001.

Ms Rantseva arrived in Cyprus on 5 March 2001 on an “artiste” visa. She started work on 16 March 2001 as an artiste in a cabaret in Cyprus only to abandon her place of work and lodging three days later leaving a note that she was going back to Russia. After finding her in a discotheque in Limassol some ten days later, at around 4 a.m. on 28 March 2001, the manager of the cabaret where she had worked took her to the police asking them to declare her illegal in the country and to detain her, apparently with a view to expelling her so that he could have her replaced in his cabaret. The police, after checking their database, concluded that Ms Rantseva did not appear to be illegal and refused to detain her. They asked the cabaret manager to collect her from the police station and to return with her later that morning to make further inquiries into her immigration status. The cabaret manager collected Ms Rantseva at around 5.20 a.m.

Ms Rantseva was taken by the cabaret manager to the house of another employee of the cabaret, where she was taken to a room on the sixth floor of the apartment block. The cabaret manager remained in the apartment. At about 6.30 a.m. on 28 March 2001 Ms Rantseva was found dead in the street below the apartment. A bedspread was found looped through the railing of the apartment’s balcony.

Following Ms Rantseva’s death, those present in the apartment were interviewed. A neighbour who had seen Ms Rantseva’s body fall to the ground was also interviewed, as were the police officers on duty at Limassol police station earlier that morning when the cabaret manager had brought Ms Rantseva from the discotheque. An autopsy was carried out which concluded that Ms Rantseva’s injuries were the result of her fall and that the fall was the cause of her death. The applicant subsequently visited the police station in Limassol and requested to participate in the inquest proceedings. An inquest hearing was finally held on 27 December 2001 in the applicant’s absence. The court decided that Ms Rantseva died in strange circumstances resembling an accident, in an attempt to escape from the apartment in which she was a guest, but that there was no evidence to suggest criminal liability for her death.

Upon a request by Ms Rantseva’s father, after the body was repatriated from Cyprus to Russia. Forensic medical experts in Russia carried out a separate autopsy and the findings of the Russian authorities, which concluded that Ms Rantseva had died in strange and unestablished circumstances requiring additional investigation, were forwarded to the Cypriot authorities in the form of a request for mutual legal assistance under treaties in which Cyprus and Russia were parties. The request asked, inter alia, that further investigation be carried out, that the institution of criminal proceedings in respect of Ms Rantseva’s death be considered and that the applicant be allowed to participate effectively in the proceedings.

In October 2006, Cyprus confirmed to the Russian Prosecution Service that the inquest into Ms Rantseva's death was completed on 27 December 2001 and that the verdict delivered by the court was final. The applicant has continued to press for an effective investigation into his daughter's death.

The Cypriot Ombudsman, the Council of Europe's Human Rights Commissioner and the United States State Department have published reports which refer to the prevalence of trafficking in human beings for commercial sexual exploitation in Cyprus and the role of the cabaret industry and "artiste" visas in facilitating trafficking in Cyprus.

Complaints, procedure and composition of the Court

Relying on Articles 2, 3 (prohibition of torture and inhuman and degrading treatment), 4, 5 and 8 (right to private and family life), Mr Rantsev complained about the investigation into the circumstances of the death of his daughter, about the failure of the Cypriot police to take measures to protect her while she was still alive and about the failure of the Cypriot authorities to take steps to punish those responsible for her death and ill-treatment. He also complained under Articles 2 and 4 about the failure of the Russian authorities to investigate his daughter's alleged trafficking and subsequent death and to take steps to protect her from the risk of trafficking. Finally, he complained under Article 6 of the Convention about the inquest proceedings and an alleged lack of access to court in Cyprus.

Decision of the Court

Unilateral declaration by Cyprus

The Cypriot authorities made a unilateral declaration acknowledging that they had violated Articles 2, 3, 4, 5 and 6 of the Convention, offering to pay pecuniary and non-pecuniary damages to the applicant, and advising that on 5 February 2009 three independent experts had been appointed to investigate the circumstances of Ms Rantseva's death, employment and stay in Cyprus and the possible commission of any unlawful act against her.

The Court reiterated that as well as deciding on the particular case before it, its judgments served to elucidate, safeguard and develop the rules instituted by the Convention. It also emphasized its scarce case law on the question of the interpretation and application of Article 4 to trafficking in human beings. It concluded that, in light of the above and the serious nature of the allegations of trafficking in the case, respect for human rights in general required it to continue its examination of the case, notwithstanding the unilateral declaration of the Cypriot Government.

Admissibility

The Court did not accept the Russian Government's submission that they had no jurisdiction over, and hence no responsibility for, the events to which the application pertained as it found that if trafficking occurred it had started in Russia and that a complaint existed against Russia's failure to investigate properly the events which occurred on Russian territory. It declared the applicant's complaints under Article 2, 3, 4 and 5 admissible.

Right to life

As regards Cyprus, the Court considered that the chain of events leading to Ms Rantseva's death could not have been foreseen by the Cypriot authorities and, in the circumstances, they had therefore no obligation to take practical measures to prevent a risk to her life.

However, a number of flaws had occurred in the investigation carried out by the Cypriot authorities: there had been conflicting testimonies which had not been resolved; no steps to clarify the strange circumstances of Ms Rantseva's death had been made after the verdict of the court in the

inquest proceedings; the applicant had not been advised of the date of the inquest and as a result had been absent from the hearing when the verdict had been handed down; and although the facts had occurred in 2001 there had not yet been a clear explanation as to what had happened. There had therefore been a violation of Article 2 as a result of the failure of the Cypriot authorities to investigate effectively Ms Rantseva's death.

As regards Russia, the Court concluded that there it had not violated Article 2 as the Russian authorities were not obliged themselves to investigate Ms Rantseva's death, which had occurred outside their jurisdiction. The Court emphasized that the Russian authorities had requested several times that Cyprus carry out additional investigation and had cooperated with the Cypriot authorities.

Freedom from ill-treatment

The Court held that any ill-treatment which Ms Rantseva may have suffered before her death had been inherently linked to her alleged trafficking and exploitation and that it would consider this complaint under Article 4.

Failure to protect from trafficking

Two non-governmental organizations, Interights and the AIRE Centre, made submissions before the Court arguing that the modern day definition of slavery included situations such as the one arising in the present case, in which the victim was subjected to violence and coercion giving the perpetrator total control over the victim.

The Court noted that, like slavery, trafficking in human beings, by its very nature and aim of exploitation, was based on the exercise of powers attaching to the right of ownership; it treated human beings as commodities to be bought and sold and put to forced labour; it implied close surveillance of the activities of victims, whose movements were often circumscribed; and it involved the use of violence and threats against victims. Accordingly the Court held that trafficking itself was prohibited by Article 4. It concluded that there had been a violation by Cyprus of its positive obligations arising under that Article on two counts: first, its failure to put in place an appropriate legal and administrative framework to combat trafficking as a result of the existing regime of artiste visas, and, second, the failure of the police to take operational measures to protect Ms Rantseva from trafficking, despite circumstances which had given rise to a credible suspicion that she might have been a victim of trafficking. In light of its findings as to the inadequacy of the Cypriot police investigation under Article 2, the Court did not consider it necessary to examine the effectiveness of the police investigation separately under Article 4.

There had also been a violation of this Article by Russia on account of its failure to investigate how and where Ms Rantseva had been recruited and, in particular, to take steps to identify those involved in Ms Rantseva's recruitment or the methods of recruitment used.

Deprivation of liberty

The Court found that the detention of Ms Rantseva for about an hour at the police station and her subsequent confinement to the private apartment, also for about an hour, did engage the responsibility of Cyprus. It held that the detention by the police following the confirmation that Ms Rantseva was not illegal had no basis in domestic law. It further held that her subsequent detention in the apartment had been both arbitrary and unlawful. There was therefore a violation of Article 5 § 1 by Cyprus.

The Court rejected the applicant's other complaints.

Under Article 41 (just satisfaction) of the Convention, the Court held that Cyprus had to pay the applicant 40,000 euros (EUR) in respect of non-pecuniary damage and EUR 3,150 for costs and expenses, and that Russia had to pay him EUR 2,000 in respect of non-pecuniary damages.

2.2. M. and Others v. Italy & Bulgaria (application no. 40020/03)

ECHR Court Judgement had become final on 17 December 2012.

The European Court of Human Rights held, by a majority, that there had been: **a violation of Article 3 (prohibition of inhuman or degrading treatment)** of the European Convention on Human Rights as regards the investigation into the alleged ill-treatment of the first applicant by private individuals, and **no violation of Article 3** in respect of the steps taken by the Italian authorities to release the first applicant. The case concerned alleged human trafficking. The Court held that there had been no evidence supporting the complaint of human trafficking. However, it found that the Italian authorities had not effectively investigated the applicants' complaints that their daughter, a minor at the time, had been repeatedly beaten and raped in a villa in the province of Vercelli.

Principal facts

The applicants, L.M., S.M., I.I. and K.L., are a Roma family of Bulgarian nationality who were born in 1985, 1959, 1958 and 1977 respectively and live in the village of Novo Selo in the Vidin region (Bulgaria). According to the applicants, on 12 May 2003 the first three of them, daughter and parents, went to Milan (Italy) following an alleged promise of work in the villa of a Roma man of Serbian origin. L.M.'s parents alleged that six days later, beaten and threatened with death, they were forced to go back to Bulgaria, leaving their daughter – who was a minor at the time – at the villa. She was then allegedly kept under constant surveillance, forced to steal, beaten, threatened to be killed and repeatedly raped.

On 24 May 2003 L.M.'s mother returned to Italy – with the fourth applicant, L.M.'s sister-in-law – and reported that her daughter had been kidnapped. On 11 June 2003 the Italian police raided the villa and rescued L.M.

On 12 June 2003, L.M., I.I. and K.L. chose to return to Bulgaria. They submitted that the events were then investigated by the Italian authorities, but that no criminal proceedings were brought in Italy against L.M.'s kidnappers. After June that year, the applicants apparently sent numerous letters and e-mails, most of which in Bulgarian, to the Italian authorities, asking for more information and for the opening of criminal proceedings against L.M.'s alleged kidnappers. They also asked the Bulgarian authorities to help them obtain information from their Italian counterparts. Apart from copies of their letters sent to the Italian authorities, the applicants only submitted to the Court two medical reports of June 2003 establishing that L.M. suffered from post-traumatic stress disorder and had a bruise on the head, a small wound on the right elbow and a broken rib. The reports further stated that she had lost her virginity and was suffering from a vaginal infection. The medical conclusions were that those injuries could have been inflicted the way L.M. described. In July 2003, the public prosecutor brought criminal proceedings against L.M. for false accusations in so far as she claimed that three people had abducted her and had kept her by force in their villa. A few days earlier, in June 2003, criminal proceedings on the same grounds were also brought against L.M.'s mother. The proceedings against L.M. were discontinued in January 2005 and her mother was acquitted in February 2006.

According to the Bulgarian Government, L.M., S.M. and I.I. arrived in Italy, into a nomad camp, where they met three individuals, one of whom chose L.M. for a wife. After the marriage was celebrated and the bride's virginity was confirmed, L.M.'s new family-in-law paid several thousand Euros to I.I. and K.L., who then returned to Bulgaria on 18 May 2003.

Thirteen days later, they complained to the Bulgarian authorities who immediately requested information from Rome. Further contacts with the Italian authorities lead to a successful raid by the Italian police of the villa where L.M. was kept and to her freeing on 11 June 2003.

Complaints, procedure and composition of the Court

Relying on Article 3, the applicants alleged in particular that the Italian authorities had failed

to ensure L.M.'s swift release, which would have prevented her further ill-treatment by the Serbian family in the villa, and that the ensuing investigation both in Italy and Bulgaria into their allegations had been ineffective. They also claimed under Article 4 (prohibition of slavery, servitude or forced labour) that L.M., forced to take part in organised crime, had been a victim of trafficking in human beings for which both Bulgaria and Italy were responsible. Lastly, relying on Article 14 (prohibition of discrimination), they claimed that they had been discriminated in both countries as a result of their Roma origin. The application was lodged with the European Court of Human Rights on 11 December 2003.

Decision of the Court

[Article 3 \(prohibition of ill-treatment\)](#)

A. Italian authorities' actions

In respect of L.M.

As regards the steps taken by the Italian authorities, the Court noted that the police had released L.M. from her alleged captivity within two and a half weeks. It had taken them three days to locate the villa and a further two weeks to prepare the raid. Given that the applicants had claimed that the people in the villa were armed, the Court accepted that surveillance prior to the intervention had been necessary. Therefore, the Italian authorities had fulfilled their obligation to protect L.M. and there had been **no violation of Article 3**.

However, in respect of the investigation carried out by the Italian authorities into her complaints that she had been repeatedly beaten and raped, the Court found that there had been a **violation of Article 3**. In particular, the police had made no efforts to question individuals who could have witnessed the events, apart from L.M., her mother and the alleged offenders. Furthermore, on the day when L.M. had been released and her complaints heard, the criminal proceedings against the assailants had been turned into criminal proceedings against her and her mother. Given that it had taken the domestic authorities less than a day to reach their conclusions on L.M.'s complaints, it had been impossible for them to have clearly established the facts.

In addition, upon her release, L.M. was not medically examined, despite her claims that she had been repeatedly beaten and raped. Even if the authorities considered that she had in fact been married to one of the individuals in the villa, they had been obliged to act in order to protect her from violence by her husband or partner. However, no particular questioning or specific tests had taken place, despite the fact that she had been a minor at the time.

The Court emphasized that the applicants' complaints required a thorough investigation and a possible "Roma marriage" could not be used as a reason not to investigate.

In respect of S.M. and I.I.

The Court noted that, even assuming that L.M.'s mother and father had been previously restrained at the villa as they had claimed they had been free as from 18 May 2003. Therefore, unlike their daughter, they could have sought medical help and acquired medical evidence in support of their claims, which they had not done. The Court had not received any evidence indicating that they could have been ill-treated at the villa and it concluded that there is no sufficient, consistent or reliable evidence to establish to the necessary degree of proof that they were subjected to such ill-treatment. In consequence, no fully fledged investigation had been necessary. Accordingly, the Court **rejected** their complaint as **inadmissible**.

In respect of L.M. and I.I.

Neither L.M. nor her mother had complained to the Italian authorities about being mistreated by the police during their questioning. Neither had they made any such complaint in the context of the proceedings subsequently brought against them.

Consequently, they had failed to exhaust domestic remedies in respect of this complaint. In addition, a lawyer or an interpreter, or both, had accompanied them during the interrogation. The fact that the police officers had warned them of the possibility of being prosecuted and imprisoned if they did not tell the truth had been a normal part of the police duties when questioning people, and not an unlawful threat.

The Court accordingly **rejected** their complaint as **inadmissible**.

B. Bulgarian authorities' actions

The Court **rejected** the applicants' complaints against the Bulgarian authorities as **inadmissible** for the reasons below.

The events in question had occurred in Italy and, therefore, outside of Bulgaria's jurisdiction. In accordance with the Court's case law, Bulgaria was not obliged under the Convention to carry out an investigation into the applicants' complaints. Furthermore, the Convention does not contain a right requiring its member States to exercise diplomatic protection or otherwise internationally intervene to protect individuals' rights. Finally, the Bulgarian authorities repeatedly pressed for action by the Italian authorities, as shown by the documents submitted to the Court.

Article 4 (slavery, servitude, forced or compulsory labour)

A. Complaint against the Italian authorities

The Court examined both versions of the events: as submitted by the applicants, and as presented by the Italian Government. It concluded that whichever version were the true one, the evidence had not shown that the circumstances fell under Article 4. The **applicants' related complaints**, therefore, were **rejected as inadmissible**.

More specifically, the applicants had complained that the events in which they had been involved in Italy had constituted trafficking in human beings. The Court agreed that the circumstances, as alleged by the applicants, could have amounted to human trafficking.

However, the evidence submitted had not allowed it to establish whether their allegations were truthful. Consequently, the Court did not accept that the circumstances had amounted to the recruitment, transportation, transfer, harbouring or receipt of persons for the purpose of exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs. Since it had not been established that L.M. had been a victim of trafficking, the Italian authorities had not been obliged to penalise and prosecute trafficking.

As regards the authorities' obligation to remove people from circumstances of risk under Article 4, the Court noted that they had freed L.M. from the situation in which she had been. Given that the Court had already found a violation of Article 3 as a result of the authorities' failure to effectively investigate L.M.'s complaints about ill-treatment, it found that it was not necessary to examine the same complaint under Article 4.

On the other hand, the Italian authorities had concluded that the events had amounted to a typical marriage according to Roma traditions. Again, there had been insufficient evidence that L.M. had been held in slavery or forced labour. Even assuming that L.M.'s father had received some money in the context of the alleged marriage, that was not enough to conclude that it had been a price in exchange of acquiring ownership over L.M. Furthermore, the applicants had themselves stated that they had been employed at the villa to do housework. Finally, there had been no evidence suggesting that the union had been undertaken for any purposes other than those generally associated with a traditional marriage.

B. Complaint against the Bulgarian authorities

The Court observed that if any alleged trafficking had started in Bulgaria, it would have been competent to examine the Bulgarian authorities' related responsibilities. However, it had already established that the circumstances of the case had not amounted to human trafficking. Furthermore, the applicants had only complained that the Bulgarian authorities had not helped them deal with the Italian authorities, and not that they had not investigated any potential trafficking.

The Court found that the Bulgarian authorities had assisted the applicants and had maintained constant contact and cooperation with the Italian authorities. The applicants' related complaint was therefore **rejected as inadmissible**.

Article 14 (prohibition of discrimination)

The Court recalled that when investigating violent incidents, State authorities had the additional duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events.

However, even assuming the applicants' version of events was true, the treatment they claimed to have suffered could not be said in any way to have had racist overtones or to have been instigated by ethnic hatred or prejudice because the alleged perpetrators had belonged to the same ethnic group as the

applicants. Furthermore, the applicants had not alleged that to the police in their complaints at the time. Consequently, there was no positive obligation on the State to investigate such motives. While the Court found already that the Italian authorities had failed to adequately investigate the applicants' allegations, from the documents submitted it did not transpire that such failure to act had been a consequence of discriminatory attitudes. Indeed, the applicants had not accused the authorities of displaying anti-Roma sentiment at the relevant time and there appeared to have been no racist verbal abuse by the police, prosecution or court during the investigation further proceedings. Accordingly, the Court rejected that complaint as **inadmissible**.

Just satisfaction (Article 41)

Although a request for just satisfaction (EUR 200,000) had been made when the applicants brought their application, they did not submit a claim for just satisfaction when requested by the Court. Accordingly, the Court did not award them any sum on that account.

2.3. L.E. v. Greece (application no. 71545/12)

The ECHR Court Judgement had become final on 21 April 2016

the European Court of Human Rights held, unanimously, that there had been:
a violation of Article 4 (prohibition of slavery and forced labor) of the European Convention on Human Rights;
a violation of Article 6 § 1 (right to a fair hearing within a reasonable time) of the Convention; and a violation of Article 13 (right to an effective remedy).
The case concerned a complaint by a Nigerian national who was forced into prostitution in Greece. Officially recognized as a victim of human trafficking for the purpose of sexual exploitation, the applicant had nonetheless been required to wait more than nine months after informing the authorities of her situation before the justice system granted her that status. The Court found that the effectiveness of the preliminary inquiry and subsequent investigation of the case had been compromised by a number of shortcomings. With regard to the administrative and judicial proceedings, the Court also noted multiple delays and failings with regard to the Greek State's procedural obligations. Lastly, the Court considered that the length of the proceedings in question had been excessive for one level of jurisdiction and did not meet the "reasonable time" requirement.

Principal facts

The applicant, L.E., is a Nigerian national who was born in 1982 and lives in Glyka Nera (Greece). In June 2004 L.E. entered Greek territory accompanied by K.A. He had allegedly promised her that he could take her to Greece to work in bars and nightclubs in exchange for a pledge to pay him 40,000 euros and not to tell the police. On her arrival in Greece K.A. confiscated her passport and forced her into prostitution. L.E. remained in forced prostitution for approximately two years, and contacted Nea Zoi, a non-governmental organisation which provides practical and psychological support to women who have been forced into prostitution.

On 12 July 2004 she applied to the Athens Aliens Department for asylum. On 8 June 2005 she was informed that a place had been found for her at the Red Cross Reception Centre for Asylum Seekers. It appears from the case file that L.E. did not go to the centre.

On 29 August 2005 L.E. was arrested for breaching the laws on prostitution and on the entry and residence of aliens in Greece. She was acquitted by a court judgment. In March 2006 she was again arrested for prostitution, convicted at first instance and acquitted on appeal.

On 2 April 2006 the head of the police department responsible for aliens issued an expulsion order. Her expulsion was suspended on the ground that it was impractical. In November 2006 L.E. was again arrested for prostitution, and then acquitted. She was subsequently placed in detention pending expulsion, as she did not have a residence permit in Greece.

In November 2006, while she was in detention pending expulsion, L.E. lodged a criminal complaint against K.A. and his partner D.J. She claimed that she was a victim of human trafficking and accused these two persons of forcing her, and two other Nigerian women, into prostitution.

On 28 December 2006 the prosecutor at the Athens Criminal Court dismissed her complaint, noting that there was nothing in the case file to indicate that she had been a victim of human trafficking.

On 26 January 2007 L.E. applied to the prosecutor for re-examination of her complaint and joined the proceedings as a civil party. In February 2007 the director of the Athens police department responsible for aliens ordered the suspension of the order for her expulsion. On 21 August 2007 the prosecutor brought criminal proceedings against K.A. and D.J. for the offence of trafficking in human beings.

On 20 July 2009 the hearing in the case was suspended until such time as the defendants, who could not be found, had been arrested. In May 2011 D.J. was arrested and remanded in custody. The court delivered judgment on 20 April 2012, and held that D.J. was not K.A.'s accomplice but, on the contrary, established that she had been another of K.A.'s victims and that he had been sexually exploiting her too.

The relevant administrative authorities renewed L.E.'s residence permit until 2 November 2014.

Complaints, procedure and composition of the Court

Relying on Article 4 (prohibition of slavery and forced labour), L.E. submitted that she was a victim of human trafficking and had been forced into prostitution. She alleged that the Greek State's failings to comply with its positive obligations under this Article had entailed a violation of this Convention provision.

Relying on Article 6 § 1 (right to a fair hearing within a reasonable time) and Article 13 (right to an effective remedy), she complained about the length of the criminal proceedings in which she was claiming civil damages, and submitted that at the relevant time no effective remedy was available in Greece in respect of complaints concerning the length of proceedings.

The application was lodged with the European Court of Human Rights on 20 October 2012.

Decision of the Court

[Article 4](#)

The Court noted that, together with Articles 2 and 3, Article 4 enshrined one of the basic values of the democratic societies making up the Council of Europe. Article 4 imposed on the States a series of positive obligations concerning the protection of victims of trafficking.

The Court noted that at the relevant time Article 351 of the Greek Criminal Code defined trafficking in human beings in line with the definition provided in the Palermo Protocol and the Council of Europe Convention on action against trafficking in human beings. The Court considered that the relevant legislation in force in Greece was capable of providing L.E. with practical and effective protection.

On 29 November 2006, and throughout her detention pending expulsion, L.E. had expressly informed the authorities that she was a victim of human trafficking. For the period prior to that date, she had not drawn the authorities' attention to her situation as a victim of trafficking. The relevant authorities, alerted by her that K.A. and D.J. were forcing her into prostitution, had not remained indifferent. The police had taken immediate action by entrusting L.E. to a specialized police department so that investigations could be conducted into the veracity of her allegations. Under the relevant legislation, the expulsion proceedings that had been pending against her had been suspended, and she had been issued with a residence permit allowing her to remain in Greek territory.

On 21 August 2007 the prosecutor at the Athens Criminal Court had formally classified L.E. as a victim of trafficking, which had been confirmed by the judgment from the Athens Assize Court.

However, the prosecutor had not granted this status until about nine months after L.E. had informed the authorities about her situation. Equally, in December 2006 E.S., director of Nea Zoi, an NGO which was assisting the applicant, had confirmed the latter's statements and asserted that she did indeed require this type of State assistance. This statement by E.S. had not been included in the case file in good time. In consequence, the nine-month period between L.E.'s statement and the recognition of her victim status by the authorities could not be described as "reasonable". The domestic authorities' delay amounted to a failing in terms of the measures that they could have taken to protect L.E.

With regard to the administrative and judicial proceedings, the Court noted that L.E.'s first complaint had been dismissed by the prosecutor. The latter did not have available the witness statement

by E.S., director of the NGO Nea Zoi, who confirmed L.E.'s claims. This witness statement had not been included in the case file on account of inadvertence by the police authorities. In addition, once the witness statement had been added to the case file, the judicial authorities had not resumed examination of her complaint of their own motion. She herself had had to revive the proceedings by applying to the prosecutor's office on 26 January 2007 and it was not until 1 June 2007 that the prosecutor ordered that criminal proceedings be brought. The Government did not provide any explanation as to this period of inactivity, which lasted for more than five months.

With regard to the preliminary inquiry and the subsequent investigation, the Court noted that a number of shortcomings had compromised their effectiveness. A house had been placed under police surveillance immediately after L.E.'s accusation, with a view to locating K.A., the presumed perpetrator. However, after having noted that he was no longer at the address in question, the police had not widened their search to the two other addresses specifically mentioned by L.E. in her statement. Nor did it appear that the police had attempted to gather other information, in particular through further inquiries. There had been considerable delays in the preliminary inquiry and investigation of the case. Once criminal proceedings had been brought against K.A. and D.J. on 21 August 2007, more than four years and approximately eight months had passed before a hearing took place before the Athens Assize Court.

Lastly, with regard to K.A., the presumed principal offender in the acts of trafficking, the evidence did not indicate that the police had taken further tangible steps to find him and bring him before the courts, other than entering his name in the police criminal research file. Nor had the authorities established contact or instigated cooperation with the Nigerian authorities in order to arrest the suspect.

The Court noted a lack of promptness as well as failings with regard to the Greek State's procedural obligations under Article 4 of the Convention and held that there had been a violation of this Article.

Article 6 § 1 and Article 13

With regard to the length of the proceedings, the period to be taken into consideration began on 26 January 2007, the date on which L.E. had announced her intention to join the proceedings as a civil party, and ended on 20 April 2012, when the court had delivered its judgment. It had therefore lasted five years and more than two months at one level of jurisdiction. At the investigation level, and without overlooking the complexity of the case, the Court noted that about two and a half years had passed between L.E.'s civil-party application to join the proceedings and 20 July 2009, the date on which the hearing in the case had been suspended until such time as the suspects were found and arrested.

The Court considered that the length of the proceedings in question had been excessive for one level of jurisdiction and had not met the "reasonable time" requirement. The Court held that there had been a violation of Article 6 § 1.

As to the existence of an effective remedy to complain about the length of the proceedings, the Court had previously held that, at the relevant time, the Greek legal system did not provide an effective remedy within the meaning of Article 13 of the Convention for complaints about the length of proceedings. On account of the absence in domestic law of a remedy by which L.E. could have enforced her right to a hearing within a reasonable time, the Court held that there had been a violation of Article 13.

Just satisfaction (Article 41)

The Court held that Greece was to pay L.E. 12 000 euros (EUR) in respect of non-pecuniary damage and EUR 3,000 in respect of costs and expenses.

2.4. J. and Others v. Austria (application no. 58216/12)

The ECHR Judgement on 17 January 2017

The European Court of Human Rights held, unanimously, that there had been:
no violation of Article 4 (prohibition of forced labor) of the European Convention on Human Rights, and **no violation of Article 3 (prohibition of inhuman or degrading treatment)** of the European Convention.

The case concerned the Austrian authorities' investigation into an allegation of human trafficking. In particular, two Filipino nationals, who had gone to work as maids or au pairs in the United Arab Emirates, alleged that their employers had taken their passports away from them and exploited them. They claimed that this treatment had continued during a short stay in Vienna where their employers had taken them and where they had eventually managed to escape. Following a criminal complaint filed by the applicants against their employers in Austria, the authorities found that they did not have jurisdiction over the alleged offences committed abroad and decided to discontinue the investigation into the applicants' case concerning the events in Austria. In their complaint before the European Court, they argued in particular that what had happened to them in Austria could not be viewed in isolation, and that the Austrian authorities had a duty under international law to investigate also those events which had occurred abroad.

The Court notably found that there had been no obligation under the European Convention to investigate the applicants' recruitment in the Philippines or their alleged exploitation in the United Arab Emirates, as States are not required under Article 4 of the Convention to provide for universal jurisdiction over trafficking offences committed abroad.

Turning to the events in Austria, the Court concluded that the authorities had taken all steps which could have reasonably been expected in the situation. The applicants, supported by a government funded NGO, had been interviewed by specially trained police officers, had been granted residence and work permits in order to regularize their stay in Austria, and a personal data disclosure ban had been imposed for their protection. Moreover, the investigation into the applicants' allegations about their stay in Vienna had been sufficient and the authorities' resulting assessment, given the facts of the case and the evidence available, had been reasonable. Any further steps in the case – such as confronting the applicants' employers – would not have had any reasonable prospect of success, as no mutual legal assistance agreement existed between Austria and the United Arab Emirates, and as the applicants had only turned to the police approximately one year after the events in question, when their employers had long left the country.

Principal facts

The applicants, Ms J., Ms G., and Ms C., are three Filipino nationals who were born in 1984, 1982, and 1972 respectively and live in Vienna (Mrs J. and Mrs G.) and Switzerland (Mrs C.). Between 2006 and 2009 all three applicants went to work as maids or au pairs in Dubai (the United Arab Emirates) for the same family or relatives of the same family. They allege that their employers took away their passports, ill-treated and exploited them. Notably, they were forced to work extremely long hours without being paid their agreed wages, were physically and emotionally abused and threatened.

In July 2010 the applicants' employers took them on a short trip to Vienna. Like in Dubai, their passports remained with their employers and they had to work from the early hours of the morning to midnight or even later, taking care of all the employers' children and carrying out numerous domestic duties. A few days after their arrival, two of applicants were subjected to extreme verbal abuse when one of their employers' children went missing at the zoo. Deciding that the violence towards them was likely to escalate at any time and that they could not continue working in such conditions any longer, they escaped with the help of an employee at the hotel where they were staying who spoke Tagalog, the first applicant's mother tongue. The applicants subsequently found support within the local Filipino community in Vienna.

About nine months later, the applicants contacted LEFÖ, a local, government-financed NGO actively involved in supporting the victims of trafficking in human beings in Austria. Assisted by the NGO, in July 2011 they filed a criminal complaint against their employers. Accompanied by the NGO, they were interviewed by police officers specially trained in dealing with victims of human trafficking, and described in detail what had happened to them and how they had been treated by their employers. On the basis of the police report, the public prosecutor's office initiated an investigation under Article 104a of the Criminal Code which related to human trafficking. However, the investigation was discontinued in November 2011 as the prosecutor's office found that the Austrian authorities did not have jurisdiction over the alleged offences, which had been committed abroad by non-nationals.

The prosecuting authorities later also specified that the applicants' complaints about their stay in

Vienna – including having to look after children, wash laundry and cook food for no more than three days – did not in themselves amount to exploitation under Article 104a of the Criminal Code.

In March 2012 the decision to discontinue the investigation was confirmed by the Vienna Regional Criminal Court, which added that there was no reason to prosecute if a conviction was no more likely than an acquittal. In its view, there was also no obligation under international law to pursue an investigation concerning events allegedly committed abroad.

The applicants were subsequently granted a special residence and work permit for victims of human trafficking in Austria, and a personal data disclosure ban was imposed on the Central Register so that their whereabouts would not be traceable by the general public.

Complaints, procedure of the Court

Relying on Article 4 (prohibition of forced labour) and Article 3 (prohibition of inhuman or degrading treatment) of the European Convention on Human Rights, the applicants alleged that they had been subjected to forced labour and human trafficking, and that the Austrian authorities had failed to carry out an effective and exhaustive investigation into their allegations. They argued in particular that what had happened to them in Austria could not be viewed in isolation, but had to be seen in the context of ongoing ill-treatment; therefore the Austrian authorities had had a duty under international law to investigate also those events which had occurred abroad.

The application was lodged with the European Court of Human Rights on 4 September 2012.

Decision of the Court

The Court decided to strike Ms C.'s application out of its list of cases because it considered that she had to have lost interest in pursuing her application as she had failed to inform her representative of her current whereabouts. Nor did it find any reason relating to respect for human rights, as defined in the Convention and its Protocols, which would require it to continue the examination of her application, the other two applicants having raised the same complaints which the Court has examined as below.

Article 4 (prohibition of forced labour)

First, the Court was satisfied that the Austrian authorities had complied with their duty to identify, protect and support the applicants as (potential) victims of human trafficking. The legal and administrative framework in place concerning the protection of (potential) victims of human trafficking in Austria had been sufficient, and the Austrian authorities had taken all steps which could have reasonably been expected in the situation. In particular, from the point when Ms J. and Ms G had contacted the police, they had been interviewed by specially trained police officers, were granted residence and work permits in order to regularize their stay in Austria, and a personal data disclosure ban had been imposed for their protection. Furthermore, during the domestic proceedings, the applicants had been supported by the NGO LEFÖ, which is funded by the Government. Furthermore, the applicants had been given legal representation, procedural guidance and assistance to facilitate their integration in Austria.

Secondly, as concerned the events abroad, the Court found that Austria had had no obligation under the European Convention to investigate the applicants' recruitment in the Philippines or their alleged exploitation in the United Arab Emirates. Under Article 4 of the Convention, States are not required to provide for universal jurisdiction over trafficking offences committed abroad.

Lastly, as concerned the events in Austria, the Court considered that the Austrian authorities' investigation in the applicants' case had been sufficient. The authorities' assessment of the case, namely that the applicants' complaints about their stay in Vienna did not in themselves amount to exploitation under Article 104a of the Criminal Code, was not unreasonable, given the facts of the case and the evidence available.

In relation to the applicants' argument that the events in the Philippines, the United Arab Emirates and Austria could not be viewed in isolation, the Court found that, even if they had been taken together, there was no indication that the Austrian authorities had failed to comply with their duty of investigation. The applicants had only turned to the police approximately one year after the events in question, when their employers had long left the country. Any further steps in the case – such as confronting the applicants' employers with the allegations made against them – would not have had

any reasonable prospect of success, as no mutual legal assistance agreement existed between Austria and the United Arab Emirates. Indeed, the Government referred to past experiences when even simple requests for legal assistance had been refused without discernible reason. The Court further emphasized that, under Austrian law, it was not possible to conduct criminal proceedings in the absence of the accused and, besides, the public prosecutor's office had room for manoeuvre when deciding which cases to pursue and which to discontinue. In conclusion, the Austrian authorities had complied with their duty to protect the applicants as (potential) victims of human trafficking. There had therefore been no violation of Article 4 of the Convention.

[Article 3 \(prohibition of inhuman or degrading treatment\)](#)

For essentially the same reasons, the Court concluded that there had been no violation of Article 3 either.

CHAPTER 3

THE RIGHTS OF THE VICTIMS OF HUMAN TRAFFICKING IN THE PROSECUTION PHASE IN ROMANIA

3.1. Victim of human trafficking rights as injured party in criminal proceedings

If a victim of trafficking **chooses to participate in the proceedings as injured party**, the rights the Criminal Procedure Code guarantees during prosecution are provided in Article 81, which also represents the relevant provisions.

1. Thus the victim as injured party has the right:

- *to be informed of his/her rights*, this information being made at the first contact of the prosecutor or criminal investigation body with the injured party;
- *to propose production of evidence by the judicial bodies, to raise objections and to make submissions*; this right guarantees the injured party equality of arms in relation to the defendant in front of the prosecutor and the criminal investigation authorities;
- *to file any other applications related to the settlement of the criminal part of the case*, a right that expressly recognizes the possibility of the injured party to seek and obtain compensation for the damage produced by the offense not only in terms of civil side of the case, but also in terms of criminal side thereof;
- *to be informed, within a reasonable term, on the status of the criminal investigation, upon explicit request, provided that they indicate an address on the territory of Romania, an e-mail address or a electronic messaging address, to which such information can be communicated*, a right that seeks to create the premises of transparent criminal proceedings whose stage must always be known by the injured party.
- *to consult the case file, under the law*, a right that guarantees the injured party an effective defense in the criminal proceedings;
- *to be heard*, a right that guarantees the injured party that his/her statement will be considered by the prosecutor or by the criminal investigation authorities, becoming evidence in the criminal proceedings;
- *to put questions to the defendant, witnesses and experts*, a right that ensures a balance between the the procedural rights of the defendant on the one hand, and the procedural rights of the injured party, on the other hand;
- *to receive an interpreter, free of charge, when they cannot understand, cannot express themselves properly or cannot communicate in the Romanian language, and to be informed about the non-indictment decision in a language which s/he understands*, a law that ensures the injured party that s/he is understood by the prosecutor or by the Romanian criminal investigation bodies;
- *to be assisted or represented by a lawyer*, a right providing the injured party an effective defense before the prosecutor or the criminal investigation bodies;
- *to use a mediator, in cases permitted by law*;
- *other rights set by law*.

2. Another right the victim as injured party enjoys during the prosecution, with the foregoing, is *his/her right to be informed by the prosecutor without delay on the release of the defendant*. In this regard, Article 111 paragraph 5 of the Criminal Procedure Code provides that "on the occasion of the first hearing, a victim shall be informed of the fact that, in the event that the defendant is deprived of freedom or convicted to a custodial sentence, the former can be informed of their release in any manner".

This right to be informed of the injured party regarding the release of the offender allows the victim to take precautions when they consider them necessary, thereby preventing revictimization, so as the victim of human trafficking will not be taken by surprise anymore by the release of the defendant.

3. Further, Article 111, paragraph 4 of the Criminal Procedure Code stipulates the right of victim as injured party to require the prosecutor that the hearing be recorded by audio or audio-video technical means, when recording is possible. In case of minors this is mandatory, as provided by Article 111, paragraph 8 of the Criminal Procedure Code.

As concerns the hearing of *child victims under the age of 14* there are provided special measures aimed at ensuring their protection and care during the hearings. Thus, Article 111 paragraphs 6, 7, Article 124 of the Criminal Procedure Code and Article 24 paragraph 3 of Law no. 678/2001 provide that the hearing of the minor under the age of 14 shall take place in the presence of at least one parent or legal representative and with the mandatory presence of a psychologist or a representative of the General Directorate of Social Assistance and Child Protection.

In addition to these national provisions, the regulations adopted in the European Union provides for special protection measures for underage victims. Thus, Article 15 paragraph 3 of the Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, states that "without prejudice to the rights of the defence, Member States shall take the necessary measures to ensure that in criminal investigations and proceedings (...)

- interviews with the child victim take place without unjustified delay after the facts have been reported to the competent authorities;
- interviews with the child victim take place, where necessary, in premises designed or adapted for that purpose;
- interviews with the child victim are carried out, where necessary, by or through professionals trained for that purpose;
- the same persons, if possible and where appropriate, conduct all the interviews with the child victim;
- the number of interviews is as limited as possible and interviews are carried out only where strictly necessary for the purposes of criminal investigations and proceedings;
- the child victim may be accompanied by a representative or, where appropriate, an adult of the child's choice, unless a reasoned decision has been made to the contrary in respect of that person".

Furthermore, the same article also stipulates that "Member States shall take the necessary measures to ensure that in criminal investigations (...) all interviews with the child victim or, where appropriate, with a child witness, may be video recorded and that such video recorded interviews may be used as evidence in criminal court proceedings in accordance with their national law (paragraph 4) and (...) to be able to order the hearing without the presence of the public or the child victim be heard in the courtroom without being present, in particular, through the use of appropriate communication technologies (paragraph 5).

4. A special place in the rights enjoyed by victims of trafficking is their right to be assisted by a lawyer.

We return to this right because the victim of trafficking in persons, unlike other victims of crimes benefit from additional legal provisions which ensures them a right to defend more complete than the right afforded to other categories of victims of crimes, namely *free of charge and mandatory legal counseling*. In other words, victims of trafficking have a privileged status compared to other types of victims of crimes, together with underage victims and those in special situations, being the only categories of victims for which legal counseling is free of charge and mandatory by law.

In this regard, Article 93 paragraph 4 of the Criminal Procedure Code provides that "legal counseling is mandatory when a victim or civil party lacks mental competence or has a limited mental competence".

These procedural provisions are supplemented by the special provisions of Law no. 678/2001 on preventing and combating trafficking in persons, providing that "victims of human trafficking are entitled to receive *mandatory legal counseling* for exercising their rights within the criminal proceedings provided by law, *at all stages* of the criminal trial and are also entitled to supply evidence

for their demands and civil actions against persons who have committed the crimes stipulated in this law, where they are involved". (Article 43 in conjunction with Article 44 of Law no. 678/2001).

These latter special provisions grant a broader protection to victims of trafficking than other categories of victims in the sense that they receive *mandatory legal counseling* not only when they lack legal competence or have limited legal competence, as provided by Article 93 paragraph 4 of the Criminal Procedure Code, but *also when they are adults*, Article 44 of Law no. 678/2001 expressly providing that.

So during prosecution both the underaged and the adult injured parties benefit from mandatory legal counseling.

Moreover, if the trafficked person is unwilling to participate in the criminal proceedings as injured party, and hence as civil party and the prosecutor, under Article 81 paragraph 2 of the Criminal Procedure Code, finds necessary his/her hearing as *witness*, the victim does not lose the right to be mandatory assisted by a lawyer.

Thus, even if s/he is only a witness in the criminal proceedings, s/he remains victim of trafficking in persons under Article 43 in conjunction with Article 44 of Law no. 678/2001 and benefits from mandatory legal counseling, the above mentioned laws making no distinction between victims as injured parties, victims as civil parties or victims as witnesses.

The legal provisions adopted at European Union level, Article 12 paragraph 2 of Directive 2011/36/EU on preventing, combating and protection of trafficking victims also support this point of view by using the same term, namely "victim of human trafficking".

Thus, according to this article: "Member States *shall ensure that victims of trafficking in human beings* have access without delay to *legal counselling*, and, in accordance with the role of victims in the relevant justice system, to legal representation, including for the purpose of claiming compensation. *Legal counselling* and legal representation shall be *free of charge* where the victim does not have sufficient financial resources".

What would be the practical right of the witness-victim who require such special protection, precisely mandatory appointment of a lawyer during the criminal investigations? For example, the witness's right to avoid self-incrimination, under Article 118 of the Criminal Procedure Code.

5. As concerns the right of the victim as injured party to consult with his/her lawyer, Article 111 paragraph 3 of the Criminal Procedure Code is supplemented with Article 109 paragraph 2 of the same law; it provides that a injured party, both before to be heard by the prosecutor and during the hearing, may consult with his/her lawyer, either a chosen lawyer or a duty lawyer, and when deemed necessary by the prosecutor, may allow him/her to use his/her own notes.

6. Another right of the victim as injured party exercised through his/her lawyer, either a chosen lawyer or a duty lawyer, is covered by Article 93 paragraph 1 of the Criminal Procedure Code which provides that "during the criminal investigation *the lawyer of the injured party*, of the the civil party or civilly liable party *is entitled to be notified of (...) to witness the performance of any criminal investigation act* under the provisions of Article 92, *to consult documents in the file, to file complaints and memoranda*".

7. Furthermore, Article 93 paragraph 2 supplemented by Article 92 paragraph 8 of the Criminal Procedure Code provides that "the lawyer of a victim, a civil party or a party with civil liability has the right to benefit from the time and facilities necessary for the preparation and implementation of an effective defense".

8. Another recognized right of the victim as injured party during the criminal prosecution is his/her right to privacy and security.

In this regard, Article 113 of the Criminal Procedure Code provides that "*when the requirements established by law in respect of the status of threatened or vulnerable witnesses are met, or for the protection of private life or dignity, criminal investigation bodies may order protection measures specified under Articles 124-130 (...)*".

By regulating this right, it is explicitly recognized the right of the victim as injured party to personal safety, protection against intimidation or revictimization; this is necessary when the injured

party through his/her statements is subject to the certain risks, such as the defendant's pressure aimed to intimidate or threat the victim and hamper the prosecution.

In this regard, Article 125 of the Criminal Procedure Code provides that "if there is a reasonable suspicion that the life, physical integrity, freedom, assets or professional activity of a witness or of a member of their family could be jeopardized as a result of the data provided by them to judicial bodies or of their statements, the judicial bodies of competent jurisdiction shall grant them the status of *threatened witness* and shall order one or more of the protection measures set by Arts. 126 or 127, as applicable".

At the same time, Article 130 of the Criminal Procedure Code provides that "the prosecutor (...) may decide to grant the status of *vulnerable witness* to the following categories of persons: the witnesses who suffered a trauma as a result of the committed offense or of the subsequent behavior of a suspect or defendant and the underage witness".

However, the special law provisions, namely Article 26 paragraphs 2 and 3 of Law no. 678/2001 provide that "victims of trafficking, whereas providing the prosecuting authorities or the court with critical information and data for the identification and holding criminally responsible of the offenders, can be included under the Protection program for witnesses, under the law. *The privacy and identity of victims of trafficking are protected under this law*".

In particular, the privacy and security of the victim of trafficking is achieved through the prosecutor's order related to the *protective measures* with regard to the victim as injured party, as provided by Article 126 paragraph 1 of the Criminal Procedure Code.

Such ***protective measures*** include:

- surveillance and guard of the witness' residence or providing of a temporary dwelling;
- accompanying and ensuring protection to the witness or to their family members during travels;
- protection of identity data, by issuing them a pseudonym under which the witness shall sign their statement;
- hearing of a witness without them being physically present, through audio-video transmission devices, with their voice and image distorted, when the other measures are not sufficient.

During the criminal investigation, the prosecutor shall apply one or more protective measures from those listed above, either ex officio or at the request of the victim as injured party, regarding one party or one main procedural subject, as stipulated by Article 126 paragraph 2 of the Criminal Procedure Code.

If the prosecutor decides the application of the last two protective measures, namely the protection of the identity data by granting the injured party a nickname to sign his/her statement and the hearing of the injured party without his/her presence by audiovisual means of transmission and distorted voice and image; in these two situations, the statement of the injured party shall not include the actual address or its identity data, these being recorded in a special register which can be accessed only by the prosecutor, the judge of rights and freedoms, the judge of the preliminary chamber or the court, under conditions of confidentiality (paragraph 3 of Article 126 of the Criminal Procedure Code).

9. Not least, during prosecution phase it is recognized the right of the victim as injured party to the prevention of revictimization.

This right is not explicitly covered by the Criminal Procedure Code or by the Law no. 678/2001.

Instead, in the European Union, the right of the aggrieved person to the prevention of revictimization, also known as *prevention of secondary and repeated victimization* is explicitly governed by two legal acts, namely: the Directive 2011/36/EU on preventing, combating and protection of victims of trafficking and the Directive 2012/29/ EU establishing the minimum standards on the rights, support and protection of victims of crime.

In this regard, Article 12 paragraph 4 of the Directive 2011/36/EU provides that "without prejudice to the rights of the defence, and according to an individual assessment by the competent authorities of the personal circumstances of the victim, Member States shall ensure that victims of trafficking in human beings receive specific treatment aimed at preventing secondary victimisation by avoiding, as far as possible and in accordance with the grounds defined by national law as well as with rules of judicial discretion, practice or guidance, the following:

- unnecessary repetition of interviews during investigation, prosecution or trial;

- visual contact between victims and defendants including during the giving of evidence such as interviews and cross-examination, by appropriate means including the use of appropriate communication technologies;
- the giving of evidence in open court;
- unnecessary questioning concerning the victim's private life".

The second legal act adopted by the European Union, namely the Directive 2012/29/EU provides in Article 18 that: "without prejudice to the rights of the defence, Member States shall ensure that measures are available to protect victims and their family members from secondary and repeat victimisation, from intimidation and from retaliation, including against the risk of emotional or psychological harm, and to protect the dignity of victims during questioning and when testifying. When necessary, such measures shall also include procedures established under national law for the physical protection of victims and their family members".

Further, Article 19 of the same Directive provides that "Member States shall establish the necessary conditions to enable avoidance of contact between victims and their family members, where necessary, and the offender within premises where criminal proceedings are conducted, unless the criminal proceedings require such contact. Member States shall ensure that new court premises have separate waiting areas for victims".

All these rights of victims of trafficking recognized when they participate at the prosecution as injured parties have dramatically changed their status in the criminal process by increasing their role in the performance itself of the criminal proceedings. Thus victims were granted again their role in their own criminal proceedings by ensuring the criminal procedural tools with which they can defend their position against the defendant.

3.2. Victim of human trafficking rights as civil party in criminal proceedings

Naturally, the victim as injured party of the offense of trafficking in persons has **the right** to be actively involved not only in settling the criminal side of the case, but also in resolving the civil side.

Thus the victim as injured party may join the proceedings as a civil party and may bring the civil action in this procedural framework.

If the victim as injured party intends to exercise this right, Article 84 paragraph 1 of the Criminal Procedure Code provides that "an injured party who initiates a civil action within criminal proceedings is party to the criminal proceedings and is called a civil party."

Further, Article 85 paragraph 2 of the Criminal Procedure Code provides that "the capacity as civil party of a person who suffered a prejudice as a result of an offense does not preclude their right to participate as a victim in the same case".

From an analysis of these two legal texts it results that the victim of trafficking *has the right to choose his/her quality to participate in the criminal proceedings, ie either as injured party or civil party*.

1. The right of the injured party to join the proceedings as a civil party stands out clearly as the most important right of victims of trafficking in the criminal proceedings, because by exercising his/her right, the victim obtains material, physical and moral compensation as a result of offense.

We can state quite rightly that all other rights of victims of trafficking are organized around this right.

Being a right of particular importance for victims of trafficking, Article 20 paragraph 1 of the Criminal Procedure Code provides that it is mandatory for the prosecutor or the criminal investigation body to inform the victims as injured party about this right.

The possibility of settling the civil side within the criminal proceedings is a facility granted by the legislature to the victim as injured party in order to avoid going through two processes, one in front of the criminal court and one in the civil court. At the same, it is aimed time the victim's quick recovery of the damage s/he had suffered; considering the principle of "*the criminal retains the civil*" the victim would not be able to address to the civil court before a decision in the criminal proceedings.

2. The legislature set a deadline by which the victim of human trafficking may exercise this right, namely starting the inquiry. In this regard, Article 20 paragraph 1 of the Criminal Procedure Code which provides that "*civil action can be introduced in criminal proceedings before the commencement of the inquiry*".

After this procedural step the victim of trafficking *loses the right to join the criminal proceedings a civil party, but does not lose the right to compensation for the damage caused by the offense*; in this regard Article 27, paragraph 1 of the Criminal Procedure Code expressly provides that "if s/he does not join the criminal proceedings as a civil party, a victim or his/her successors may file an action at the civil court for the remedy of the damages caused by the offense".

Setting a time limit by which the victim of human trafficking can join the criminal proceedings as civil party aims first to respect the rights of the defendant to organize in good time the defense against the civil claims of the trafficked person.

Second, setting a time limit by which the victim of human trafficking can join the criminal proceedings as civil party aims to smooth the trial, because the settlement of the civil side of the case involves, similar to settling the criminal side, the production of evidence that the court needs in order to pronounce a decision.

3. If the trafficked person is underaged or is in a special condition, having no legal capacity or limited legal capacity, Article 19 paragraph 3 of the Criminal Procedure code provides that "*a civil action shall be initiated on their behalf by their legal representative or, as applicable, by the prosecutor, under the terms of Art. 20 paragraphs 1 and 2*". The legislature thus provides *special protection to certain categories of people*, considering their vulnerable condition.

However, it should be noted that this special protection the above mentioned category of victims enjoy is much narrower than the special protection enjoyed by the same victims under the old criminal procedure rules.

Thus, if Article 17 of the old Criminal Procedure Code provided that the court was required to rule *ex officio* on damage compensation, including the moral compensation; the current criminal procedural regulations do not provide for such obligation of the court. In other words, the court shall rule on the civil side of the case ***provided there is a civil party constituted*** under the provisions expressly stipulated by law.

If the civil action was not brought in the criminal proceedings until the latest term (start of the inquiry) by the persons specified by law (attorney or legal representative of the minor/person with a special condition), *the court cannot settle the civil action within the criminal proceedings*.

In this case, victims of trafficking, minors or persons with special conditions, do not lose their right to compensation for damage caused by the offence but, as was noted above, this right can be exploited separately by way of a civil action.

4. In order to ensure full respect for the victim's rights to compensation for damage caused by the offense, the legislator has foreseen his/her possibility to choose how s/he intends/wishes to exercise this right, either in criminal proceedings or separately in civil proceedings.

In this respect Article 27 paragraph 1 of the Criminal Procedure Code provides that "if s/he does not join the criminal proceedings as civil party, the victim or his/her successors may file an action at the civil court for the remedy of damages caused by an offense". Thus the legislature recognizes the right of the victims of human trafficking to choose the court before his/her damages are recognized and receives appropriate material and moral compensations.

If the victim of human trafficking chooses to exercise this right in a civil action, it will be accomplished only subject to the conditions that the trial in the civil court is suspended until the final resolution of the criminal case. In this regard, Article 27 paragraph 7 of the Criminal Procedure Code provides that "*the trial before the civil court shall be suspended after the initiation of criminal action and until settlement of the criminal case by the court of first instance, but no longer than a year*".

Considering the high importance of this right of the victims of human trafficking and also the legal consequences that can result from a possible failure of its exercise within the deadline set by law or by persons expressly stated, the legislature has provided that in the course of criminal investigations *at the first hearing of the injured party the prosecutor shall notify him/her of his/her right to join the criminal proceedings as civil party*.

5. Another right of the victim as civil party in the criminal proceedings is provided by Article 81 paragraph 2 of the Criminal Procedure Code which stipulates that "the quality of civil party of the person who suffered harm from an offense does not remove his/her right to join the same case as injured party". In other words, the trafficked victim *is entitled to participate in the prosecution in a double procedural quality, ie as civil party and as injured party.*

6. In the European Union the right of the trafficked victim to receive compensation for damage caused by offense is covered by Article 17 of Directive 2011/36/EU which states that "Member States shall ensure that victims of trafficking in human beings have access to existing schemes of compensation to victims of violent crimes of intent", and also by Article 16 of Directive 2012/29/EU, which states that "Member States shall ensure that, in the course of criminal proceedings, victims are entitled to obtain a decision on compensation by the offender, within a reasonable time, except where national law provides for such a decision to be made in other legal proceedings. Member States shall promote measures to encourage offenders to provide adequate compensation to victims".

7. As concerns other rights recognized by the law to the civil party as victim of trafficking during criminal investigations, Article 85 paragraph 1 of the Criminal Procedure Code stipulates that "during the course of criminal proceedings, a civil party has the rights listed under Art. 81", precisely all the procedural rights that the law recognizes to the injured party as victim of trafficking during the criminal investigations.

Since these rights have been thoroughly analyzed in point I of this study, this analysis will not be resumed, being necessarily to emphasise only that during prosecution the civil party as victim of human trafficking shall enjoy and exercise all these rights to the same extent and in the same content as presented with regard to the injured party as victim of trafficking.

3.3. Victim of human trafficking rights as witness during criminal investigations

As noted above, the injured person as victim of trafficking in persons *has the right not to participate in criminal proceedings as injured party.* In this case, if the prosecutor considers necessary, may order his/her hearing *as witness* during criminal investigations, as provided by Article 81 paragraph 2 of the Criminal Procedure Code.

As such, the victim of trafficking in persons as witness during the criminal prosecution, as well as the rights referred to in the study when it was analyzed the status of injured party and that of civil party, also enjoys the following rights specific to witnesses, as provided by the Criminal Procedure Code:

- 1. The right to be subject to protection measures** (Article 120 paragraph 2 letter a);
- 2. The right to receive reimbursement of expenses incurred by their being summoned before judicial bodies when the conditions provided by law are met.** (Article 120 paragraph 2 letter a);
- 3. The right to avoid self-incrimination** (Article 118).

1. The right of the trafficked victim as witness during the criminal investigation to be subject to protective measures

If the victim of human trafficking is a *threatened witness* in the criminal prosecution, under Article 125 of the Criminal Procedure Code, *the protective measures* which may be ordered by the prosecutor during the criminal prosecution for this are:

- surveillance and guard of the witness' residence or providing of a temporary dwelling;
- accompanying and ensuring protection to the witness or to their family members during travels;

- protection of identity data, by issuing them a pseudonym under which the witness shall sign their statement;
- hearing of a witness without them being physically present, through audio-video transmission devices, with their voice and image distorted, when the other measures are not sufficient (Article 126 paragraph 1).

The prosecutor orders the application of protection measures *ex officio* or upon request by the witness, one of the parties or a main trial subject (Article 126 paragraph 2).

If the prosecutor decides the application of the last two protective measures, the statement of the threatened witness will not include the actual address or his/her identity data, these being recorded in a special register which can be accessed only by the prosecutor, the judge of rights and freedoms, the judge of the preliminary chamber or the court, under conditions of confidentiality (Article 126 paragraph 3).

The protective measures ordered by the prosecutor shall be maintained throughout the criminal proceedings if the state of danger did not cease (Article 126 paragraph 6).

If the victim of human trafficking is a *protected witness* in the criminal prosecution under Article 129 of the Criminal Procedure Code, there is one protective measure that can be ordered by the prosecutor during the criminal prosecution. Namely, the hearing of the protected witness by audio-video means, without him/her being physically present in the same place with the prosecutor. The main procedural subjects, their parties and lawyers can question the witnesses heard, but the prosecutor may reject the questions that could lead to the identification of the witness (Article 129 paragraphs 1 and 3).

And finally, when the victim of human trafficking is a *vulnerable witness* in the criminal prosecution under Article 130 of the Criminal Procedure Code, the protective measures that may be ordered by the prosecutor during the criminal prosecution are:

- accompanying and ensuring protection to the witness or to their family members during travels;
- hearing of a witness without him/her being physically present, through audio-video transmission devices; voice and image distortion is not mandatory, as in the case of the threatened witness, but it will be appreciated by the prosecutor. The latter protective measure shall be ordered by the prosecutor only if the other measures are not sufficient.

It is noted that, when dealing with the issue of protective measures granted to witnesses, the Criminal Procedure Code uses three notions, namely: the threatened witness, the protected witness and the vulnerable witness. Only two of these three concepts are defined by the Code, namely threatened witness and the vulnerable witnesses.

Thus, as concerns the *threatened witness*, Article 125 of the Code provides that "if there is a reasonable suspicion that the life, physical integrity, freedom, assets or professional activity of a witness or of a member of his/her family could be jeopardized as a result of the data provided to the judicial bodies of their statements, the competent judicial body shall grant him/her the status of threatened witness (...)"

With regard to the *vulnerable witness*, Article 130 of the Code provides that "the prosecutor (...) may decide to grant the status of vulnerable witness to the following categories of persons: the witnesses who suffered a trauma as a result of the committed offense or of the subsequent behavior of a suspect or defendant and the underage witness".

From the interpretation of the two definitions above mentioned and in the absence of a definition of the concept of *protected witness*, we can state that the category of protected witness will include all those witnesses which are neither threatened witnesses, nor vulnerable witnesses, but whose protection requires his/her hearing to through audio-video devices, namely without being physically present in the same place with the prosecutor, with the main procedural subjects, the parties and their lawyers.

The protective measures that may be granted to the witness during prosecution are different in the three categories of witnesses (threatened, protected and vulnerable); the threatened one shall be granted the most of the protective measures and the protective one the fewest. The difference in terms of content of the protection measures for three categories of witnesses is due to the existence of differences of the risks associated.

2. The right of the trafficked victim as witness during the prosecution to receive reimbursement of the costs occasioned by his/her appearance before the prosecutor

The victim, of human trafficking as witness during the criminal prosecution is entitled to receive reimbursement of the costs occasioned by his/her appearance before the prosecutor. The real exercise of this right is achieved by an application that the victim of trafficking as witness during the criminal prosecution, submitted to the prosecutor, proving the expenses incurred and their amount.

Article 273 of the Criminal Procedure Code provides those three types of expenses the witnesses may require. Thus, according to this article, "witnesses (...) are entitled to reimbursement of their travel, upkeep and accommodation costs as well as other incidental expenses occasioned by their presence. Witnesses (...) who are employees of an organization are entitled to continue receiving their pay from their place of employment for the duration of their absence from work as caused by being called upon by the criminal investigation body or the Court (...). The witnesses who are not employed, but do derive income from work are entitled to receive a compensation (...)".

Likewise are the legal provisions adopted by the European Union, Article 14 of Directive 2012/29/EU providing that "Member States shall afford victims who participate in criminal proceedings, the possibility of reimbursement of expenses incurred as a result of their active participation in criminal proceedings, in accordance with their role in the relevant criminal justice system. The conditions or procedural rules under which victims may be reimbursed shall be determined by national law".

3. The right of the trafficked victim as witness during the prosecution to avoid self-incrimination

The trafficked victim as witness during the prosecution has the right to avoid self-incrimination. Thus, under Article 118 of the Criminal Procedure Code "a witness statement given by a person who had the capacity as suspect or defendant before such testimony or subsequently acquired the capacity of suspect or defendant in the same case, may not be used against them. At the moment when they record the statement, judicial bodies are under an obligation to mention their previous capacity".

Special provisions on this right are provided by the Directive 2011/36/EU on preventing and combating trafficking in human beings under Article 8 providing that "Member States shall, in accordance with the basic principles of their legal systems, take the necessary measures to ensure that competent national authorities are entitled not to prosecute or impose penalties on victims of trafficking in human beings for their involvement in criminal activities which they have been compelled to (...)".

3.4. Case Studies

Case Study 1

The facts:

By indictment no. X/D/P/2016 the Prosecutor's Office attached to the High Court of Cassation and Justice – The Directorate for Investigating Organized Crime and Terrorism - Central Structure the defendant V.V.I. was sent to trial in remand; the defendant together with the defendants N.M.A., O.M.M., T.G., G.M. and P.M.G. were found guilty for organized criminal group at which the defendants Z. P., C.Ş., S.C., C.A.M., R.M. and S.V.M. have also joined; the organized criminal group was also supported materially and morally by the defendants I.M., C.V., G.A., S.I.A. and B.F.I. called "B" for offenses of human trafficking and trafficking in minors.

Therefore:

1. In early April 2016, V.V.I. together with the defendants R.M. called "P", S.V.M. and N.M.A. recruited **the injured party C.I.A. aged 13** for sexual exploitation; they took advantage of her visible state of vulnerability and took her from the city B. to the city C.N., where in early April 2016 they accommodated her for about three days for the same purpose in an apartment located at address X in the city C.N. which was rented by the defendant N.M.A.; in this context, the defendants V.V.I. and N.M.A. provided her with psychoactive substances and together with the defendants S.V.M. and RM called "P" had permanently supervised her, and the defendant S.V.M. exerted physical violence against the injured party.

2. On 01.04.2016 V.V.I. received from the defendants G.M. called "P" and P.M.G. called "B" **the civil party G.C.M. aged 20**; taking advantage of her visible state of vulnerability first he transported her from the city B to the city C.N. and subsequently, together with the defendant N.M.A. in the cities S., C. and C., where together with the defendants N.M.A., O.M.M. and C.Ş.G. accommodated her during 01.04.2016 until 14.09.2016, with the moral complicity of the defendant G.A. - the victim's mother, with the purpose of her sexual exploitation; in this context, the defendant V.V.I. had permanently supervised her and exerted physical violence against the injured party; he also provided her with psychoactive substances purchased from the defendant B.F.I. said "B".

3. On 02.04.2016 V.V.I. received from the defendant S.I.A. called "A.G." **the witness D.M.R. aged 19**, for the purpose of sexual exploitation; she was recruited in early April 2016 by the defendant S.I.A. with the aid of the defendants G.M. called "P" and P.M.G. called "B"; they took advantage of the victim's visible state of vulnerability together with the defendant N.M.A. and with the aid of the defendants T.G., I.M. and C.V. transported her from the city B. to the city C.N. where they accommodated her during the period 02.04.2016 - 15.04.2016; in this context, they deprived her of liberty, they physically abused her and provided her with psychoactive substances purchased from the defendant BFI called "B".

On 03.05.2016, V.V.I. together with the defendants N.M.A. and P.M.G. called "B" transported the injured party L.M.D. aged 16, from the city B to the city of C.N. for the purpose of her sexual exploitation; the injured party was recruited in early May 2016 by the defendant N.M.A..

2. On 03.05.2016 V.V.I. received **the civil party B.F.A.M. aged 19**, for the purpose of sexual exploitation from the defendants G.M. called "P" and P.M.G. called B; she was recruited in early May 2016 by the mentioned defendant who took advantage of the her visible state of vulnerability and transported her together with the defendants N.M.A. and P.M.G. from the city B. to the city C.N. and subsequently the city S. where they accommodated her during the period 03.05.2016 - 25.05.2016 for the purpose of sexual exploitation; in this context, they permanently supervised her and provided her with psychoactive substances purchased from the defendant B.F.I. said "B".

4. In late May 2016, V.V.I. together with the defendant S.C. and with the aid of the defendants P.M.G. called "B" and G.M. called "P" recruited from the city B. **the injured party B.D.A. aged 15** for the purpose of sexual exploitation; on 01.06.2016 he transported her to the city C. and subsequently to the cities C.N., C., S., where together with the defendants N.M.A. and C.Ş.G. accommodated her during the period 01.06.2016-03.08.2016 for the purpose of sexual exploitation; in this context, the defendant V.V.I. had permanently supervised her, abused her physically and provided her with psychoactive substances purchased from B.F.I. called "B".

5. During 02.01.2016 - 21.05.2016, V.V.I. together with the defendants N.M.A., T.G. and O.M.M. obtained money through the prostitution of **the witness N.A.F. aged 20** in the cities C.N. and S. and facilitated her prostitution by posting ads on the Internet, by ensuring her protection; in this context, the defendants V.V.I. and N.M.A. exerted physical violence and threats against the witness.

6. During 12.08.2016 - 14.09.2016, V.V.I. together with the defendants N.M.A., T.G., C.Ş.G., C.V. and I.M. obtained money through the prostitution of **the witness N.A.F. aged 20** in the cities C.N., S. and C., and facilitated her prostitution by posting ads on the Internet, by ensuring her protection and raising her minor children.

7. During 02.04.2016 - 15.04.2016, they obtained money through the prostitution of **the witness D.M.R. aged 19**, together with the defendants N.M.A., G.M., P.M.G., I.M., C.V. and T.G.; they facilitated her prostitution by posting ads on the Internet, by ensuring her protection and raising her minor child; the defendant V.V.I. exerted physical violence and threats against the injured party.

Description of the legal issues:

During the prosecution the case prosecutor ordered the issuance of a letter to the Bar B. for the designation of duty lawyers for the defendants unassisted by chosen lawyers, under Article 91 CPC and also for the injured minors, according to Art. 93 paragraph 4 CPC.

The defendants' chosen lawyers requested under the provisions of Art. 92 CPC to be notified of the date and time of the hearing of the injured parties.

1. In order to hear the injured parties **B.D.A.** and **C.I.A.**, the prosecutor notified the defendants' chosen lawyers and the lawyers appointed ex officio by the prosecutor for the injured parties.

On hearing of these two injured parties, respectively on 20.10.2016, there were present the defendants' chosen lawyers, the lawyers appointed ex officio for the injured parties, and the prosecutor.

The defendants' chosen lawyers formulated several questions to be addressed to the injured parties, but they were dismissed by the prosecutor because they concerned privacy issues of the injured parties.

2. The defendants' chosen lawyers were notified about the hearing of the injured parties **B.F.A.M.** and **G.C.M.**.

On hearing of these two injured parties, respectively on 22.10.2016 participated the defendants' chosen lawyers and the prosecutor.

Since the two injured persons notified the prosecutor even from the beginning of their statements that they joined the proceedings as civil parties for the amount of 1.000.000 Euro, the defendants' chosen lawyers formulated several questions in order to clarify the nature and extent of the civil claims brought by them. The prosecutor censured those questions of the lawyers related to their private life either by their reformulation or by dismissal.

3. The defendants' chosen lawyers were notified about the hearing of the witnesses **D.M.R.** and **N.A.F.**.

The defendants' chosen lawyers and the prosecutor attended the hearing of the two witnesses, respectively on 27.10.2016. The defendants' chosen lawyers formulated questions to be addressed to the two witnesses; among them there were questions related to the private life of the witnesses. From the formulation of these questions, although rejected by the prosecutor, the two witnesses refused to give statements in the case, motivating they were ashamed to describe the facts in the presence of four men.

.....

Presentation of the legal solutions:

1. At the first hearing (dated 20.10.2016), the prosecutor heard the minor **C.I.A.** who was aged 13, in the absence of a parent or her legal representative. At the same time, the prosecutor did not require the presence of a psychologist and a representative of the General Directorate of Social Assistance and Child Protection, as required by Art. 24 paragraph 3 of Law 678/2001.

The hearing of the minor **C.I.A.** provides grounds for relative nullity, according to Art. 282 of the Criminal Procedure Code.

2. At the second hearing (dated 22.10.2016), the adult injured parties **B.F.A.M** and **G.C.M.** were not assisted by a lawyer, as required by Art. 44 of Law 678/2001, under which legal counseling is mandatory. The prosecutor should have ordered the appointment of duty lawyers for the adult injured parties, these being victims of human trafficking within the meaning of Articles 43 and 44 of Law no. 678/2001.

The hearing of the two injured parties provides grounds for absolute nullity under the provisions of Art. 281 paragraph 4 of the Criminal Procedure Code, because when they joined the proceedings as civil parties, the victims ceased to be the main procedural subjects according to Art. 33 of the Criminal Procedure Code and became parties under Art. 32 of the Criminal Procedure Code.

In this case, Art. 281, paragraph 1, letter f of the Criminal Procedure code provides that "it is always causing nullification the violation of rules concerning legal assistance by a lawyer for the suspect or defendant, as well as of the other parties, when counseling is mandatory".

3. At the third hearing (dated 27.10.2016) the witnessed **D.M.R.** and **N.A.F.** were not assisted by a lawyer, as required by Art. 44 of Law 678/2001, under which legal counseling is mandatory. The prosecutor should have ordered the appointment of duty lawyers, since the adult witnesses were victims of human trafficking within the meaning of Articles 43 and 44 of Law no. 678/2001.

The hearing of the two injured parties provides grounds for relative nullity, according to Art. 282 of the Criminal Procedure Code.

Victims of human trafficking can choose to be witnesses in the criminal proceedings by renouncing the quality of injured party, as stipulated by Art. 81 paragraph 2 in conjunction with Art. 115 paragraph 1 of the Criminal Procedure Code.

Case Study 2

The facts:

By indictment no. X/D/P/18.11.2015 the Prosecutor's Office attached to the High Court of Cassation and Justice – The Directorate for Investigating Organized Crime and Terrorism ordered the indictment of the defendants C.G., C.F., C.F. called "C.", C.S., C.M., C.I., S.M., S.V.G., I.M., G.F., G.I., G.C., F.P., S.A.Ş., B.I., T.E.B., D.C., M.I.G., G.M. and O.A.I. who were found guilty for organized criminal group with the aim to commit the offenses of *trafficking in persons* and *trafficking in minors* through the sexual exploitation of the victims; the victims were recruited by false promises of marriage or by offering jobs abroad (as housekeepers, baby-sitters or elderly carers) or being abducted off the street.

The defendants C.G., C.F. and C.F. called "C" recruited the young girls from the Moldova region; then they transported the victims to Bucharest and sold them to their grandchildren, the defendants C.S., C.M. and C.I. who were sexually exploiting the young girls recruited across Bucharest or were reselling them to Giurgiu to the defendants M.S. and S.V.G. (who were exploiting their victims in Italy) or to other defendants.

The young girls were also recruited directly by the defendants C.S., C.M., C.I., I.M., G.F., G.I., G.C., F.P., S.A.Ş.. These defendants were using the physical appearance, by establishing cohabitation relationships with the victims and persuading them to prostitution against remuneration, with a view to build a future together. The first three defendants were recruiting victims also through violence by kidnapping the victims in the street and forcing them to engage in prostitution and reselling them among defendants.

The victims were accommodated either at the defendants' own places in Romania, in rented locations or in hotels in Italy – Rome; the victims were transported to customers (when required) either by the defendants B.I. and T.E.B. (the taxi-drivers who were receiving a commission for transport, and when they were required by the defendants they were watching the victims and receiving money from customers) in Romania, or by the defendants in person in Italy - Rome.

The victims were exploited both by the victims's recruiters and those not involved in their recruitment; the defendants D.C. (the concubine of the defendant C.M.) M.I.G. and G.M. were taking care of the victim's outfits; they were responding to customer calls, establishing the price, the meeting place and they were accompanying the victims to the customers's places. The Defendant O.A.I. was **also** posting ads on the Internet related to offering sexual services against remuneration.

....

Description of the legal issues:

1. During the prosecution, on 10.09.2015 the minor injured parties A.N., H.I, T.R., P.I., G.D. and U.N. were heard in the presence of all persons expressly provided by law on hearing minors; there also participated the defendants M.S., C.G, C.M. and C.S., the defendants' lawyers and the duty lawyers appointed for the injured minors.

2. On 11.09.2015, in the presence of all duty lawyers and chosen lawyers there were heard the adult injured parties D.V., M.N., G.L., S.A.; the injured parties requested the prosecutor to be protected by the authorities, whereas immediately after the hearing of the minor victims by the prosecutor, the defendants S.M., C.G., C.M. and C.S. came at their places and threatened them, the adult victim G.L. being attacked by some of the defendants. The injured parties also requested the arrest of the defendants and to be notified about their release. The prosecutor asked the duty lawyers of the injured parties to submit written requests in order to respond to them.

On 11.09.2015 the prosecutor requested the judge for rights and freedoms the arrest of the defendants C.G., C.F., C.F. called "C", C.S., C.M., C.I., S.M., S.V.G., I.M., G.F., G.I., G.C., F.P. and S.A.Ş. since their release would represent a real danger for public order and of the defendants S.M., C.G, C.M. and C.S. because they tried to directly influence the truth by threats against the adult injured parties. The proposal was accepted by the judge of rights and freedoms, as formulated by the prosecutor.

After the arrest, the duty lawyers of the adult injured parties did not submit also in writing those requested orally by the injured when they were heard by the prosecutor, because the defendants were arrested.

3. On 25.09.2015, at the request of the chosen lawyers of the defendants S.M., C.G, C.M. and C.S. (who requested this in order to comply with the defendant's right to an effective defense) the injured

minors were reheard (being present all the persons expressly provided by law for hearing minors); on this occasion, the chosen lawyers of the defendants bullied the victims by raising more questions on issues related to the private life of the victims, determining them to refuse to give statements in the case.

On 20.10.2015 the claim of the defendant M.S. requesting the replacement of the provisional detention with judicial review was admitted because the defendant needed medical care that could not be provided in prison.

Between 20.10.2015 - 15.11.2015 the only procedural steps carried out by the prosecutor were the hearing of 10 witnesses in the presence of the lawyers who requested this; on 18.11.2015 it was ordered the indictment of the defendants in custody respectively under judicial review, by issuing the indictment.

.....

Presentation of the legal solutions:

1. The prosecutor had wrongly heard the injured minors in the presence of the defendants S.M., C.G., C.M. and C.S. because during prosecution Art. 83 of the Criminal Procedure Code does not recognize the defendants' right to participate directly at the hearing of the injured parties, as it is provided for inquiry (Articles 351 and 380 paragraph 2 of the CPC).

In this regard, the prosecutor infringed the provisions of Art. 12 paragraph 4 letter b of the Directive 2011/36/EU and of Art. 19 of the Directive 2012/29/EU on *the victim's right to prevention of repeat victimization*; the legal provisions laid down for the avoidance of visual contact between the victim and the offender during the hearings and the provisions of Art. 124 paragraph 4 CPC providing that hearing of an underage witnesses must avoid to cause any negative impact on their psychological state.

2. During the hearing of the adult injured parties, the prosecutor had wrongly requested the duty lawyers to submit written requests by which the adult injured parties requested both protection from the authorities and to be informed on the release of the defendants, because these requests can also be made orally by the injured parties when interviewed by the prosecutor, since the prosecutor has the obligation to register such requests in the statement of the injured party.

Even if subsequently the duty lawyers did not submit such written requests because they considered that there were no longer grounds for this, as the defendants were arrested, the prosecutor had the obligation to rule on the requests of the victims to receive protection from the authorities, particularly since the provisional detention for the defendants S.M., C.G., C.M. and C.S. was ordered and because they tried to directly influence the truth by threats against the adult injured parties. It was infringed *the right of the injured parties to privacy and security* as provided by Art. 26 paragraphs 2 and 3 of Law no. 678/2001 and Articles 113 and 125 of the CPC, Art. 11 point 3 of the Directive 2011/36/EU, and Art. 18 of the Directive 2012/29/EU.

As concerns the request of the adult injured parties to be informed about the release of the defendants, the Criminal Procedure Code does not make the exercise of this right subject to a written request submitted by the injured party to the prosecutor. Therefore, the prosecutor was obliged to register these oral requests of the injured parties in their statements. Thus it was infringed *the right of the injured parties to be informed by the prosecutor about the release of the defendants*, as provided by Art.111 paragraph 5 of the CPC, Art. 6 paragraphs 5 and 6 of the Directive 2012/29/EU.

3. The prosecutor had wrongly accepted the request submitted by the duty lawyers of the defendants S.M., C.G., C.M. and C.S. concerning the rehearing of minor victims, due to the absence of any objective grounds, with the violation of the provisions of Art. 113 paragraph 4 of the CPC, Art. 12 paragraph 4 letter a and Art. 15, point 3, point letter e of the Directive 2011/36/EU and also Art. 20 paragraph 1, letter b, Art. 23 paragraph 3, letter c of the Directive 2012/29/EU on *the victim's right to prevention of repeat victimization*. These legal provisions avoid repeated hearings of victims when they are not absolutely necessary and also avoid unnecessary questioning concerning the victim's private life. There were also breached the provisions of Art. 124 paragraph 4 of the CPC which stipulate that hearing of an underage witnesses must avoid to cause any negative impact on their psychological state.

Regarding *the right of the injured parties to be informed by the prosecutor about the release of the defendants*, as required by Art.111 paragraph 5 of the CPC, Art. 6 paragraphs 5 and 6 of the Directive 2012/29/EU, the prosecutor infringed this right recognized for all injured parties, because the only procedural steps carried out by the prosecutor in the period 20.10.2015 - 18.11.2015 was the hearing of the 10 witnesses.

CHAPTER 4

THE RIGHTS OF THE VICTIMS OF HUMAN TRAFFICKING IN THE COURT PHASE IN ROMANIA

4.1. Right to information

The victims of crimes are entitled to receive information in a language they understand on the applicable legal and administrative procedures (Art. 43 of Law no. 678/2001).

The national legislation meets the European requirements established by Art. 6 (the right to receive information about their case) and Art. 7 (the right to interpretation and translation) of the Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime.

Thus, the right to information is provided by Art. 43 of Law no. 678/2001 on preventing and combating trafficking in human beings, and by Art. 4 of Law no. 211/2004 on the protection of victims that establishes a series of obligations that must be fulfilled by the judicial body in front of which the victims presents first, namely the information concerning: a) the services and organizations that provide counseling or any other form of assistance to victims according to their needs; b) the prosecution authority to which they can make a complaint; c) **the right to legal counselling** and the institution they may address for this right; d) the conditions and procedure for granting free legal counselling; e) **the procedural rights of the injured party and of the civil party**; f) the conditions and procedures to benefit from under the provisions of Art. 113 of the Criminal Procedure Code and of Law no. 682/2002 on witness protection, and its subsequent amendments; g) the conditions and procedure for granting financial compensation by the State; h) the right to be informed when the defendant is deprived of liberty or condemned to imprisonment, on his/her release in any way, according to the Criminal Procedure Code.

This information is made known to the victim in a language which s/he understands, or in his/her native language (if s/he is a Romanian citizens belonging to a national minority). Fulfilling this obligation is recorded in the minutes which is registered at the institution to which the judicial body belongs to. There are also relevant the provisions of Art. 5 of Law no. 211/2004, showing that the Ministry of Justice and the Ministry of Interior, with the support of the Ministry of Communications and Information Technology ensure *a telephone line available at any time to inform the victims of crime*. The telephone line ensures the provision of information referred to in Art. 4 paragraph (1), the access to the telephone line is free by dialing a single phone number nationwide. Also, local authorities and NGOs can establish local telephone lines for the information of victims of crime.

However, the information provided in Art. 4 paragraph (1) *shall be published* on the websites of the Ministry of Justice and the Ministry of Interior; the courts, the prosecutor's offices attached to the courts and the police units may also publish it on the Internet.

During the trial and before the hearing, the court shall inform the injured person on his/her *right to be informed* of his/her rights (Art. 81 CPC), and these rights are: to propose production of evidence by the judicial bodies, to raise objections and to make submissions; the right to file any other applications related to the settlement of the criminal part of the case; to be informed, within a reasonable term, on the status of the criminal investigation, upon explicit request, provided that they indicate an address on the territory of Romania, an e-mail address or an electronic messaging address, to which such information can be communicated; the right to see the case file, under the law; the right to be heard; to address questions to the defendant, witnesses and experts; to receive an interpreter, free of charge, when they cannot understand, cannot express themselves properly or cannot communicate in the Romanian language. In urgent cases can be used technical means of communication, if it is considered necessary and does not preclude the rights of the injured party; the right to translation in a language which s/he understands regarding any decision of not-indictment when s/he does not not understand Romanian language; the right to be assisted by a lawyer or represented; the right to appeal to a mediator, where permitted by law; other rights provided by law - for example:

- The right to be informed of the fact that, in the event that the defendant is deprived of freedom or convicted to a custodial sentence, the former can be informed of their release in any manner (Art. 111, paragraph 5 CPC);
- The right to become a civil party up to the beginning of the court investigation (Art. 374, paragraph 3 CPC).

If the person who suffered a physical injury, a material or moral damage for which the criminal proceedings are initiated ex officio does not want to join the criminal proceedings, then s/he shall inform the judicial body in this respect; if the judicial body considers necessary, it will hear the person as a witness (Art. 81 paragraph 2 of the CPC). In practice, often the judge does not explain to the victim the difference between the status of injured party/civil party and witness, in particular with regard to the obligation to make statements and to tell the truth, respectively losing the right to obtain compensation in criminal proceedings.

However, such disclosure should take place in a synthetic manner, understandable for the victim (according to the level of education), but also considering the time necessary for processing the information (Art. 3 of the Directive 2012/29/EU - the right to understand and to be understood).

There is also additional information on the procedure from the preliminary chamber, during which, according to the legislative amendments decided by the Constitutional Court, the injured party and the civil party may submit claims and exceptions regarding the competence and legality to seize the court and the legality related to provision of evidence and documents by the prosecution authorities.

Also, the victim of trafficking in persons has the right to be informed of the possibility to appeal against a decision of non-prosecution ordered against the accused person for committing the illegal activity; the provisions of Art. 336 paragraph 1, Art. 339 paragraph 4 and Art. 340-341 CPC are consistent with the provisions of Art. 11 of the Directive 2012/29/EU.

4.2. Right to legal assistance and representation

Victims of trafficking in persons are entitled to assistance and support, including legal counselling to support their claims and civil claims against the offenders who committed the crime of trafficking in persons.

However, Art. 12 paragraph (2) of the Directive 2011/36/EU provides that Member States shall ensure that victims of trafficking in human beings have access without delay to legal counselling, and, in accordance with the role of victims in the relevant justice system, to legal representation, including for the purpose of claiming compensation. Legal counselling and legal representation shall be free of charge where the victim does not have sufficient financial resources. Art. 13 of the Directive 2012/29/EU contains provisions in this respect.

At national level, the provisions of Art. 44 of Law no. 678/2001 are unequivocal in this regard; persons stipulated in Art. 43 are entitled to free legal counselling for exercising their rights within the criminal proceedings provided by law, **at all stages of the criminal trial** and are also entitled to supply evidence for their demands and civil actions against persons who have committed the crimes stipulated in this law, where they are involved.

It also shows that the provisions of Chapter IV of Law no. 211/2004 on certain measures for the protection of victims of crime, as amended and supplemented, regarding the provision of free legal counselling to victims of crime are applied properly to victims of trafficking, as well.

A distinction needs to be made between **compulsory legal counselling** (which is ordered by the court on its own initiative from receiving the case file, issuing a letter to the local bar association, according to Art. 44 of Law no. 678/2001; for the underaged injured parties there are also considered the provisions of Art. 93 paragraph 4 CPP) and **free legal counselling**, granted under the provisions of Chapter IV of Law no. 211/2004, under the following conditions:

- If the victim noticed the prosecution or the court within 60 days from the offense. If the victim was unable physically or mentally to notify the prosecution authorities, the 60-day term is calculated from the date of termination of the inability condition; underaged victims and those under interdiction are not required to notify the prosecution authorities or the court on the offense.

- The application may be submitted personally by the victim, the legal representative of the minor or by the person under interdiction, by non-governmental organizations operating in the field of victim protection, if it is signed by the victim.

- The application for free legal counselling is exempt from stamp duty; it shall be filed at the court in whose jurisdiction the victim lives and shall be solved by two judges from the Commission for Granting Financial Compensation to Victims of Crimes through conclusion, within 15 days of the submission date. The application shall include the identification details of the victim, the monthly income per victim's family member, the documents supporting the information contained in the application and any other documents held by the victim which are useful for the settlement of the claim. The application for free legal counselling is settled by the council chamber by summoning the victim and, if rejected, the victim has the right to appeal within 15 days of notification.

- If the victim has not chosen a lawyer, the conclusion through which it was granted the application for legal counselling should include the appointment of a duty lawyer under the Law no. 51/1995 on the organization and practice of the lawyer's profession, republished, as amended and supplemented, and the Lawyer's Statute.

Free legal counselling is granted to each victim throughout the process, up to an amount equivalent to two gross minimum salaries per country established for the year in which the victim applied for free legal counselling, and the necessary funds for free legal counselling are provided from the state budget through the Ministry of Justice.

These provisions *also apply correspondingly for granting the necessary amount to enforce the judgment which awarded civil damages to the victim.*

With regard to the **extrajudicial counselling** (distinct from the judicial one during the criminal investigation and trial), it consists of providing advice, submission of claims, petitions, referrals, initiating of other such legal proceedings and representation in front of public authorities or institutions, other than judicial or with judicial powers, in order to achieve legitimate rights or interests, also during the settlement of disputes through alternative ways that may be subject to them.

Details for the granting of such counselling and the manner of appointing the lawyer are provided by the Resolution no. 419/2008 of the National Union of Bars of Romania – The Framework Regulation - regarding the organization, functioning and powers of the legal counselling services of the Bars. To be noted that under this act, the lawyer who provided extrajudicial counselling becomes incompatible to provide legal counselling for the same case.

This is relevant because victims often need stability and do not have a pleasant perception of a changed lawyer. Also, there is no legal provision binding - for example, the duty lawyer who provided legal counselling to the victim during the criminal investigations - to assist him/her in the trial stage.

Other problems occurring in practice are related to the quality of the appointed duty lawyer's performance, as such cases are distributed mainly to young lawyers, interns or permanent, who not always have adequate specialized training or experience to interact with victims. In addition, it is allowed the substitution of the appointed lawyer with another lawyer registered at the Bar Register for legal counselling.

In theory, the victim has the right to request the change of the appointed lawyer, but in practice it happens rarely. On the other hand, it remains the duty of the court to ensure a fair trial and to determine whether, based on the performance of the appointed lawyer, the defense is effective, the guarantees for a fair trial guarantees being applicable not only to the accused, but also to victims. There must also be ensured that the lawyer is not counselling parties with adverse interests in the case (Art. 88 paragraph 4 CPC).

Also, NGOs can provide legal counselling and legal assistance through their associated lawyers, but during the trial stage they cannot draw conclusions, unless they are elected in the case or designated to provide mandatory or free legal counselling.

4.3. Right not to cooperate with law enforcement bodies

Pursuant to Art. 2 letter c of Law no. 678/2001, the quality of victim of human trafficking is not conditional on his/her participation in criminal proceedings: *the term victim of trafficking in persons shall mean the individual, passive subject of the facts set out in Articles 210, 211, 264 and 374 of the Criminal Code or of the attempt of one of those facts, whether s/he participates or not in the proceedings as injured party.*

Moreover, Art. 81 paragraph 2 of the CPC provide about the possibility of the person who suffered a physical injury, a material or moral damage for which the criminal proceedings are initiated

ex officio does not want to join the criminal proceedings, then s/he shall inform the judicial body in this respect; if the judicial body considers necessary, it will hear the person as a witness.

In practice, refusal to appear before the court or to make statements during the trial can also be a consequence of non-compliance with the period of reflection that the victim is entitled to during the criminal investigations, when - generally - the judicial bodies concentrate more on provision of evidence and less on respecting the right of victims to reflection (provided by Art. 39² of Law no. 678/2001, namely a period of 90 days).

If the victim does not wish to cooperate with the judicial authorities, s/he does not receive state support services for trafficked persons, but can receive assistance and protection provided by non-governmental organizations.

As concerns children, there are no special provisions (just related to their hearing), but it must be noted that they are considered victims whether they wish or not to cooperate with the judicial bodies and must receive protection and age specific assistance.

4.4. Right to privacy and safety

The fear of most victims of trafficking is related to the advertising involved by the criminal proceedings (especially the desire not to inform the family about what happened or avoiding the disclosure to the public by publishing information about the trial, the media access/public dissemination, disclosure of the victim's identity and actions in which s/he has been involved).

Art. 12 paragraph 4 of the Directive 36/2011/EU expressly states that without prejudice to the rights of the defence, and according to an individual assessment by the competent authorities of the personal circumstances of the victim, Member States shall ensure that victims of trafficking in human beings receive specific treatment *aimed at preventing secondary victimization*. However, the Directive 2012/29/EU contains similar provisions in Articles 18-20 and Art. 23.

At national level, Chapter 4 of Law no. 678/2001 contains specific provisions on judicial proceedings. According to Art. 24, court sessions in cases involving crimes of trafficking in human beings within Art. 211 of the Criminal Code and child pornography within Art. 374 shall not be open to the public. The court proceedings can be attended by the parties, their representatives, legal counsels, as well as other persons whose presence is deemed necessary by the court.

In cases involving the offenses under Chapter VII of Title I of the special part of the Criminal Code and in cases involving offenses of facilitating illegal residence in Romania, provided by Art. 264 of the Criminal Code, and child pornography, provided by Art. 374 of the Criminal Code, *the hearing of a minor under 14 years* shall be made in the presence of at least one parent or legal representative and is also mandatory the presence of a psychologist or a representative of the General Directorate of Social Assistance and Child Protection.

However, the trial involving offenses of trafficking in persons, provided by Art. 210 of the Criminal Code, and facilitating illegal residence in Romania, provided by Art. 264 of the Criminal Code, the court may decide to hold the session behind closed doors upon the request of the victim (Art. 25 of the same law).

These provisions completed with those from Art. 352 CPC on the public character of the hearing and exceptions to this rule.

Thus, the court hearing shall be public, except for the cases provided by law. The hearing taking place in chambers shall not be public. Persons under 18 years may not take part in the court hearing, except for when they are parties or witnesses; the same holds for persons carrying weapons, except for the security and order staff.

If a public hearing in court were to harm to various state interests, morality, a person's dignity or privacy, the interests of juveniles or to justice, the court, based on application by the prosecutor, the parties, or ex officio, may declare that the court hearing shall not be public for the entire duration of the court proceedings in this case, or only for a certain part of the court proceedings in this case.

The court may also declare that the court hearing shall not be public based on application by a witness if the latter's hearing in open court session were to bring harm to his safety or dignity or privacy or to that of the members of his family, or based on application by the prosecutor, the victim or the parties, if a public court hearing were to jeopardize confidential information.

The court shall declare that a court hearing shall not be public in an open court session, after hearing the parties present, the victim and the prosecutor. This court ruling is enforceable and while the court hearing shall not be public, only the parties, the victim, their representatives, the counsels and the other persons whose presence is authorized by the court are allowed to be in the court room.

The parties, the victim, their representatives, the counsels and the experts appointed for the case have the right to be informed of the actions and the contents of the court case file. The president of the judicial panel must inform persons participating in the trial taking place in a closed court hearing that they are under an obligation to keep confidential the information gathered throughout the court proceedings.

A particular attention should be given *the right to protection of personal data*. Thus, the Council of Europe Convention on Action against Trafficking in Human Beings, Art. 11 provides that personal data of victims shall be stored and used in conformity with the conditions provided for by the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (European Treaty Series No. 108).

The right to protection of personal data is enshrined in Art. 8 of the EU Charter of Fundamental Rights, and also in the Council Framework Decision 2008/977/JHA on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters, but also in the EU Regulation 2016/679 (General Data Protection Regulation, which will come into effect next year in May).

One of the fundamental principles on data protection is processing of such data by the police and judicial authorities accordingly, *in an adequate, relevant and not excessive manner* with regard to the purpose of processing, and *accurate* processing.

During the trial, this right is respected because the writ of summon is in a sealed envelope, but the envelope can be handed to a person who lives with the victim (a family member - Art. 261 paragraph 1 of the CPC) and can create trouble to the victim when the family is not aware of his/her exact situation and quality of victim. Also, they were taken measures to ensure anonymisation of victim's details included in the minutes of the hearings or judgments (sentences, decisions) when information is replicated on the portal of the courts (www.just.ro) so as not to be identified as victims of trafficking.

4.5. Right to witness protection and to be treated with respect and dignity

Art. 12 (4) of the Directive 36/2011/EU provides examples of measures to avoid, as far as possible and in accordance with the criteria defined in the national law and with the rules on the margin of appreciation of the court, the practice or orientation of the criminal courts, the following:

- unnecessary repetition of interviews during investigation, prosecution or trial;
- visual contact between victims and defendants including during the giving of evidence such as interviews and cross-examination, by appropriate means including the use of appropriate communication technologies;
- the giving of evidence in open court; and
- unnecessary questioning concerning the victim's private life.

The aim is to avoid secondary victimization, and victims will cooperate more easily with the judicial authorities if they receive adequate information, if there are avoided unnecessary hearings/confrontations with the accused (including visual contact), but in particular by rejecting questions about the private life of the victim (for example, the sexual experience prior to trafficking for the purpose of practicing prostitution), sanctioning the behaviour of the defendants consisting of insults, threats or any other form of intimidation of victims. It is particularly important to avoid excessive, repeated, useless deferrals of the case, which creates a feeling of unease and insecurity for the victims.

According to Art. 27 paragraph (1) Law no. 678/2001, the Ministry of Internal Affairs ensures the physical protection of victims of trafficking in human beings, under the conditions of Art. 113 of the Criminal Procedure Code.¹

¹ Art. 113 refers to *the protection of the injured party and the civil party*: (1) When the requirements established by law in respect of the status of threatened or vulnerable witnesses are met, or for the protection of private life or dignity, criminal

At the same time, the Criminal Procedure Code defines the notion of threatened and vulnerable witness. According to Art. 125 of the CPC, if there is a reasonable suspicion that the life, physical integrity, freedom, assets or professional activity of a witness or of a member of their family could be jeopardized as a result of the data provided by them to judicial bodies or of their statements, the judicial bodies of competent jurisdiction shall grant them the status of threatened witness and shall order one or more of the protection measures set by Art. 126 (protection measures ordered during the criminal investigation) or Art. 127 (protection measures ordered during the trial), as applicable.

During the trial, once that the status of threatened witness was granted, the court shall order the application of one or more of the following measures: **a)** surveillance and guard of the witness' residence or providing of a temporary dwelling space; **b)** accompanying and ensuring protection to the witness or to their family members during trips; **c)** closed court sessions during the hearing of witnesses; **d)** hearing of witnesses without them being physically present in the court room, through audio-video transmission devices, with their voice and image distorted, when the other measures are not sufficient; **e)** protection of identity data, by issuing a pseudonym under which the witness shall testify.

The court orders the application of protection measures *ex officio*, upon request by the prosecutor, the witnesses, the parties or the victim, pronounced by conclusion, which is not subject to appeal. The conclusion ordering the protection measure shall be kept confidential. If the protection of the witness is necessary after the final decision has been passed, there are applicable the provisions of the special law apply (namely Law no. 682/2002 on the protection of witnesses²).

As regards the vulnerable witness, the court may decide to grant the status of vulnerable witness: to the witness who has suffered a trauma as a result of the crime or as a result of the subsequent

investigation bodies may order protection measures specified under Art. 124 – 130 in respect of a victim or a civil party. Such provisions shall apply accordingly. (2) There are presumed to be vulnerable the following categories: child victims, victims who depend on the perpetrator, victims of terrorism, organized crime, human trafficking, violence in close relationships, sexual violence or exploitation, victims of hate crimes, victims subject to an offense due to prejudices or on grounds of discrimination that may relate in particular to their genuine particulars, victims with disabilities, as well as to victims who have suffered a considerable damage as a result of the serious offense. (3) If the injured party or the civil party is in one of the situations provided in paragraph (2), the criminal investigation body shall inform him/her of the protective measures that may be taken, in what they consist of and the possibility to dismiss them. Dismissal of the injured person or the civil party in taking protective measures shall be recorded in writing and signed by the injured party or the civil party in the presence of the legal representative, if any. (4) **The injured party shall be heard again only if it is strictly necessary for the criminal proceedings.** (5) At the hearing, the injured party may be accompanied at his/her request by his/her legal representative and by another person designated by him/her, except for the cases when the judiciary reasonably decides otherwise. (6) Whenever the judicial body cannot determine the age of the injured party and there are reasons to consider him/her to be minor, the injured person shall be presumed to be a minor.

² Art. 2 of the Law no. 682/2002 provides that the program shall apply in the following circumstances:

1. Shall have the quality as witness under the law, namely:

- S/he is a witness, under the Criminal Procedure Code, a witness and, through his/her statements discloses information and crucial data for finding the truth regarding serious offences or which contributes to prevent extreme damage that may be caused by committing such offences or to recuperation thereof;

- without being in a procedural position s/he contributes, through the crucial information and data s/he holds to uncover the truth in cases of serious offences or to prevent major damage by committing such offences or to recuperation thereof; this category may also include the defendant from another case;

- s/he is executing an imprisonment sentence and through the crucial information and data s/he provides contribute to finding the truth in cases of serious offences or to the prevention of major damage by committing such offences or to recuperation thereof;

2. The state of jeopardy means the situation of the witness when the physical integrity or freedom of his/her family members or close persons are threatened, following the information and data provided or which s/he agreed to provide to the judicial bodies or following his/her statements;

3. There is a motivated proposal from the competent authorities.

The claim submitted to the National Witness Protection Office shall be made during the criminal prosecution of the police officer or case prosecutor, mentioning that the person concerned is at high risk, and during the trial - the court has to settle the case. At the same time, being involved in the program means keeping the victim far from the family and friends, with the risk to destabilize the victim.

behavior of the suspect or defendant; respectively, the minor witness. Once the status of vulnerable witness is granted, the court may order the protection measures provided for in Art. 127 letters b) - e), which applies accordingly. Distortion of voice and image is not mandatory.

With regard to the minor witness or hearing of the child victim, the provisions of Art. 15 paragraph 3 of the Directive 2011/36/EU provide more age-specific hearing rules; in the national law there are relevant the provisions of Art. 124 of the CPC which state that hearing of underage witnesses up to 14 years of age shall take place in the presence of one of the parents, of the guardian or of the person or representative of the institution to which the minor is entrusted for raising and education. If the persons mentioned cannot be present or have the capacity of suspect, defendant, victim, civil party, party with civil liability or witness in the case, or if there is a reasonable suspicion that these can influence the minor's statement, their hearing shall take place in the presence of a representative of the guardianship authority or of a relative having full legal capacity, established by the judicial bodies. If they deem it necessary, upon request or ex officio, criminal investigation bodies or the court may order that a psychologist be present during the hearing of underage witnesses. ***Hearing of underage witnesses must avoid the causing of any negative impact on their psychological state.***

The repeated hearing of the victim can be avoided when the Judge for Rights and Liberties orders the early hearing under Art. 308 of the CPC. Therefore, when the injured party, the civil party, the civilly liable party or a witness risk not be available for hearing during trial, the prosecutor can ask the Judge for Rights and Liberties to hear the concerned witness before the trial. If the Judge for Rights and Liberties declares the request well founded, then s/he shall immediately set a date and place for the hearing and summon of the parties and main procedural subjects. If the hearing takes place in closed session, the prosecutor's participation is mandatory.

These provisions shall apply accordingly to the hearing of the underage witness or civil party and also to the hearing of the injured party; according to their quality or the nature of the case, the prosecutor considers that the repeated hearing during the trial is avoided in their best interest.

At the same time, it must be noted the *National Program for Coordination of Victims of Trafficking in Persons in the Criminal Proceedings* of the National Agency Against Trafficking in Persons in partnership with the General Inspectorate of the Romanian Police, the General Inspectorate of the Romanian Border Police, the General Inspectorate of the Romanian Gendarmerie and DIOCT, that aims mainly to encourage victims to participate in the criminal process. Regarding the measures applied in the program, with reference to the trial phase, are worthy of note: informing the victim of the beginning of the trial phase and the need to be brought before the court; accompanying the victim to the courtroom before the established date for the trial in order to familiarize himself/herself with the headquarters of the court/the courtroom, the procedures applicable to the hearing; ensuring the victim's physical protection in collaboration with the Gendarmerie Inspectorate; accompanying the victim by personnel of the Agency during the trial phase; ensuring that the victim is informed of his/her rights also after the trial, as long as there is a safety risk for the victim, her family or other close persons.

4.6. Right to protection of physical integrity

Under Art. 27¹ of Law no. 678/2001, the medical assistance for victims of trafficking in human beings is ensured in accordance with the normative acts that regulate social health insurance. The medical procedures are performed in compliance with the requirements of the Law 95/2006 on health reform (with the valid consent expressed personally by the patient who is 18 years, with written consent in case of risk, respecting the patient's will and his/her right to refuse or stop the medical procedure, except in cases provided by law).

The victim may be subject to a forensic examination during the criminal prosecution in order to ascertain the traces and consequences of a crime (Art. 189 of the Criminal Procedure Code), and at the trial stage a forensic expertise may be approved under Art. 172 of the CPC, a new expertise or an additional expertise, according to Articles 180 and 181 of the CPC.

However, it is very important to inform the victim about the risk of publishing such medical data. The access to medical records is allowed to the defendant, either through a lawyer or personally. However, there are statutory provisions stating that these medical records are kept separately. Therefore, under Art. 95 paragraph 6 of the Rules of Internal Organization of the Courts, if medical

and forensic medical records, evidence obtained through technical surveillance methods, transcripts of any kind of conversation, photographs and evidence containing images administered in criminal cases, as well as photographs or other images provided in civil cases relate to private life, they are kept in separate volumes, with the mention "confidential data" on the cover. The access to the case file or photocopying of these documents is allowed, but only with the approval of the president of the panel, under restrictive conditions.

According to Art. 20 paragraph 1 of the Law no. 678/2001 the person subjected to trafficking in human beings who committed, as a result of his/her exploitation, the offense of illegal crossing of the state border or donation of organs, tissues or cells of human origin *is not punished for these crimes*. There have also been jurisprudence cases where victims of trafficking in human beings have been accused of prostitution until the entry into force of the Criminal Code of 01.02.2014, when prostitution was decriminalized.

At the same time, according to Art. 32 of the Law no. 678/2001 victims of trafficking in human beings may be temporarily accommodated in centers for the assistance and protection of victims of trafficking in human beings, hereinafter referred to as centers, or in shelters protected for victims of trafficking, established by the present law, hereinafter referred to as protected shelters. Under the international standards (The EC Convention on the fight against trafficking in human beings – Art. 26 or the Directive 2011/36/EU – Art. 8), certain categories of victims should be accommodated in open centers, closed or semi-open centers: victims with mental problems, with disabilities, etc., who can not go without a companion. With regard to child victims, their detention is strictly prohibited, according to the Children's Rights Committee. In practice, child victims are housed in centres for abandoned, abused, etc. children, usually administered by the General Directorate for Social Assistance and Child Protection.

4.7. Case Studies

Case Study 1

In 2013, the defendants M.V., S.F., C.P.I., C.G., M.M., C.A., U.C., D.I. and D.G. recruited the injured parties N.F., B.I.C. (minor, 12 years old), B.A.M. (minor, 11 years old) and the witness N.M. through kidnapping and the use of constraining means (violence, threats); subsequently they transported, accommodated and hosted them in their homes or residence in village T., commune T., county I., for the purpose of exploitation through the obligation to practice prostitution within the commune of T., county I. and around the ring road of the capital. Also, the abducted injured parties have been left without goods by the defendants; they especially took their mobile phones, for not being able to announce the police or relatives. The defendants have been sued for committing repeated trafficking in human beings, as provided by Art. 12 paragraphs 1 and 2 letter a) of Law no. 678/2001 with the application of Art. 41 paragraph 2 of the Criminal Code of 1968 and repeated trafficking in minors, as provided by Art. 13 paragraphs 1, 2 and 3 of Law no. 678/2001 with the application of Art. 41 paragraph 2 of the Criminal Code of 1968.

At the trial dated 02.05.2014, established for the public hearing of the injured parties N.F., B.I.C. (minor), B.A.M. (minor) and of the witness N.M., without being present in the courtroom and without having direct contact with the defendants who were present in the courtroom; the representative of the Placement Centre informed the court that the minor B.I.C. who was accommodated at the Placement Centre was approached and threatened by the minor M.R, who presented himself to the minor as the nephew of some of the defendants in the cause in order to determine her to change her statements. At the same hearing, before the hearings, the defendants D.I. and C.P. were sanctioned with an administrative fine, removal from the courtroom, with incident reports and referral for contempt of the judiciary for extremely aggressive verbal behavior in the courtroom. To justify this behavior, the defendants stated that they were brought in the courtroom very late.

The witness N.M. requested the hearing to be declared non-public, motivating that she could not tell what happened, because in the courtroom there were present her neighbors in the village where she was living. The court rejected the request, because the witness N.M. is not a party in the case file, and did not have the same rights as the injured parties; there were discussions to declare the hearing

non-public at this trial date during the hearing of the summoned persons, and those present agreed to this measure.

The duty lawyer of the injured party N.F. requested the postponement of the case because s/he did not have the opportunity to study the case file, being substituted by the colleague holder. The prosecutor dismissed the claim, on grounds that the case had been delayed several times, mainly due to the absence of the defendants, and the present lawyer knows the case file, as during the criminal prosecution s/he assured the legal assistance of the defendant C.P.I.. The court dismissed the request for postponement, pointing out that the duty lawyer, even as substitute, had the obligation to study the case file, while the court has an active role and ensures the fairness of the proceedings, under the provisions of the Criminal Procedure Code.

During the hearing, the injured parties and the witness were assisted by duty lawyers, and for the minor injured B.I.C. there was present the representative of the placement center where she was accommodated.

The case was adjourned for the trial date of 30.05.2014 to continue the hearing of the injured minor B.A.M. who was ill and needed medical care, the hearing being interrupted; the injured party showed that she no longer wished to be present in the court and that she maintained her statements made in the criminal prosecution. The court ruled that the injured party should be heard directly as long as she initially agreed to make statements in the case and was informed of the obligations she had as injured party, since not all defendants had the possibility to ask her questions.

Task

Identify the errors committed by the court measures at the trial dated 02.05.2014.

Presentation of legal solutions

1. The rejection of the witness's claim to declare the hearing non-public is an error, as the witness - victim of trafficking in human beings – was allowed to submit such a claim under the provisions of Art. 352 paragraph 4 of the CPC.
2. The duty lawyer of the injured person N.F. provided legal counselling to one of the defendants during the criminal investigations, a party with opposite interests, so the court had to take measures to replace him/her, in order to ensure an effective protection of the injured party who was victim of trafficking in persons and who had to trust that s/he will be defended effectively. The active role of the court involves provision of the necessary facilities for the preparation of an effective defense by the defender.
3. At the hearing of minor injured persons, there had to be summoned a psychologist and a representative of the General Directorate for Social Assistance and Child Protection and at the hearing of the minor injured party B.A.M. there should have been summoned her parent or her legal representative, according to the provisions of Art. 24 paragraph 2 of Law 678/2001.
4. The court did not take any action with regard to the situation presented by the representative of the placement centre as regards the minor B.I.C., although the special regulations on trafficking in human beings, by their spirit and letter, require the judicial bodies to exercise increased caution in the provision of evidence and, in particular, the statements of the potential victims. Such provisions are found in Law no. 678/2001, not only in chapter IV regarding the judicial procedure, but also in chapter V dedicated to the protection and assistance of victims of trafficking, in particular the provisions of Art. 26 of this chapter. Therefore, the court could - under Art. 128 related to Art. 127 of the CPC - order the supervision of the placement centre and of the minor by the police.
5. As regards the continuation of the hearing of the minor injured party at the following trial, there was not brought any relevant reason for such rehearing; the fact that the victim initially agreed to make a statement was not an obligation, because she did not have to make statements under any circumstances, since the victim has the right not to cooperate with the judicial bodies and not to make statements. Therefore, the court did not consider the victim's right to prevent repeated victimization, as enshrined in the provisions of Art. 20 paragraph 1 letter b of the Directive 2012/29/ EU and Art. 12 paragraph 4 letter a and Art. 15 paragraph 3 letter e of the Directive 2011/36/EU, which provide for the avoidance of repeated hearings of victims when they are not absolutely necessary. The provisions of Art. 124 paragraph 4 of the CPC which stipulate that the hearing of the minor witness must avoid producing any negative effect on his/her psychological state were infringed.

Case Study 2

In May 2014, the defendants L.N., H.C., B. A.-M. and S.D. constituted an organized criminal group aimed at identifying more rural individuals interested in finding a job abroad and who could be misled about the conditions they were to benefit from (transport, accommodation, meals and wages) and then transported and accommodated in the houses of the defendants and finally forced them to carry out agricultural activities for the various Spanish landowners, with an important part of the amounts representing the value of the work performed by the persons concerned being appropriated by the defendants.

The petition noted that the joint activity of the mentioned defendants (among which the accused B.A.M.) the civil parties B.M.G., B.M., T.C.D., A.F.M., C.N., P.C., P.N.M., R.M., B.A., M.F.A., Ş.N.F., Z.I.C and the witness B.D. were exploited by being constrained to work in difficult conditions; they were deprived of identity documents by the members of the criminal group in order to restrict the freedom of movement of the civil parties and under the condition to return the amounts of money paid for the transport, accommodation and food of the civil parties, invoked in an exaggerated value, followed by threats or violence, as it was the case, in order to determine the civil parties to carry out activities for the profit of the members of the organized criminal group.

At the same time, the activity of the defendant B.A.M. resulted in the following: sending to the witness M.E. the amounts of money necessary to pay the transport in Spain of the first six civil parties; she made available to the members of the organized criminal group the dwelling she previously rented and where the civil parties were accommodated; she undertook to carry out the formalities necessary for the civil parties to fulfill the conditions which allowed them to carry on their activity in an apparently legal manner by bringing them before the representatives of the Spanish authorities; before the counter they were handed over their identity documents, but after that they had to return them; during the activities carried out by the civil parties, she has repeatedly accompanied and supervised them at work, forcing them to work through injuries and threats, constantly informing the defendant Lixandru Nicolae about what happened.

Thus, the defendant B.A.M. was sent to court on 04.02.2016 for the offense of establishing an organized criminal group, provided by Art. 367 paragraph 1 of the Criminal Code, and repeated trafficking in persons, provided by Art. 210 paragraph 1 letter b of the Criminal Code, with the application of Art. 35 paragraph 1 of the Criminal Code, retaining the provisions of Art. 5 of the Criminal Code and Art. 38 paragraph 1 of the Criminal Code on multiple offenses. The other defendants were sent to court separately in 2015, since the defendant in the present case could only be found in 2016 when she returned from Spain.

In the pre-trial proceedings, the witness B.D. presented himself on the date established by the preliminary chamber judge to decide whether to start the trial or not, indicating that he was not notified of the trial, since he had found his name on the court portal and identified the file; although he does not want to participate as civil party or injured party in the case, he wishes to communicate the document instituting the proceedings to the court; also, he considers unlawful to sue B.A.M. separate from the other defendants a year later, practically to be favored, perhaps, and to receive a light punishment. The defendant's chosen lawyer seeks to return the case to the Prosecutor's Office, pointing out that s/he will do so in the other case, which concerns the other defendants in order for the Prosecutor's Office to bring a unitary trial of all the defendants guilty of committing the offense of trafficking in persons. The defendant's chosen lawyer argued that s/he was not against the claims submitted by the witness, although s/he should not participate in such a procedure, but anyway s/he showed that the defendant would chose the simplified procedure in the case of recognition of guilt; s/he totally assumed all charges, including those against the witness B.D..

Task

How will the preliminary chamber judge take into account the claims made by the witness? Were there violations of legal provisions related to the witness B.D.? Motivate.

Presentation of legal solutions

1. The witness B.D. is without doubt a victim of trafficking in human beings, but he chose not to participate in the criminal trial as injured party or civil party, under Art. 81 paragraph 2 of the C.P.C.; he expressly maintained this position before the judge of preliminary chamber. The preliminary chamber judge will dismiss as inadmissible the request of the witness to return the

case to the Prosecutor's Office, without the participation of the witness in this procedure, without being able to invoke claims and exceptions regarding the lawfulness of the court's notification, the lawfulness of the provision of evidence or the execution of the acts by the criminal prosecution bodies under Art. 342-345 of the C.P.C..

2. The fact that the witness has not been summoned meets the legal provisions; only the parties and the injured person participate in the preliminary chamber procedure, under Art. 344 paragraph 4 of the C.P.C.. The communication of the document instituting the proceedings to the witness has no legal basis, as long as the provisions of Art. 344 paragraph 2 of the C.P.C. provides that the indictment shall be communicated only to the defendant (not to the other parties or injured parties), namely the right to consult the case file for the other parties and the injured party. Therefore, even less the document instituting the proceedings may be communicated to the witness who cannot even participate in such a procedure.

The fact that the full name of the witness was available on the court portal may raise issues from the point of view of respecting the right to the protection of personal data, as long as such information was not required to appear publicly.

Case Study 3

By the indictment no. XX/D/P/2010 of the Prosecutor's Office attached to the High Court of Cassation and Justice DIOCT – The Territorial Service of Bucharest – on 16.10.2015 it was ordered the indictment together with other defendants, of the defendant B.A. *in provisional detention for the offenses* of constitution of an organized criminal group, a deed provided by Art. 367 paragraph 1 of the C.C.; trafficking in minors, deed provided by Art. 211 paragraph 1 of the C.C., with the application of Art. 35 paragraph 1 of the C.C.; (related to the minor victims D.T.R.M., A.E., D.L.E., I.F.D., A.R.M. and V.(P) F.I.); trafficking in persons, deed provided by Art. 210 paragraph 1 of the C.C., (related to the adult victim B.V.); pimping, deed provided by Art. 213 paragraphs 1 and 3 of the C.C. (related to the civil party/defendant L.A.M.); all with the application of Articles 5 and 38 of the C.C.. In fact, it was noted that before 2003, together with the defendants G.M.I. (concubin), B.D. (brother), P.D. (cousin), S.F. (sister-in-law), D.P., D.V. (brothers-in-law), the perpetrators B.E. (sister, deceased), I.M. (mother, deceased) and others, constituted an organized criminal group that was supported by other persons for the purpose of committing the offense of trafficking in persons/minors; in the period 2003 - October 2012 they exploited the minor victims D.T.R.M., A.E., D.L.E., I.F.D., A.R.M. and V.(P) F. I., the adult victim B.V. or facilitated the practice of prostitution by the civil party/defendant L.A.M., all these for the purpose of obtaining material benefits.

All injured parties were heard during the trial, except for the minor victim V.(P)F.I. and the defendants who did not want to make statements. During the trial dated 10.02.2017, a witness with protected identity was heard in a non-public hearing, as well as the witness B.V., an adult victim of trafficking in human beings, who refused to participate in the criminal proceedings as injured party or civil party. However, she requested to be assisted by a chosen lawyer who was unable to appear at the trial; the defendants and the prosecutor opposed arguing that the witness's right to be assisted by a chosen lawyer when the privilege against self-criminality is objected, but in the present case - in relation to the facts set out in the document instituting the proceedings and the statement of the witness given during the criminal prosecution - there is no such risk. The court heard the witness in the absence of the chosen lawyer, pointing out that the lawyer was required to be present at the case, at the established hour (12.00).

The defendant B.A. requested the re-hearing of the injured party A.P.M. who was heard by the court on 23.09.2016, given that the defendant B.D. (co-defendant in the case) in the meantime married to this injured party, so it is likely that this injured party changed her statements concerning the defendant B.A., especially because it is necessary to determine how the injured party had come to marry this defendant and the fact that she was not as innocent as she looked. At the same time, the lawyer chosen by B.A. requested the release of a copy of the record of the hearing dated 10.02.2017 when the witnesses were heard, indicating it was necessary for the defendant's personal archive.

The duty lawyer of the injured party A.P.M. opposed to the re-hearing request, showing that although the victim married one of the defendants it did not mean that she was not traumatized for what

happened to her, and she did not intend to appear before the court after her hearing dated 23.09.2016, asking for the judgement of the case in her absence.

The court accepted both claims submitted by the defendant A.B., by virtue of the full exercise of the right of defense, and postponed the judgement of the case with a view to hearing the injured party A.P.M. and of other five witnesses indicated in the document instituting the proceedings.

Task Show and motivate whether the court has acted correctly at the trial dated 10.02.2017.
Presentation of legal solutions

1. The witness B.V. had to be heard in the presence of the lawyer, legal assistance being mandatory, under the provisions of Art. 44 of Law 678/2001, the adult witness being a victim of trafficking in persons within the meaning of Articles 43 and 44 of the Law no. 678/2001; therefore, the privilege against self-incrimination is not relevant in terms of the right to legal counselling. The court could not proceed to the hearing of the witness during the trial dated 10.02.2017, as long as she had a chosen lawyer; in the case of the unjustified absence of the chosen lawyer, the Court could have ordered the appointment of a duty lawyer and postponement of the trial for another term when the witness could have been effectively assisted by a duty lawyer.
2. The court wrongly admitted the claim of the defendant's B.A. lawyer concerning the re-hearing of the victim A.P.M. because there were no reasonable grounds for this re-hearing, as long as she had already been heard by the court at another term of the trial, thus violating the provisions of Art. 12 point 4 letter a and Art. 15 point 3 letter e of the Directive 2011/36/EU, as well as Art. 20 paragraph 1 letter b and Art. 23 paragraph 3 letter c of the Directive 2012/29/EU on the victim's right to prevent repeated victimization which provide for the avoidance of repeated hearings of victims when they are not strictly necessary, and the avoidance of addressing unnecessary questions to the victim about his/her private life („how the victim came to marry a co-defendant").
3. The release of electronic copies of the record of the court hearing shall be made under the provisions of Art. 369 paragraph 6 of the CPC, respectively: *Upon request, the parties, at their expense, may obtain an electronic copy of the record of the hearing of the case, except for the cases where the hearing was not public in whole or in part.* In the present case, the hearing of the witnesses took place in a non-public hearing and the lawyer of the defendant B.A. did not provide a valid ground for the release of this copy, not contesting the statements of the witnesses concerning the way in which the statements were recorded, without contesting the registrar's notes at the hearing. In non-public hearings the release of such copies must be duly justified, which is not the case here.

Case Study 4

By the indictment no. 8xxD/P/2011 of 28.01.2015, it was ordered the preventive detention of the defendants of F.F., B.A. and D.T. for 5 trafficking crimes, deeds provided and punished by Art. 210 paragraph (1) letter a) of the C.C. with the application of Art. 38 paragraph (1) of the C.C. and the offense of establishing an organized criminal group provided by Art. 367 paragraph (1) of the C.C., all with the application of Art. 38 paragraph (1) C.C.. The case was filed before the B. Tribunal on 30.01.2015 under no. xxx/3/2015.

The document instituting the proceedings noted the following:

At the beginning of 2011, together with the defendant F.F., as general manager of S.C. F. S.R.L. and with the defendant B.A. they constituted an organized criminal group for the purpose of committing trafficking in human beings by exploitation through work and by misleading through mediation contracts; in February 2011 they recruited the injured parties P.N., N.C.C., N.A., F.F., F.M.G. for the purpose of their exploitation through work in Spain in violation of the legal norms on working conditions, salary, health and safety.

Therefore, the said F.F. and F.C.M., through the company SC F. SRL, based in B., xxx Street S., flat x, sector x, recruited the victims by means of advertising announcements and concluded mediation contracts with them sending them abroad; once arrived there, the injured parties were transported from one locality to another, with the false promise that they would find work at the respective place. From the evidence provided in the case it appeared that on the rare occasions when

the injured parties were taken to the field to perform various works, they did not receive their promised money.

Specifically, the aforementioned have ensured the injured parties N.C.C., N.A., F.F., F.M.G. that their jobs were ensured by the defendants B.A. and D.T. who were presented as the representatives of the foreign employer.

The verifications performed revealed that the company SC F. SRL was not authorized by the Territorial Labor Inspectorate to provide mediation services in the field of recruitment and placement of labor in the country or abroad, and the said B.A. and D.T. were not authorized to provide services specific to a foreign employer and to represent any foreign employer in Spain. Moreover, the Romanian company did not conclude real employment contracts with the foreign employer, within the meaning of Art. 8 letter d) of the Law no. 56/2000, republished.

Even if, according to the provisions of Art. 13 of the Law no. 156/ 2000, the non-fulfillment of the obligation to register within the territorial labor inspectorate in whose jurisdiction the employment agent is located shall be sanctioned as an administrative offence, as misleading the injured parties does not reside in the absence of this authorization, but in the presentation as true of a false act, the victims being persuaded, after mediation, that once they arrive in Spain they would be legally taken over by the foreign employer who would conclude their employment contracts and offer them a paid work.

The criminal group was initiated in the beginning of 2011 by the defendant F.F. and the said V.R.C., subsequently being co-opted in order to achieve the criminal purpose (labour exploitation in Spain) and the defendant D.T. together with the defendant B.A..

In the above-described manner, the said F.F., F.F.C., V.R.C., B.A. and D.T. misled the injured parties by using ingenious dolossive means, attempting to make legitimate the so-called employment contracts of the Romanian citizens abroad, capturing the interest of a large number of applicants and thus obtaining illicit income.

Following the seising of the court and the beginning of the judgement in the case, the court declared the hearing non-public, considering that the public court hearing would affect the private life of the injured parties; from the statements made during the prosecution would result that they were forced to commit certain illicit activities (theft, begging) or degrading activities (looking for food through rubbish to ease their hunger while staying in Spain); they did not want their family or local communities to know where they live in present.

At the trial dated 10.06.2016, the injured party P.N. submitted a claim requesting the court not to display the writ of summons on the door of the house and not to send the police at his/her home in order to be brought to the court, because s/he does not want to make statements and feels like arrested. In fact, s/he learnt from the local press that the defendant D.T. was placed under judicial control two weeks ago, although s/he asked to be informed of his/her release during the criminal prosecution. He stated he did not want to be represented by a duty lawyer and did not want to deal with justice anymore.

At the same time, the representative of the Spanish Embassy presented himself/herself as an observer, as the facts took place in Spain. The defendants opposed to the presence of the representative of the Spanish Embassy, because the legal proceedings concerning the defendants were ongoing in Spain at that time. The court did not pronounce anything on this issue and deferred the case for summoning and hearing the injured party P.N., the only person who did not appear before the court and the last person to be heard (all other persons and witnesses being already heard), also issuing an order for bringing of the injured party P.N. who unreasonably did not appear before the court. It was maintained the delegation of the duty lawyer of the injured person P.N..

Task

Analyze and motivate the measures taken by the court during the time dated 10.06.2016.

Presentation of legal solutions

1. The summon of the injured party P.N. by displaying the writ of summons on the door of the house is unlawful, because in case the injured party is not found home, a notice (and not the writ of summons) shall be displayed on the door of the house; the postman shall leave a notice in this respect, mentioning the date when the injured party can appear at the court to receive personally the envelope containing the writ of summons - Art. 261 paragraph 4 of the C.P.C..
2. Regarding the fact that the injured party was not informed about the defendant's release (even release under judicial control), the Criminal Procedure Code does not make the exercise of this

right conditional on the existence of a new written request to the court if the injured party submitted such a claim during the criminal prosecution. Therefore, there were violated the provisions of Art. 111 paragraph 5 of the CPC and Art. 6 paragraphs 5 and 6 of Directive 2012/29/EU.

3. The presence of others in the trial of a case when it is judged in a non-public hearing is allowed, but only under certain conditions: either under the law (the persons indicated by the provisions of Art. 24 of Law No. 678/2001 - the parties, their representatives, lawyers, representatives of the National Agency against Trafficking in Persons, respectively the provisions of Art. 352 paragraph 6 CPC) or under the court's consent (other persons than those mentioned in the text whose presence is deemed necessary by the court). As long as the representative of the Spanish Embassy was not one of the persons listed by the law, the court had to decide on his/her presence in the courtroom, all the more as the defendants opposed his/her presence.
4. The representation of the injured party by a duty lawyer (even despite waiving of this right by the injured party P.N.) is correct, the legal counselling being mandatory in the case of victims of trafficking and not subject to their consent for legal counselling, under Art. 44 of the Law no. 678/2001.
5. Taking measures to bring the injured party through coercion (issuance of an order for bringing) may result in the victim's secondary victimization, since the court does not reasonably justify why it is necessary to hear this party; under the provisions of the Criminal Procedure Code, the injured party is has the right and not the obligation to make statements in the case. Therefore, there were violated the provisions of Art. 12 and Art. 15 of the Directive 2011/36/EU, as well as the provisions of Art. 20 of the Directive 2012/29/EU, the legal provisions to prevent repeated hearings of victims when they are not absolutely necessary, and to avoid asking unnecessary questions to the victim about his/her private life (the victim's right to prevent repeated victimization).

CHAPTER 5

FINANCIAL COMPENSATION FOR VICTIMS OF HUMAN TRAFFICKING IN ROMANIA

For the damages inflicted on them by the crime, the victims of trafficking in human beings are entitled to remedies in kind (medical treatment not covered by health insurance or income they were deprived of while being trafficked etc), but more so to remedies for moral damages – most for often psychological suffering (including reliving the trauma during hearings or negative impacts on family and social life) and impact on health. In the national law, the victims of trafficking in human beings may obtain compensations either by initiating civil action within or concurrently with the criminal proceedings or by obtaining financial compensations from the government. The relevant legal provisions are included in the Code of Criminal Procedure and Law no. 211/2004 instating measures for the protection of victims of crime.

5.1. Initiation of civil action in criminal proceedings

Applicable law: Article 19 - 26 CCP

The civil action is undertaken by victims or by their successors, who become a civil party against the defendant and, as applicable, against the party with civil liability and seeks to establish the civil liability in tort of the persons liable under the civil law for damages caused by having committed an act that is the subject matter of criminal action.

When a victim lacks legal competence, or has limited legal competence, *the civil action is initiated on their behalf by their legal representative or, as applicable, by the prosecutor*, and, depending on the interests of the person on whose behalf this is initiated, is aimed at holding responsible the person that has civil liability in tort.

A civil action in criminal proceedings may be initiated by a written or oral petition/statement (recorded in a report or a hearing resolution) no later than the commencement of the judicial examination. The relevant judicial bodies are under the obligation to inform victims on the existence of such right.

The plaintiff is required to indicate the nature and scope of claims, as well as the reasons and evidence on which such claims are based. Until completion of judicial examination, the plaintiff may: correct clerical errors contained in the application to become a civil party; increase or decrease the scope of claims; and request remedy of damages through the payment of monetary compensation, if an in-kind remedy is no longer possible.

In the event that any of the above-mentioned requirements are not met, the victim or its successors may no longer become civil party in criminal proceedings; however, they may file such action with a civil court. If the right to remedies was conventionally assigned, the assignees **may not** initiate civil action in criminal proceedings. If such right was assigned after the victim became a civil party in criminal proceedings, the civil action may be disjoined (judged by the same criminal court, but separately).

A civil action seeking to hold liable the defendant and the party with civil liability filed with a criminal or civil court *is exempted from judicial stamp fees*.

The action to establish the civil-delictual liability of the party with civil liability (that, in the civil action, has all the rights provided by law for a defendant) may be introduced in criminal proceedings upon request by the party entitled under the civil law before the commencement of the judicial examination and the prosecutor is under an obligation to request introduction of a party with civil liability in the criminal proceedings within the same deadline. However, a party with civil liability may intervene in criminal proceedings until completion of the judicial examination conducted by the

court of first instance, and shall continue procedures from the stage where they are at the moment of intervention.

Since the civil action is litigant-led, the plaintiff may waive all or any of the claims he/she raised, before the completion of debates in appeal, either by written application or verbally, in the court hearing. Nevertheless, the plaintiff *may not change his/her mind in respect of such waiver and may not file an action with a civil court in relation to the same claims.*

Furthermore, in respect of civil claims, the defendant, the plaintiff and the party with civil liability may enter a settlement or mediation agreement, under the law. The defendant, *based on the consent of the party with civil liability*, may accept all or part of the civil party's claims, and the court shall order indemnifications, to the extent of such acknowledgment, whilst evidence may be produced in support of the rejected claims.

A civil action shall remain under the competence of jurisdiction of the criminal court in case of death, reorganization, winding up or dissolution of a civil party, if its heirs or, as applicable, successors in title or liquidators explicit their choice to continue the civil action, within maximum two months as from the date of such death or reorganization, winding up or dissolution. In case of death, reorganization, winding up or dissolution of a party with civil liability, a civil action shall remain under the competence of jurisdiction of the criminal court, if the civil party indicates the heirs or, as applicable, successors in title or liquidators of the party with civil liability within maximum two months from the date when it acknowledged the relevant circumstance.

The physical and moral losses are to be remedied in compliance with the civil law, namely in kind (by restitution of a specific object, return to previous condition, fully or partially voiding a document, and by any other means of remedy) or by the payment of a money compensation (when a remedy in kind is not possible).

Freezing orders for repairing damages caused by crime

The freezing orders issued during the criminal proceedings are a guarantee that the defendant is solvent when the final judgement of the criminal case is passed.

According to Article 249 of the CCP, the preliminary chamber judge or the court, officio or upon request by the prosecutor, during preliminary chamber procedure or throughout the trial, may order asset freezing by order or, as the case may be, by a reasoned court resolution, in order to avoid concealment, destruction, disposal or dissipation of the assets that may be subject to special or extended confiscation or that may serve to secure the payment of a fine or court fees or of damages caused by the crime.

Asset freezing consists of freezing movable and immovable assets, based on a restraint³ order, with the proviso that assets belonging to a public authority or institution or to other public-law legal

³ According to Article 252 CCP, the entity that enforces the freezing order is required to identify and evaluate the seized assets, being permitted to resort, if necessary, to evaluators or experts. It is mandatory to seize perishable goods, objects made of precious metals or stones, foreign payment instruments, domestic securities, art and museum works, valuable collections as well as sums in cash subject to the freezing order. Perishable goods are to be delivered to the relevant authorities, according to their field of activity, which are required to receive and sell them immediately. Precious metals or stones or items made of such, as well as foreign payment instruments shall be deposited with the nearest bank. Domestic securities, art and museum works and valuable collections shall be delivered for storage to specialist institutions. The objects referred to under paragraphs (4) and (5) shall be delivered within 48 hours of their collection. If such items are absolutely necessary for the criminal investigation, preliminary chamber procedure or the trial, they may be delivered at a later time, but no later than 48 hours from the return of a final court decision in the case in question. Seized assets shall be stored until the freezing order is lifted. The moneys resulting from any sale according to Paragraph (3) and any money seized under Paragraph (2) shall be deposited in an account set up in compliance with the relevant special regulations, within 3 days from the seizure of money or sale of assets. Other movable assets subject to the freezing order shall be deposited under seal or seized, it being possible to appoint a custodian.

In this same context, reference should also be made to the provisions of Article 27 (1) of Law no. 318/2015, according to which, the National Agency for Management of Seized Assets manages and keeps track of the money seized in accordance with Article 252 (2) of Law no. 135/2010, money resulting from the sale of perishable goods in accordance with Article 252 (3) of Law 135/2010, money resulting from the interlocutory sales in accordance with Article 2521 of Law no. 135/2010. Also, in compliance with Article 28 (1) of Law no. 318/2015, at the request of the prosecutor or of the court, the Agency [National Agency for Management of Seized Assets] shall temporarily store and manage seized movable assets whose individual value exceeds the RON equivalent of 15,000 EURO at the moment when the seizing measure is ordered; for this purpose, the Agency is appointed custodian, under Article 252 (9) of Law no. 135/2010, as amended and supplemented.

person or property exempted by law *cannot* be seized. Asset freezing intended to the *repair damages caused by the crime* and to guarantee the payment of court expenses may be ordered against the assets of the suspect or the defendant and of the person with civil liability, up to the concurrence of their probable value. During the criminal investigation, the preliminary chamber procedure and the trial such measures may also be ordered **on request by the plaintiff**. The freezing orders issued *ex-officio* by the judicial bodies listed in paragraph (1) may also be used by the plaintiff.

Asset freezing *is mandatory when the victim lacks or has limited mental competence*.

The freezing order or its enforcement may be challenged during the criminal investigation under Article 250 CCP, more specifically, within 3 days from the notification of the freezing order or its enforcement, the suspect, defendant or any other interested person may challenge the asset freezing order before the judge for rights and liberties of the court which would have jurisdiction to settle the case in first instance. Against the manner in which such asset freezing order is enforced by the preliminary chamber judge or by the court, the prosecutor, the suspect, defendant or any other interested person may file a challenge with that judge or court, within 3 days from the enforcement of such order.

Recent amendments to Article 250¹ CCP (on the grounds of rulings by the Constitutional Court) provide for the possibility to also challenge **freezing orders issued during the trial**. Thus, the defendant, prosecutor or any other stakeholder may challenge a freezing order issued by the preliminary chamber judge, the court of first instance or the court of appeal, within 48 hours from the judgement or notification of the order, as applicable.

The challenge is to be filed with the preliminary chamber judge, the court of first instance or the court of appeal that passed the judgement being challenged. The challenge (and the case file, as applicable), shall then be forwarded to the preliminary chamber judge from the court of the upper of jurisdiction or the court of upper jurisdiction, within 48 hours from it being filed. However, the challenge does not result in the suspension of enforcement.

With regard to **the sale of assets seized during the trial**, the trial court may order the disposal of the seized assets *ex-officio* or on request by the prosecutor, one of the parties or the custodian. For this purpose, the trial court shall summon the parties and the custodian of the assets, if appointed, in chambers, with no less than 10 days prior notice, with the mandatory participation of the prosecutor. If the duly summoned parties fail to appear, shall not prevent the procedure. In chambers, the court shall debate the value of the seized assets with the parties and inform them that they are entitled to make observations or file requests in relation to such assets. The court shall rule by reasoned judgement on the sale of and any petitions related to any seized assets. The court judgement shall be final.

According to Article 256 CCP, during trial, the court may order measures for the return to the condition before the crime was committed, wherever the change in that original condition was the result of the crime and such return is feasible

In practice, garnishment was demonstrated to be a more effective measure, since the moneys owed in any way by a third party or by the victim to the suspect, defendant or to the party with civil liability are garnished within the limits established by law, from the date of receipt of the garnishing order or freezing order. Such moneys will be deposited by the debtors at the disposal of the judicial body having ordered the garnishment or of the enforcement body, as applicable, within 5 days from their due date, and the receipts are to be surrendered to the prosecutor, preliminary chamber judge or court within 24 hours of depositing⁴.

When a civil action seeks remedy of physical damages through the restitution of a specific object and such restitution is possible, the criminal trial court shall order that the relevant object **be**

⁴ According to article 27 (1) of Law no. 318/2015, the National Agency for Management of Seized Assets manages and keeps track of the money owed under any title to the suspect, defendant or civilly responsible party and subject to seizure under article 254 of Law no. 135/2010.

returned to the civil party. Even when a party did not file a civil action in criminal proceedings, the court shall decide on the ***entire or partial nullification of a deed or on restoring the status prior to the crime.***

Where the defendant is acquitted or the charges are dropped on the grounds of Article 16 (1) b) e), f), i) and j), where the criminal proceedings are terminated on the grounds of the victim withdrawing the complaint, and in the cases provided for by Article 486 (2), ***the court shall not judge the civil action.*** This legal provision also covers the situation where criminal charges are dropped on the grounds of statutes of limitation of the defendant's liability, so that the plaintiff does not receive any compensation and can file a civil action with a civil court. This legal solution was harshly criticised and was declared unconstitutional by the Constitutional Court, with the requirement to amend the law such as to ensure that the criminal court resolves the civil action, by administering evidence to such effect.

Furthermore, in compliance with Articles 249 – 254, when admitting the civil action, the court should examine the need to freeze assets as required for covering civil liability, if such measures have not already been ordered, and rule on the return of goods and restoration of previous condition, in compliance with Articles 255 and 256. The provisions in the ruling concerning the asset freezing and the restitution of goods are enforceable.

According to Article 397 (5) of the CCP, when the court leaves the civil action unsettled in compliance with the provisions of Article 25 (5), the asset freezing order is maintained. These measures shall terminate as such if the victim does not file an action in a civil court ***within 30 days from the court ruling becoming final.***

When, during the criminal investigation, the preliminary chamber procedure or the trial the defendant was placed under judicial control on bail or the decision was taken to replace another preventive measure with judicial control on bail and the civil action is admitted, the court shall order the damages for the consequences of the crime be taken from the bail, according to Article 217 of the CCP.

It should also be mentioned that, in compliance with Article 19 (4) of the CCP, a civil action is to be settled within the criminal proceedings, if this does not lead to exceeding the reasonable duration of the trial, provisions that are correlated with Article 26 of the CCP, which provides that *the court may sever a civil action, when its settlement would lead to exceeding the reasonable term for the settlement of the criminal action, but the settlement of the civil action shall remain under the jurisdiction of the criminal court.* Ex-officio or on request by the prosecutor or the parties, the court shall order the severance by a final resolution and *evidence submitted before the severance are to be used for settling the severed civil case.*

With regard to the possibility to order the civil party to pay ***judicial expenses*** under Article 275 and Article 276 CCP and in case the defendant is acquitted, the victim/plaintiff shall be ordered to pay the defendant's judicial expenses, if generated by the former. However, in practice, such situations are extremely rare, and even more so in the case of victims of trafficking in human beings, where no procedural fault can be found.

5.2. Settlement of civil actions in civil courts

Applicable law – Article 27-28 CCP

The situations where civil actions are settled in civil courts are covered by Article 27 CCP, thus:

- 1. A civil action is not filed in the criminal trial:*** If no civil action for reparations was filed in the criminal proceedings, the victim or his/her successors may file an action with a civil court for compensations for injuries sustained from the crime. The civil case shall be stayed after the initiation of criminal trial and until settlement of the criminal case by the court of first instance, but for no longer than one year.
- 2. The criminal court does not settle the civil action:*** A victim or its successors who filed a civil action in criminal proceedings may file an action with a civil court if, through a final sentence, the criminal court left the civil action unsettled. It is very important to point out that the evidence produced during the course of criminal proceedings may be used before the civil court.
- 3. The stay of the criminal trial:*** A victim or its successors who filed a civil action in criminal proceedings may file an action with a civil court if the criminal proceedings were stayed. If

criminal proceedings are resumed, the action filed with the civil court shall be stayed *after the resumption of the criminal trial and until settlement of the criminal case by the court of first instance, but for no longer than one year*. A victim or his/her successors who initiated an action before a civil court may leave this court and address the criminal investigation body, the judge or the court, if the criminal action was initiated subsequently or if criminal proceedings were resumed following a stay. A civil court may not be abandoned if it rendered a court decision, even a non-final one.

4. The losses are not entirely covered

In the event that civil action was initiated by the prosecutor, if the evidence shows that damages were not fully covered through the final sentence of the criminal court, the difference may be claimed through action filed with a civil court. A victim or its successors may file an action with a civil court for the remedy of damages incurred or discovered after they filed a civil action in criminal proceedings. In the above-mentioned cases, the issue of *res judicata* may be raised, as regulated by Article 28 CCP, providing that a final sentence of a criminal court has *res judicata* authority before the civil court examining the civil action, in respect of the existence of the crime and of the perpetrator. The civil court is not bound by a final sentence deciding acquittal or termination of criminal proceedings in respect of the damages or guilt of an author of a crime. On the other hand, a final sentence of a civil court settling a civil action does not have *res judicata* authority before criminal judicial bodies in respect of the existence of a criminal act, the person having committed it and his/her guilt

5.3. Financial compensation granted by the government to victims of certain crimes

This type of compensation is regulated in detail in Chapter 5 of Law no. 211/2014 instating certain measures for the protection of victims of crime.

Financial compensation is granted on request to *the following categories of victims*, as per Article 21 of this special law:

a) victims of attempted murder, or first degree murder, listed under Articles 188 and 189 of the Criminal Code, victims of bodily harm, provided by Article 194 of the Criminal Code, victims of a crime committed with intent that resulted in bodily harm of the victim, rape, sexual intercourse with a juvenile and sexual assault, provided by Articles 218 - 220 of the Criminal Code, *trafficking in human beings and underage persons*, provided by Articles 210 and 211 of the Criminal Code, terrorism, as well as any other crime committed with intent and violence;

b) spouse, children and dependants of persons deceased as a result of the crimes provided at Paragraph (1).

Financial compensation is granted to the victims listed in Paragraph (1) if the crime was committed in Roma and the victim is a Romanian citizen; a foreign citizen or stateless individual legally residing in Romania; a citizen of a EU Member State being legally present in Romania at the time of the crime; or a foreign or stateless citizen resident in a EU Member State being legally present in Romania at the time of the crime. In the case of victims that are not included in the above-listed categories, the financial compensation is granted based on the international conventions signed by Romania.

The Law establishes a number of requirements that must be met in order to be granted financial compensations.

Thus, the financial compensation is only granted to the victim *if he/she reported the crime to the criminal investigation agencies within 60 de days from* the date of the crime. In the case of a spouse, children or dependants or persons deceased as a result of crimes provided by Article 21 (1), the 60 days deadline shall be calculated from the date when the victim became aware of the crime; when it was physically or psychically incapable for the victim to report the crime, the 60 deadline shall be calculated from the cessation of the incapacity state.

According to Article 23 (4) of Law no. 211/2004, victims bellow the age of 18 and those legally incompetent are not required to report the crime. The minor's or legally incompetent person's legal representative may report the crime to criminal investigation agencies.

Article 24 of the same Law also lays down important requirements concerning the *deadlines for claims*, namely:

- Where **the perpetrator is known**, financial compensation may be granted to the victim if the following conditions are met:

- a) the victim submitted the claim for financial compensation within one year, thus:

- 1. from the date of the final judgement of the criminal court sentencing or acquitting the defendant, in certain cases, or granting civil compensation or the termination of the criminal trial, in certain cases;

- 2. from the date when the prosecutor dropped the charges, in certain cases;

- b) the victim filed a civil action in the criminal proceedings, except when the charges were dropped on the grounds of Article 315 (1) a) CCP;

- c) the perpetrator is insolvent or absconding;

- d) the victim did not obtain full reparations for the losses from an insurer.

When the victim is in incapacity to make a claim for financial compensation, the one year deadline provided in Paragraph (1) a) shall run from the date when the incapacity state ceased.

Where the court ordered the severance of the civil action from the criminal proceedings, the one-year deadline starts from the date the decision to admit the civil action remained final.

At the same time, the underage and legally incompetent victims are not bound by the requirement of Paragraph (1) b), namely to file a civil action in the criminal proceedings.

- Where **the perpetrator is unknown**, the victim may make a claim for financial compensation within 3 years from the crime, if the requirements of Article 24 (1) d) are met.

- When **the victim is underage** and his/her legal representative did not make a claim for financial compensation within the deadlines provided in Article 24 or 25 of the Law, as applicable, these deadlines run date when the victim turned 18.

The types of losses for which financial compensations may be claimed are provided in Article 27 of the Law, namely:

- (a) in the case of victims provided in Article 21 (1) a) – the person subject to the crime

- 1. hospitalisation and other categories of medical costs incurred by the victim;

- 2. losses resulting from the destruction, degradation or rendering useless of the victim's assets or loss of possession of assets as a result of the crime;

- 3. earnings of which the victim is deprived as a result of the crime;

- (b) in the case of victims provided in Article 21 (1) b) – spouse, children and dependants of persons deceased as a result of crime:

- 1. funeral costs;

- 2. support that the victim is deprived of as a result of the crime.

The financial compensation for physical loss is limited to the equivalent of **10 national minimum gross base wages** for the year in which the victim made the claim for financial compensation. The moneys paid by the perpetrator as civil compensation and the indemnity obtained by the victim from an insurer for losses incurred as a result of crime are subtracted from the compensation granted to the victim by the government.

The victim may apply with the Crime Injuries Compensation Board **for an advance** on the financial compensation. Such advance payment may be granted if the victim is in financial difficulty, within the limit of **10 national minimum gross base wages** for the year in which the victim requested the advance payment. The advance payment may be requested in the financial compensation claim or in a separate claim that may be filed at any moment after the crime was reported to the law enforcement authorities or the court, if applicable, and no later than 30 de days from the submission of the compensation claim, in case the advance payment is requested in a separate claim that should also indicate the status of the judicial proceedings.

The victim's application for an advance on the financial compensation shall be settled within 30 days from the application, and if the claim for financial compensation is rejected, the victim shall be required to reimburse the advance payment, except when the claim for financial compensation was rejected only on the grounds of the perpetrator being insolvent or absconding. Also, the victim that was granted an advance on the financial compensation shall be required to reimburse it if he/she did not submit the claim for financial compensation within the deadlines provided by law.

The financial compensation claim shall be submitted to the County Court of geographic jurisdiction in the area where the victim resides. The claim shall be settled by two judges of the *Crime Injuries Compensation Board set up in each County Court*. Besides the claimant's identification, the

claim should indicate: the date, place and context of the crime that generated the loss; types of losses incurred as a result of the crime; the law enforcement agency or the court to which the crime was reported and the date of reporting, if applicable; number and date of the judgement or of the prosecution document, if applicable, when a final judgement was issued in first instance; the capacity as spouse, child or dependant of a deceased person, in the case of the persons provided for in Article 21 (1) b); criminal record; money paid as damages by the perpetrator or the indemnity obtained by the victim from an insurer for losses incurred as a result of the crime; and amount of financial compensation claimed. Also, the claim should be accompanied by documents supporting the information provided and by any other documents that the victim may have and that may be useful for settling the claim.

The financial compensation claim and the advance payment claim may be formulated by the legal representative of an underage or legally incompetent person or by victim protection NGO's, if signed by the victim, and are exempt from the payment of judicial stamp duty.

Both the financial compensation and the advance payment claim shall be dealt with in chambers, by summoning the victim and with the mandatory participation of the prosecutor. In order to settle the claim, the Board may hear persons, request documents and administer any evidence deemed useful for the settlement of the claim. The decision settling the financial compensation or advance payment claim shall be notified to the victim and may be challenged with the Court of Appeal within 15 days from notification.

Furthermore, since the procedure before the Board and the criminal proceedings may be concurrent, Article 32 of the Law provides for the Crime Injuries Compensation Board's obligation to inform the prosecuting entity, the court judging the crime or the civil court, as applicable, on the financial compensation or advance payment claim submitted by the victim⁵.

In practice, multiple problems occur, given that victims are not correctly or fully informed on their right to claim financial compensation or that, if they claim financial compensation from the government and damages from the defendant, such cannot be granted in full, cumulatively, but are subtracted (the smaller amount is subtracted from the larger one). Moreover, civil damages in a criminal trial are granted at the end of the proceedings that may go on for years (more often than not, trafficking in human beings is committed in the context of organised crime and the cases are complex and involve extraordinary numbers of persons, this encumbering the judicial proceedings).

A highly important aspect is also that the granting of compensation for losses does not equate with receiving it. In most cases, the judgement ordering compensation to be paid to a victim requires enforcement by a court enforcement officer, and the victims do not have the financial resources to undertake the enforcement proceedings, except when they obtain free legal assistance that is also granted under Law no. 211/2004, covering the cost of enforcing the court judgement for compensation.

Claiming financial compensation in cross-border situations

The provisions of Directive 2004/80/CE on compensation of crime victims in cross-border situations were transposed into the national law in Chapter 5¹ of Law no. 211/2004, but also in the Order no. 1319/C/2008 of the Minister of Justice for the implementation of the procedure for provision of financial compensation to victims of violent intentional crimes committed in the cross-border situations provided for by Law no. 211/2004 instating certain measures for the protection of victims of crime. These regulations provide for the right of a victim subjected to crime in another Member State than that of his/her residence to claim compensation from an authority or entity of the Member State in question. A special procedure is instated for the filing and submission financial compensation claims when the victim is subject to a crime committed in a EU Member State and the access of Romanian citizens to financial compensation from the EU Member State where the crime was committed is facilitated.

⁵ According to Article 33 of Law no. 211/2004, the funds required for granting financial compensations or advances thereof to victims of crime are provided from the state budget, through the budget of the Ministry of Justice. The disbursement of financial compensations or advances thereof to victims of crime is effected by the financial departments of County Courts within 15 from the final decision to grant the financial compensation or an advance thereof. The Government, through the Ministry of Justice, subrogates in the rights of the victim that received financial compensation or an advance thereof to recover the money paid to the victim.

5.4. Case Studies

Case Study 1

By a petition filed with County Court I on 09.01.2015 under no. XX, the petitioner A.B. claimed financial compensation for victims of crimes provided for by Law no. 211/2004 total amount of 35,145 Lei, equivalent of ten minimum national gross wages in 2014, income that the petitioner was deprived of between May 2011 and January 2015, calculated at the level of the minimum guaranteed cash income according to Government Decision no. 1091/2014.

In support of his claim addressed to the Crime Injuries Compensation Board of County Court I set up based on Law no. 211/2004, the petitioner showed that:

On 29.04.2011, in the town of S, County I, he was the victim of trafficking in human beings. In fact, on 26.04.2011, at a petrol station on the outskirts of the town, he met the said C.M, representative of the Company Y SRL with its registered office in A, County I, registered on 27.09.2010, including workforce placement in its scope of business. The said C.M. presented A.B. with a written employment offer from a certain T.G. and A.B. signed to acknowledge the offer.

He immediately resigned from SC. G. SRL to leave for Spain, tempted by T.G's offer (convicted by criminal sentence no. XX/F/04.07.2014). On the same day he arrived in the town of S. in Spain – where the accommodation conditions were unsuited for living and resting – the petitioner returned to Romania. The petitioner showed that, deceived by the convict T.G., he had left for Spain being in order to earn more money to cover necessary and useful expenses, to pay the instalments on the loan in amount of xxxxx CHF he has from Pireus Bank and to increase his income because, at the time of the petitioner's departure, his child was attending high school on completion of which the child would move into higher education. Consequently, the *de facto* and *de jure* cause for ending the employment relationship was resignation based on Article 81 of the Labour Code.

Also, he indicated that since his return to Romania, he tried to get a job in order to cover his monthly expenses comprised of the bank loan instalments, school fees and other useful and necessary costs of living. He also mentioned that he had been in uninterrupted employment with his last employer from 2007 until 2011, where he had worked as security guard, with no disciplinary offence, complaints against him or incidents, thus demonstrating his good faith in having a job and obtaining a monthly income for covering all the useful and necessary expenses. Furthermore, he stated that, since his return to Romania, he worked as daysman in agriculture and as a house painter for a number of natural persons who required such services, these being his only sources of income during this time period.

In conclusion of his allegations, the petitioner claimed that he had made all the efforts to get a job and will continue to do so until such time as he will meet the legal retirement requirements.

About the job offer in Spain, more specifically, picking fruit and vegetables, the petitioner claims that he would have earned 800-1200 Euros per month, since the remuneration was 4 Euros per hour and the working day between 8 to 12 hours, this meaning earning between 32 and 48 Euros per day, considering 25 working days per month. At the time he was employed by SC. G. SRL, according to the employment record, his wages were in amount of 720 Lei per month.

Given that at the time of his departure he owed and currently still owes money to the creditor Pireus Bank, a debt in amount of xxxxx CHF, he decided to leave to work, being attracted by the advantageous offer presented to him and, for this purpose, he resigned from SC. G. SRL. The above-mentioned debt is payable in monthly instalments and at the time of his departure he could cover it from the 720 Lei wages.

Also, he showed that, should he had not been deceived by the said T.G. with the job offer in Spain, he would not have resigned from SC. G. SRL and the employer would not have dismissed him.

He deems that he has been deprived of income he could have earned between May 2011 and January 2015 ***in amount of 35,145 Lei that he claims in his the application for financial compensation filed on the grounds of Law no. 211/2004.***

The petitioner filed the following documents: criminal judgement no. XX/F/04.07.2014 issued by Court I in the criminal case no. XXX, remaining final by criminal judgement no. XX of 25.09.2014 by the Court of Appeal B, whereby the defendant T.G. was convicted to **4 years imprisonment** for the continuing offence of trafficking in human beings, to be served in a prison and, among others, admitting in part the civil action initiated by the plaintiff I. G., with the defendant being ordered to pay the latter 450 Euros in physical damages and 1000 Euros in moral damages; report made on 24.02.2015

by the Office of the Court Enforcement Officer A finding that the debtor TG is insolvent; notification from the R. Town Hall indicating that the said T.G. has no movable and/or immovable goods subject to taxation; income statements showing that the petitioner I.G. was not liable for any income tax in 2013 and 2014; certificates issued by the S. Town Hall showing that the petitioner has not property and arable land; Decision no. 556/21.04.2011 of SC.G.SRL showing that the employment was terminated by resignation; proof that, on 06.01.2015, the petitioner registered with the Employment Agency of County I.

The witnesses called by the petitioner (3 witnesses) were heard. The witnesses stated under oath that, after leaving to work abroad and quickly returning disappointed, the petitioner looked permanently for a job.

Task

If you were members in the Crime Injuries Compensation Board of County Court I, what decision would you take in this case? Provide arguments for your opinion.

Presentation of legal solutions

According to Article 21 (1) a) and Article 27 (1) a) 3) of Law no. 211/2004 instating measures for the protection of victims of crime, in the case of the petitioner who was victim of trafficking in human beings, the loss consists of the income that the victim was allegedly deprived of as a result of the crime. The law requires the allegedly lost income to be conditional on the crime, establishing a direct cause-effect relationship between the crime and loss of income.

In this case, the petitioner being deprived of such income throughout the claimed period (May 2011- January 2015) is not a direct consequence of the crime of trafficking in human beings, in the context where the cause of losing the job in Romania is the previous resignation of the petitioner (a voluntary action) and not the specific crime to which the petitioner was a victim of, the more so since he was only trafficked when presented with the employment offer in Spain and only for a day in Spain, after which the petitioner returned to Romania.

It is true that Article 22 of Law no. 211/2004 does not specifically set the diligent search for a job as a requirement for the granting of compensations. However, this requirement is inherent to establishing the relation to the claims (wages not obtained in Romania). In the context where the petitioner claims the wages he did not earn in Romania over a four year period during which he was free in Romania, not being trafficked, it is natural to obtain evidence that it was impossible to find a job and such impossibility was generated by the crime of trafficking in human beings to which the petitioner is a victim.

Moreover, the petitioner registered with the Employment Agency of County I only three days before submitting the claim at hand, as shown by the relevant document on file.

Therefore, in the context of the claim covering income that the victim was deprived of as a result of the crime, the law envisaging rather the income not paid to the victim for work done while being exploited, the legal and sound judgement is to reject the claim.

Case study 2

By a petition filed on 17.11.2014 with County Court B, the petitioner A.B., legal representative of minors X and Y (children of a victim of the crime trafficking in human beings, as incriminated by Article 12 (1), (2) a) and (3) of Law no. 678/2001 in corroboration with Article 5 of the Criminal Code – the trafficking in human beings also resulted in the death of the victim), claimed financial compensation for each minor child in amount equivalent to 10 minimum national base gross wages for 2014, in compliance with Article 27 of Law no. 211/2004, in consideration of the needy status the two minors were left in.

Then petitioner indicated that she had submitted a similar claim under case no. XX judged at County Court B, and was granted 3,500 Lei in funeral costs, so that the 3,500 Lei amount must supplemented with the remaining amount of compensation claimed.

In support of the petition, decision no. X issued on 16.05.2014 by County Court B on the grounds of Article 21 (1) b) and Article 27 and Article 30 of Law 211/2004 granting the victim's children an advance on the financial compensation in amount of 3500 Lei for funeral costs and support for the minors.

County Court B rejected the petitioner's claim showing that:

Having examined the legal grounds based on which the advance on the financial compensation was granted by decision no. X issued on 16.05.2014 by the County Court B and based on which the claim for the remaining portion of the payable financial compensation was filed, the Court established that Law no. 211/2004 provides for financial compensation to be granted to certain categories of victims only once, when the requirements of Articles 23 and following of the Law are met.

According to Article 30 of the same Law, the victim may apply to the Crime Injuries Compensation Board for one advance payment only of the financial compensation, within the limit of 10 minimum national base gross wages in the year in which the victim claimed the advance payment.

Since in this case an advance on the financial compensation has already been granted by the above-mentioned decision, the beneficiaries are not entitled to submit a new claim for a second advance payment, such claim not being possible under the law.

Task

Indicate whether the judgement in this case is sound and legal. Provide arguments for your opinion.

Presentation of legal solutions

The petitioner having applied for and being granted an advance on the financial compensation in amount of 3,500 Lei –representing only funeral expenses – has no relevance, as long as the petition on trial claims financial compensation for each minor child, within the limit of 10 minimum national base, gross wages for 2014, in compliance with Article 27 of Law no. 211/2004.

Even if the petitioner is unaware of the legal meaning of terms (requesting *the supplementing* of the financial compensation), examining the facts as presented and the purpose of the initial petition, it appears that, in fact, she requested not the supplementing of an advance but financial compensation, since she refers specifically to the provisions of Article 27 of Law no. 211/2004.

The Court must differentiate the provisions of Article 27 (1) a) of Law no. 211/2004 in relation to Article 21 (1) a) of the same Law (these not being indicated in the case, and the minors not being included in this category of individuals provided for by law) and the provisions of Article 27 (1) b) corroborated with Article 21 (1) b) of Law no. 211/2004.

By corroborating these last legal texts, it becomes apparent that the financial compensation may be granted to children and dependants of the person deceased as a result of the offence incriminated under Article 1, as is the case on trial [Article 21 (1) b)], and such compensations are granted to the following categories of losses: funeral costs and support of which the victim is deprived as a result of the crime (Article 27 (1) b).

The court was required to qualify the petition on trial correctly in relation to the outcome envisaged by the petitioner and the subjective right which was pursued, the more so since the words used in the petition that specifically and unquestionably requested not the supplementing of the advance (under Article 30 of Law no. 211/2004 that refers to the granting of an advance payment), but financial compensation under Article 27 of the Law.

Furthermore, when settling the case, the court should have also considered that Paragraph 2 of Article 27 concerning the limitation of the amount of compensation to 10 minimum national gross wages only applies to the situations covered in Article 27 a), and not to those covered by Article 27 b), which does not provide for such limitation.

This last text should be seen in corroboration with the provisions of Article 30 (1) of Law no. 211/2004 that sets forth the maximum amount payable as advance, and not the compensation as such. Therefore, according to Article 27 b) of the Law, the compensation may exceed this limit.

Case Study 3

By the petition filed with County Court B on 10.06.2015 under no. XX by the said A.B. on behalf of the minor A.C., victim of trafficking in minors in the criminal case no. ZZZ, a compensation of 5,000 Lei was requested, representing physical losses – cost of hospitalisation, medical tests, and psychological counselling classes.

In support of the petition, the petitioner showed that her daughter, A.C., was a victim of the actions of the defendant C.G. who was convicted by final sentence for the crime of trafficking in

minors, incriminated by Article 211 (2) of the Criminal Code, Article 210 (1) a), b) Criminal Code, the crime of sexual intercourse with a minor, incriminated by Article 220 (1) and (2) Criminal Code. The defendant is serving a 7 years prison term, as per the Decision of the Court of Appeal B no. xx/07.04.2015. The defendant is not solvable and has no movable or immovable property.

The petitioner attached to the petition the following documents: receipt no. xx of 06.08.2014 for 225 Lei that A.C. paid to the Teaching Psychiatry Hospital Prof. Dr. Alexandru Obregia, representing the cost of 9 days hospitalisation as attendant for the juvenile; receipt no. xx/19.05.2015 and invoice no. xx/19.05.2015 whereby A.B. paid 800 Lei representing medical services rendered from 2.08.2014 by SC Medical SRL; receipt no. xx/15.05.2015 and invoice no. xx/ 15.05.2015, whereby A.C. paid 1,150 Lei representing medical evaluation and psychological counselling services provided to the child A.C. in the interval August 2014 – January 2015; expenses claim for patient A.C. prepared by the Teaching Psychiatry Hospital for the amount of 1,233.49 Lei.

Also, the petitioner called two witnesses, acquaintances that are familiar with the juvenile's precarious health state.

De jure, the petition was grounded on the provision of Law no. 211/2004.

In the case, a request was transmitted to Bar of B to designate a lawyer *ex-officio* and the criminal sentence no. x/F of 21 January 2015 issued by County Court I in the criminal case no. XX, rendered final on 07.04.2015 by the criminal decision no. xx/07.04.2015 of CAB was attached, showing that the defendant C. G., currently in the Prison of S., was convicted:

- to 6 years imprisonment and denial of the rights provided by Article 66 (1) a), b), d), e), f), n) and o) of the Criminal Code for 4 years for the crime of trafficking in minors.

- on the grounds of Article 220 (1) and (2) of the Criminal Code corroborated with Article 396 (10) of the Code of Criminal Procedure, the same defendant was convicted to 3 years in prison and denial of the rights provided by Article 66 (1) a), b), d), e), f), n) and o) of the Criminal Code for 2 years for the crime of sexual intercourse with a minor.

- on the grounds of Article 38 (1) of the Criminal Code and Article 39 (1) b) of the Criminal Code and Article 45 (3) a) of the Criminal Code, the defendant C.G. must now serve the longer sentence of 6 years in prison to which 1/3 of the 3 years prison sentence is added, so that the defendant has to serve a 7 years prison term and 4 years denial of the rights provided by Article 66 (1) a), b), d), e), f), n) and o) of the Criminal Code. The above-mentioned decision obliged the defendant C.G. to pay the amount of 500 Euros as moral damages to the juvenile plaintiff, A.C.

Also, a notification from the S Town Hall was also submitted to the file, showing that, currently, Mr. C.G. is not registered for tax purposes with any movable or immovable property. The prisons where the perpetrator serves the sentence pay his health insurance contribution, his income being nil.

On the judgement term of 18.06.2015, in public session, the petitioner A.B., mother of the juvenile A.C. appeared and requested the petition to be admitted as formulated, after previously the Board rejected the testimony of the two witnesses as inadmissible in this procedure, considering the prosecutor's conclusions to such effect.

Task

- 1. Indicate the resolution you would pass if you would be members of the Board judging the petition filed by A.B. as parent of the juvenile A.C.? Provide arguments for your opinion.***
- 2. Identify the errors committed by the Board, if any, in the procedure of judging the petition.***

Presentation of legal solutions

1. Examining the documents submitted in support of expenditure incurred, the petition is only partly grounded, namely for 3,408.49 Lei. Thus, according to Article 21 of Law no. 211 of 27 May 2004 instating certain measures for the protection of victims of crime, *financial compensation is granted on demand to victims of the crime of trafficking in human beings and trafficking in minors, incriminated by Article 210 and 211 of the Criminal Code.*

Financial compensation is granted to the victim for certain categories of losses incurred as a result of the crime, in the case of the victims provided for in Article 21 (1) a), among others, hospitalisation costs and other types of medical expenses incurred by the victim.

The documents submitted to file, namely the certificate from the S Town Hall show that the perpetrator is insolvent, and the victim was not paid any indemnifications from an insurer.

Since all the requirements for the granting of financial compensation are met, as provided for in Article 21 – Article 34 of Law no. 211 of 27 May 2004 instating certain measures for the

protection of victims of crime, based on the documents that certify the expenses for medical care provided to the juvenile (cost of hospitalisation and therapy), the petition should be admitted for the amount of 3,408.49 Lei, amount to be paid out from the state budget, through the budget of the Ministry of Justice, in compliance with Article 33 (1) of Law no. 211/2004.

The compensation is to be disbursed by the financial department of County Court I within 15 days from the judgement being rendered final, in compliance with Article 33 (2) of Law no. 211/2004.

2. The procedural errors are the following:

- The case was judged in public session, in breach of Article 31 (1) of Law no. 211/2004.
- The case was settled without submissions from the court appointed lawyer, though the designation of an *ex-officio* lawyer for the juvenile, victim of trafficking in minors, had been ordered when the petition was first filed;
- The witness evidence is admissible in this procedure, on the grounds of Article 31 (3) of Law no. 211/2004.

Case Study 4

By the petition filed with County Court X, the juvenile petitioner V.R.L., through her legal representative V.M.E., requested the granting of financial compensation on the grounds of Law no. 211/2004.

By the civil decision no. xx/ of 26 February 2016 issued by the County Court X, the challenge on grounds of late submission and, in consequence, the petition for financial compensation submitted by the petitioner V.M.E., as legal representative of the juvenile V.R.L., was rejected.

When making this judgement, the court of first instance considered that, in compliance with Article 24 (1) a) of Law no. 211/2004 instating certain measures for the protection of victims of crime, when the perpetrator is known, the financial may be granted to the victim only if he/she submits an application within one year from the final sentence of the criminal court.

The criminal sentence no. xx of 22.02.2014 issued by County Court M convicting the defendant XY for the crime of trafficking in minors, as incriminated by Article 211 (1) and (2) c) of the Criminal Code in corroboration with Article 5 of the Criminal Code, the victim being the juvenile V.R.L., was rendered final on 19.10.2014, by decision no. xx/2014 of the Court of Appeal of B.

For the enforcement of the payment due by the defendant to the juvenile plaintiff V.R.L., the latter called on a court enforcement officer who, on 28.02.2015, notified her that: "XY does not own property and has no money in banks or income that may be garnished, being away, in Spain".

The petition for financial compensation was filed on 4.02.2016, after the one year deadline laid out by Article 24 (1) a) of Law no. 211/2004.

In this situation, the County Court appreciated that the one year deadline provided by law is imperative and the failure to meet it results in the forfeiture of the right to claim financial compensation.

The petitioner V.R.L. challenged this decision through her legal representative, requesting the decision to be overturned and the petition to be admitted by the court.

In support of the challenge, the petitioner alleged that the court of first instance erroneously interpreted the provision of Article 24 c) of Law no. 211/2004, reducing its active role to a simple mathematical operation of calculating the one year deadline from the date of the final enforceable title.

Based on the logical method, the legal provisions should be interpreted to the effect of its application, and Article 24 c) of Law no. 211/2004 provides precisely for the situation that the court of first instance ignored, namely the calculation of the one year deadline from the time when the perpetrator is insolvent or absconding.

In the case, both requirements set forth by Article 24 c) of Law no. 211/2004 are met: the perpetrator being insolvent and absconding.

Calculating the one year deadline from the sentence being rendered final, without considering the diligences of the creditor to recover the amounts due to him/her by enforcement of payment, puts the later in the fortuitous situation of being obliged to enforce the sentence within one year, and not 3, as provided in Article 3715 of the Code of Civil Procedure. The law maker provided specifically for the possibility to submit a financial compensation claim within one year from the time the perpetrator is found to be insolvent precisely in order not to limit access to justice.

The appellant also showed that she informed the court of first instance that she was only aware of the 3 years deadline for claiming compensation and the obligation of the court enforcement officer to establish that the defendants are insolvent.

Since the petitioner first addressed the court enforcement officer for the recovery of the debt from the defendants, the enforcement officer found that the debtors were insolvent, and when the petitioner petitioned the court for financial compensation the one year deadline from the final criminal sentence had elapsed, the court of higher jurisdiction (court of appeal), in its resolution of 17.04.2016, submitted to the Constitutional Court a challenge on the constitutionality of Article 24 (1) of Law no. 211/2004. The Constitutional Court Decision no. xx/ of 13 November 2016, the challenge on the constitutionality of Article 24 (1) a) of Law no. 211/2004 was rejected, indicating that the right to claim financial compensation is not confounded with the enforcement of a court decision, given that the right in question is a benefit granted by the state that is based on the principle of social justice and solidarity. For the purpose of preventing potential abuse or limiting any perturbing effects on the stability and security of civil legal relations, this right can only be exercised in a climate of pre-established legal order. Furthermore, requirements of the kind of those contested in the challenged do not deny the right as such, yet generalising the exercising of the right may result in either the denial or the reduction of the legitimate rights or interests of third parties whom the state is obliged to protect equally.

In the recitals of its decision, the Constitutional Court referred to the case law of the European Court of Human Rights that, concerning the right to access to justice, in the Case of Z and others versus the United Kingdom of Great Britain, ruled that Article 6 (1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms may be called upon by any person who believes that any of his/her civil rights were illegally infringed, but added that “the right of access to the County Court is not an absolute right” and that “it may be subject to certain limitations, such as statutes of limitation or ordinances requiring the payment of bail”.

In this context, the court judging the challenge filed by the petitioner deemed that the claim for financial compensation should be submitted within the one year deadline from the final criminal sentence, as provided by the special law, and not from the date when it was found that the perpetrator was insolvent or within the ordinary three-year deadline provided in Article 6 of Decree no. 167/1958 on the statutes of limitation of liability. It was also pointed out that the petitioner did not make a request for relief from effects of expiry of the deadline grounded on the provision of the Code of Civil Procedure. Therefore, considering also the stipulations of the Constitutional Court, it was appreciated that the court of first instance legally rejected the claim for financial compensation as being tardy.

Task

Demonstrate in a reasoned manner if the decision of the court of appeal is correct.

Presentation of legal solution

According to Article 24 (1) a) and c) of Law no. 211/2004, when the perpetrator is known, financial compensation may be granted to the victim if he/she applied for financial compensation within one year from the final criminal sentence. The provisions of the special law take precedence over the general legal provisions on the limitations of liability.

CHAPTER 6

VICTIMS OF HUMAN TRAFFICKING FOREIGN CITIZENS IN ROMANIA

6.1. The applicability of the 1951 Geneva Convention on refugees' status to victims of human trafficking

The European Union Member States must guarantee third-country nationals who are victims of human trafficking a reflection and recovery period, so they can decide in full awareness whether or not to cooperate with the competent authorities. During this period, no measure of removal from the territory can be enforced against them, and at the expiration of the period of reflection the competent authorities will consider whether it is appropriate to extend the stay of the person concerned on its territory for the purpose of investigation and legal proceedings; whether the person concerned clearly shows s/he wants to cooperate; if s/he severed all ties with the alleged perpetrators. (*Directive 2004/81/EC on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities*)

This chapter addresses the issue of foreign citizens who are victims of trafficking in human beings, considering two categories:

- Foreign citizens who are victims of trafficking in human beings, applicants for a form of protection (refugee status, subsidiary protection).
- Foreign citizens who are victims of trafficking in human beings, beneficiaries of tolerated status.

The asylum seeker – the foreign citizen or stateless person who has expressed his/her willingness to obtain international protection, as long as the asylum procedure related to his/her application is not completed.

The beneficiary of international protection – the foreign citizen or stateless person whose refugee status has been recognized or he was granted subsidiary protection under the law.

The refugee – the foreign citizen or the stateless person who fulfills the conditions laid down in the Convention Relating to the Status of Refugees, Geneva 28 July 1951 (to which Romania adhered through the Law 46/1991)

The person with a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

A person eligible for subsidiary protection means a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm and who is unable, or owing to such risk, is unwilling to avail himself or herself of the protection of that country; Under the Directive 2004/83/EC (on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted), **serious harm consists of:** (a) death penalty or execution; (b) torture or inhuman or degrading treatment or

punishment of an applicant in the country of origin; (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict. ***A third country national or a stateless person is excluded from being eligible for subsidiary protection where there are serious reasons for considering that: (a) s/he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; s/he has committed a serious crime; (b) s/he has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations; (c) s/he constitutes a danger to the community or to the security of the Member State in which he or she is present.***

Tolerance – remaining on the territory of foreigners without right of residence and who for objective reasons cannot leave the state granting a tolerated status.

In the actual European and international context, Romania and Bulgaria are included in the so-called “Balkan Route” of the illegal migration. A major problem in the last years, at national and international level, is human trafficking, which frequently has a close connection with the illegal migration. A vulnerable category of persons are the **refugees**. A consequence of their vulnerable status, the devastating losses they have experienced, and their precarious life situations until durable solutions become available. Among the factors that increase trafficking risks for refugees are their physical insecurity; social, economic and political marginalization; victimization by smugglers facilitating refugee movement; experience with sexual violence; social isolation or other negative consequences resulting from sexual violence; pressure to engage in survival sex; severe disruptions to family structure; and lack of legal protection.

The crime of human trafficking represents a violation of human rights of victims. Persons who have been or are at risk of being trafficked may have a **well-founded fear of persecution**. The potential need for international protection of persons who have been trafficked or are at risk of being trafficked must be taken into account. This includes assessing protection needs under the **1951 Convention Relating to the Status of Refugees** as well as complementary forms of protection, including subsidiary protection as defined in the **Council Directive 2004/83/EC** on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

In some respects, human trafficking resembles the smuggling of migrants, but still there are clear differences. The relation between the migrant and the smuggler ends either with the arrival at the destination or with the individual being abandoned en-route. Victims of human trafficking are distinguished from migrants who have been smuggled, by the protracted nature of the exploitation they endure, which includes serious and ongoing abuses of their human rights at the hands of the traffickers.

Not all the victims or potential victims of trafficking fall within the scope of the refugee definition from the 1951 Convention relating to the status of refugees. To be recognize as a refugee, all elements of the refugee definition need to be accomplished.

Definitional Issues

The primary function of the Convention against Transnational Crime and its supplementary Protocols against Trafficking and Smuggling is crime control. They seek to define criminal activities and guide States as to how best to combat them. In doing so, they nevertheless provide helpful guidance on some aspects of victim protection and therefore constitute a useful starting point for any analysis of international protection needs arising as a result of human trafficking.

Article 3 of the Trafficking Protocol (Protocol against the smuggling of migrants by land, sea and air, supplementing the United Nations Convention against Transnational Organized Crime):

“For the purposes of this Protocol”:

(a) ‘Trafficking in persons’ shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability, or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;

(c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered ‘trafficking in persons’ even if this does not involve any of the means set forth in subparagraph (a) of this article; (d) ‘Child’ shall mean any person under eighteen years of age.”

The Trafficking Protocol thus defines trafficking by three essential and interlinked sets of elements:

The act: recruitment, transportation, transfer, harbouring or receipt of persons;

The means: by threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power, abuse of a position of vulnerability, or of giving or receiving of payments or benefits to achieve the consent of a person having control over the victim;

The purpose: exploitation of the victim, including, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs

Some victims or potential victims of trafficking may fall within the definition of a refugee contained in Article 1A(2) of the 1951 Convention and may therefore be entitled to international refugee protection. Such a possibility is not least implicit in the saving clause contained in Article 14 of the Trafficking Protocol, which states: “ Nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein”.

A claim for international protection presented by a victim or potential victim of trafficking can arise in a number of distinct sets of circumstances. The victim may have been trafficked abroad, may have escaped her or his traffickers and may seek the protection of the State where she or he now is. The victim may have been trafficked within national territory, may have escaped from her or his traffickers and have fled abroad in search of international protection. The individual concerned may not have been trafficked but may fear becoming a victim of trafficking and may have fled abroad in search of international protection. In all these instances, the individual concerned must be found to have a “well-founded fear of persecution” linked to one or more of the Convention grounds in order to be recognized as a refugee.

Well-founded fear of persecution

What amounts to a well-founded fear of persecution will depend on the particular circumstances of each individual case. Persecution can be considered to involve serious human rights violations, including a threat to life or freedom, as well as other kinds of serious harm or intolerable predicament, as assessed in the light of the opinions, feelings and psychological make-up of the asylum applicant.

In this regard, the evolution of international law in criminalizing trafficking can help decision-makers determine the persecutory nature of the various acts associated with trafficking. Asylum claims lodged by victims of trafficking or potential victims of trafficking should thus be examined in detail to establish whether the harm feared as a result of the trafficking experience, or as a result of its anticipation, amounts to persecution in the individual case. Inherent in the trafficking experience are such forms of severe exploitation as abduction, incarceration, rape, sexual enslavement, enforced prostitution, forced labour, removal of organs, physical beatings, starvation, the deprivation of medical treatment. Such acts constitute serious violations of human rights which will generally amount to persecution.

In cases where the trafficking experience of the asylum applicant is determined to be a one-off past experience, which is not likely to be repeated, it may still be appropriate to recognize the individual concerned as a refugee if there are compelling reasons arising out of previous persecution, provided the other interrelated elements of the refugee definition are fulfilled. This would include situations where the persecution suffered during the trafficking experience, even if past, was particularly atrocious and the individual is experiencing ongoing traumatic psychological effects which would render return to the country of origin intolerable. In other words, the impact on the individual of the previous persecution continues. The nature of the harm previously suffered will also impact on the opinions, feelings and psychological make-up of the asylum applicant and thus influence the assessment of whether any future harm or predicament feared would amount to persecution in the particular case.

Apart from the persecution experienced by individuals in the course of being trafficked, they may face reprisals and/or possible re-trafficking should they be returned to the territory from which they have fled or from which they have been trafficked.¹⁵ For example, the victim's cooperation with the authorities in the country of asylum or the country of origin in investigations may give rise to a risk of harm from the traffickers upon return, particularly if the trafficking has been perpetrated by international trafficking networks. Reprisals at the hands of traffickers could amount to persecution depending on whether the acts feared involve serious human rights violations or other serious harm or intolerable predicament and on an evaluation of their impact on the individual concerned. Reprisals by traffickers could also be inflicted on the victim's family members, which could render a fear of persecution on the part of the victim well-founded, even if she or he has not been subjected directly to such reprisals. In view of the serious human rights violations often involved, re-trafficking would usually amount to persecution.

In addition, the victim may also fear ostracism, discrimination or punishment by the family and/or the local community or, in some instances, by the authorities upon return. Such treatment is particularly relevant in the case of those trafficked into prostitution. In the individual case, severe ostracism, discrimination or punishment may rise to the level of persecution, in particular if aggravated by the trauma suffered during, and as a result of, the trafficking process. Where the individual fears such treatment, her or his fear of persecution is distinct from, but no less valid than, the fear of persecution resulting from the continued exposure to the violence involved in trafficking scenarios. Even if the ostracism from, or punishment by, family or community members does not rise to the level of persecution, such rejection by, and isolation from, social support networks may in fact heighten the risk of being re-trafficked or of being exposed to retaliation, which could then give rise to a well-founded fear of persecution.

Agents of persecution

While persecution is often perpetrated by the authorities of a country, it can also be perpetrated by individuals if the persecutory acts are "knowingly tolerated by the authorities or if the authorities refuse, or prove unable to offer effective protection". In most situations involving victims or potential victims of trafficking, the persecutory acts emanate from individuals, that is, traffickers or criminal enterprises or, in some situations, family or community members. Under these circumstances, it is also

necessary to examine whether the authorities of the country of origin are able and willing to protect the victim or potential victim upon return.

Place of persecution

In order to come within the scope of Article 1A(2) of the 1951 Convention, the applicant must be outside her or his country of origin and, owing to a well-founded fear of persecution, be unable or unwilling to avail her- or himself of the protection of that country. The requirement of being outside one's country does not, however, mean that the individual must have left on account of a well-founded fear of persecution. Where this fear arises after she or he has left the country of origin, she or he would be a refugee *sur place*, providing the other elements in the refugee definition were fulfilled. Thus, while victims of trafficking may not have left their country owing to a well-founded fear of persecution, such a fear may arise after leaving their country of origin. In such cases, it is on this basis that the claim to refugee status should be assessed.

Whether the fear of persecution arises before leaving the country of origin or after, the location where the persecution takes place is a crucial aspect in correctly assessing asylum claims made by individuals who have been trafficked. The 1951 Convention requires that the refugee demonstrate a well-founded fear of persecution with regard to her or his country of nationality or habitual residence. Where someone has been trafficked within her or his own country, or fears being trafficked, and escapes to another in search of international protection, the link between the fear of persecution, the motivation for flight and the unwillingness to return is evident and any international protection needs fall to be determined in terms of the threat posed to the individual should she or he be obliged to return to the country of nationality or habitual residence. If no such well-founded fear is established in relation to the country of origin, then it would be appropriate for the State from which asylum has been requested to reject the claim to refugee status.

The circumstances in the applicant's country of origin or habitual residence are the main point of reference against which to determine the existence of a well-founded fear of persecution. Nevertheless, even where the exploitation experienced by a victim of trafficking occurs mainly outside the country of origin, this does not preclude the existence of a well-founded fear of persecution in the individual's own country. The trafficking of individuals across international borders gives rise to a complex situation which requires a broad analysis taking into account the various forms of harm that have occurred at different points along the trafficking route. The continuous and interconnected nature of the range of persecutory acts involved in the context of transnational trafficking should be given due consideration.

The causal link ("for reasons of")

To qualify for refugee status, an individual's well-founded fear of persecution must be related to one or more of the Convention grounds, that is, it must be "for reasons of" race, religion, nationality, membership of a particular social group or political opinion. It is sufficient that the Convention ground be a relevant factor contributing to the persecution; it is not necessary that it be the sole, or even dominant, cause. In many jurisdictions, the causal link ("for reasons of") must be explicitly established, while in other States, causation is not treated as a separate question for analysis but is subsumed within the holistic analysis of the refugee definition. In relation to asylum claims involving trafficking, the difficult issue for a decision-maker is likely to be linking the well-founded fear of persecution to a Convention ground. Where the persecutor attributes or imputes a Convention ground to the applicant, this is sufficient to satisfy the causal link.

In cases where there is a risk of being persecuted at the hands of a non-State actor for reasons related to one of the Convention grounds, the causal link is established, whether or not the absence of State protection is Convention-related. Alternatively, where a risk of persecution at the hands of a non-State actor is unrelated to a Convention ground, but the inability or unwillingness of the State to offer protection is for reasons of a Convention ground, the causal link is also established.

Convention grounds

The causal link may be established to any one single Convention ground or to a combination of these grounds. Although a successful claim to refugee status only needs to establish a causal link to one ground, a full analysis of trafficking cases may frequently reveal a number of interlinked, cumulative grounds.

Race: For the purposes of the refugee definition, race has been defined as including “all kinds of ethnic groups that are referred to as ‘races’ in common usage.

Religion: Individuals may similarly be targeted by traffickers because they belong to a particular religious community, that is, they may be targeted because their faith or belief identifies them as a member of a vulnerable group in the particular circumstances, if, for instance, the authorities are known not to provide adequate protection to certain religious groups.

Nationality: it has a wider meaning than citizenship. It can equally refer to membership of an ethnic or linguistic group and may overlap with the term “race”. Trafficking may be the method chosen to persecute members of a particular national group in a context where there is inter-ethnic conflict within a State and certain groups enjoy lesser guarantees of protection.

Membership of a particular social group: Victims and potential victims of trafficking may qualify as refugees where it can be demonstrated that they fear being persecuted for reasons of their membership of a particular social group. In establishing this ground it is not necessary that the members of a particular group know each other or associate with each other as a group. It is, however, necessary that they either share a common characteristic other than their risk of being persecuted or are perceived as a group by society. The shared characteristic will often be one that is innate, unchangeable or otherwise fundamental to identity, conscience or the exercise of one’s human rights. Persecutory action against a group may be relevant in heightening the visibility of the group without being its defining characteristic.

Women are an example of a social subset of individuals who are defined by innate and immutable characteristics and are frequently treated differently to men.

Political opinion: Individuals may be targeted for trafficking because they hold a certain political opinion or are perceived as doing so. Similar considerations apply for the other Convention grounds, that is, individuals may, depending on the circumstances, be targeted because of their actual or perceived political views which make them vulnerable and less likely to enjoy the effective protection of the State.

6.2. Analyze of the Romanian national legal framework on combating human trafficking & the foreigners legal regime

The main legislation regulating relevant and expressly provided provisions on foreign citizens who are victims of human trafficking are the **Law No. 678/2001** on preventing and combating trafficking in human beings; **the Government Emergency Ordinance (GEO) 194/2002** on foreigners in Romania; **the Law 122/2006** on asylum in Romania.

Foreigners who are victims of trafficking in human beings and applicants for international protection are subject to the provisions of **Law 122/2006 on asylum in Romania (updated)**, which establishes the legal regime of foreigners applying for international protection in Romania, the legal status of foreigners beneficiaries of international protection in Romania, the procedure for determining the Member State responsible for examining an asylum application and award conditions, as well as exclusion and termination of temporary protection. **Article 5 index 1** contains provisions on vulnerable persons (asylum seekers requiring special reception conditions) such as **the victims of trafficking in human beings**. *Classification in the category of vulnerable persons is determined after applying for*

asylum as soon as possible by the specialists from the General Inspectorate for Immigration, based on an individual assessment.

Law 678/2001 on preventing and combating trafficking in human beings (as amended and supplemented) contains provisions on foreign citizens who are victims (Art. 37, 38, Art. 38 index 1, Art. 39, Art. 39 index 1, Art. 40, Art. 41). By law, Romania facilitates the return to their home country of foreigners who are victims of trafficking, without undue delay and provides their transport in safe conditions up to the border of the Romanian State, unless otherwise provided in bilateral agreements.

Trafficked foreign citizens can be accommodated in special centers established according to the GEO 194/2002 on foreign citizens without their detention; in this respect, the administration of the centers arranged special areas separate from the foreign citizens in detention (**Art. 38 paragraph 1, Law 678/2001**).

Although the law provides locations in centers as provided by the GEO 194/2002, practically there are no such special locations in the facility that could accommodate foreign citizens who are victims of trafficking.

Art. 38, paragraph 2, Law 678/2001 provides that if the foreign citizen who is a victim of trafficking applies for a form of protection in Romania, s/he can be accommodated in the regional centers for accommodation and procedures for asylum seekers under the Law No. 122/2006. In Romania there are six regional centers for asylum seekers (Bucharest, Giurgiu, Galați, Rădăuți, Șomcuta Mare, Timișoara). Accommodation is approved by the General Inspectorate for Immigration at the request of the competent authorities. According to this article, foreign victims shall be informed within the accommodation in a language which they understand, about the judicial and administrative procedures they must follow, and that they also may benefit from psychological, medical, social assistance, medicines and food under the same conditions as the Romanian victims. The law also contains provisions according to which "foreign citizens who are victims of trafficking are provided with the legal assistance required to exercise their rights in the criminal proceedings in all phases of the trial, the provisions of Law 211/2004 on the protection of victims of crime to be applied appropriately to the trafficked victims, as well" (Art. 44 Law 678/2001). As concerns the minors of foreigners accompanying the victims of trafficking, or who are themselves victims shall be properly applied the provisions concerning the foreigners in Romania (Art. 41 Law 678/2001).

Art. 38 paragraph 2 Law 678/2001 is incomplete regarding the fact that it does not expressly indicate which competent authorities may request the General Inspectorate for Immigration accommodation for the asylum seekers in the regional centers. Also, in practice there are few specialists who can provide support services to foreigners who are victims of trafficking; this finding is based on the fact that the assistance provided to a foreign citizen who is victim of trafficking requires a very good knowledge of both the issues of trafficking and the legal status of foreigners.

Generally, in Romania, the specialists and entities providing support services are focused only on a single target group (assisting generally Romanian citizens who are victims of trafficking; assisting only asylum seekers, refugees, migrants who are victims of trafficking).

By Law No 230/2010 amending and supplementing Law No. 678/2001, it was introduced Art. 38 index 1 stipulating that the provisions related to the Romanian citizens who are victims of trafficking also apply to victims of trafficking who are citizens of a Member State of the European Union or the European Economic Area.

Art 38 index 1 Law 678/2001 has no provisions related to victims of trafficking who are foreigners from third countries of the European Union, given that over the years the victims identified by authorities or non-governmental organizations did not come from the EU Member States or the European Economic Area. Therefore it is required a change of this Article, an extension of its scope to all foreign nationals who are victims of trafficking, regardless their country of origin.

If foreigners who are victims of trafficking do not possess any identity document or it was lost, stolen or destroyed, the Ministry of Internal Affairs may ask the embassies accredited in Romania to issue a new passport or travel document, as appropriate, for them, *except for the asylum seekers or the beneficiaries of protection in Romania (Art. 39 Law 678/2001)*.

Art. 39 index 1 Law 678/2001 contains provisions on the period of recovery and reflection and the situations in which it may cease, granting tolerance for staying in Romania. *The analysis of Art. 39 index 1 Law 678/2001 requires to be accomplished in conjunction with Art. 106 index 1 and Art. 106 index 2 of the GEO 194/2002 on foreigners in Romania.*

According to *Law 678/2001*, to the extent that there are reasonable grounds to believe the foreigner is a victim of trafficking, s/he can benefit from a period of reflection and recovery of up to 90 days in order to recover, to get out from the influence of the perpetrators and to take a conscious decision regarding cooperation with the competent authorities, during which they are granted *a tolerated status in Romania by the General Inspectorate for Immigration at the request of the prosecutor or of the court*. The reflection and recovery period of 90 days may be terminated under Art. 39 index 1 Law 678/2001, in the cases where: it appears that the victims of trafficking restore the contact with the offenders on their own initiative; there is a danger to public order and national security; the status of victim was unduly invoked".

Under **paragraph 4 of Art. 106 index 1, GEO 194/2002**, *the prosecutor by ordinance or, where appropriate, the court by conclusion grants tolerance* when there are reasonable grounds to believe that a foreigner without the right to stay is a victim of trafficking in human beings and his/her presence in Romania is necessary for the proper criminal proceedings. Under the provisions of **Art. 106 index 2, GEO 194/2002**, tolerance is granted for a period of six months and may be extended for further periods of up to six months, until elimination of the causes for which there were granted; as concerns paragraph 4 of Art. 106 index 1, the tolerance may be extended until the end of the trial. A tolerated person is allowed to access the labor market under the conditions provided by law for Romanian citizens. The foreigner is obliged every two months, or whenever s/he is called at the General Inspectorate for Immigration (GII) which has issued the document and to notify any change of address where s/he lives. *Toleration has limited territorial validity within the competence of GII which issued the document*, and any movement beyond it is allowed only with prior approval.

A general analysis of **Art. 106 index 1, GEO 194/2002** notes that if there are reasonable grounds to believe that a foreigner without the right to stay in Romania is a victim of trafficking, **the prosecutor** (by ordinance) **or the court** (by conclusion) may allow tolerance and the General Inspectorate for Immigration shall issue the document certifying the status of tolerated person.

Art 106 index 1 is incomplete regarding the fact that it does not expressly indicate whether the prosecutor or the court grant toleration ex officio or upon request, nor the remedies of a foreigner who is presumed victim of trafficking in human beings, to the extent that the prosecutor or the court would not grant toleration. Art 106 index 1 referred to in paragraph 3 only to contest the decision of the GII (paragraph 1) when this Institution has competence to grant the status of tolerated person, at the competent territorial Court of Appeal within five days from the date of notification of the decision of GII, followed by a final Court decision within 30 days.

GEO 194/2002 and Law 678/2001 have no provisions regarding the status of tolerated person to foreigners who are presumed victims of trafficking in human beings; if the investigation/criminal investigation is in an early stage (i.e. the foreigner submitted a complaint to the police, the file has not yet been sent to the prosecutor).

Article 106 paragraph 2 of GEO 194/2002 establishes the limits of toleration only within the area of competence of the GII which issued the document, and any movement beyond it requires prior approval. The provisions of this article should be amended and adapted to the situations encountered in practice. For example the foreigner obtains the status of tolerated person but finds a job outside the area

of competence of the GII, or must travel for certain legal proceedings in other areas of the country. We appreciate that especially in the case of foreigners who are victims of trafficking in human beings they should benefit from the right of free movement across Romania without the need to go frequently to the IGI territorial jurisdiction in order to notify/to request permission.

Article 106 paragraph 2 of GEO 194/2002 provides that the prosecutor, the court may extend the status of tolerated person until the end of criminal proceedings. GEO 194/2002 basically provides limited right of residence until the completion of criminal proceedings, although there may be legal proceedings for which the presence in the country of the foreigners would be further justified, even after the trial (i.e. provisions of Title II, Chapter II The Civil Action (for pecuniary and non-pecuniary compensation), the Criminal Procedure Code, Art. 27 the settlement cases of civil action at the civil court).

6.3. Case Study

The criminal offence of human trafficking, foreign citizen victim, asylum procedure

It was pending before Court of Appeal in city B the settlement of the appeal filed by the Prosecutor's Office attached to the High Court of Cassation and Justice – the Directorate for Investigating Organized Crime and Terrorism against the criminal judgment of the Court of city B.

The judgment of the Court B (pronounced in 2013) decided the following: under Art. 11 paragraph 2 letter a) in conjunction with Art. 10 letter d) of the Romanian Criminal Procedure Code, **the acquittal of the defendants A.H. and S.A.I.N. for the offence of trafficking in human beings for the purpose of labour exploitation** (*A.H. was born in Lebanon with Lebanese and American dual citizenship with residence declared by his chosen lawyer in the USA*) (*S.A.I.N. is Chilean and Jordanian citizen, residing in Romania*)

To pronounce this judgement, the first court (the Tribunal) held the following:

The indictment of the Prosecutor's Office sent to trial the defendants **A.H.** and **S.A.I.N.** for the offense of “*trafficking in persons for purposes of labour exploitation*” (under the legislation in force at that time, namely Art. 12 paragraph 1 and paragraph 2, letter a) of Law 678/2001 with the application of Art. 41 paragraph 2 of the Romanian Criminal Code).

In fact it was held that the defendants A.H. and S.A.I.N. in September-October 2008, according to a previous common agreement conducted individually the material acts of recruitment, ensurance of transport, reception and accommodation by deception, debt, threats, withholding of passports and refusing the restitution of these documents in order to prevent them from leaving Romania, for the purposes of labour exploitation with the violation of the legal rules on working conditions, salaries, health and safety without legal employment contracts of a total number of 13 citizens of THE REPUBLIC OF HONDURAS, respectively the injured parties: (1) R.A.J.N., (2) A.A.M.D., (3) L.L.M.G., (4) H.C.N.D., (5) M.O.E.E., (6) V. A. T., (7) G.A.N.E., (8) M.B.D.A., (9) P.G.A.F., (10) C.A.A.J., (11) M.P.E.E., (12) C.M.M., (13) F.G.M.A..

The indictment is based on the following evidence:

The statements of the injured persons; the statements of nine witnesses who worked in the company in Romania of the two defendants, financial information of the Romanian company (it had debts to the state, it didn't even pay on time the Romanian employees), telephone conversations between the defendants, respectively between the defendants and other persons in the company about the foreigners from Honduras, bank statements of the defendants' company, information on the number of country entry-exit of the two defendants, letters to Interpol to locate the defendant A.H. (for a period of time he stayed in Lebanon and later moved to the USA), photos of the passport of the foreigners in Honduras, minutes related to the home seizure of the defendant S.A.I.N., e-mail correspondence between the recruitment agency in Honduras and the Romanian employing company.

During the inquiry there were heard: the defendant S.A.I.N. and 15 witnesses, whose statements were registered and attached to the file.

Analyzing the documents in the file, the Court stated the following facts:

In November 2008, the Directorate for Investigating Organized Crime and Terrorism (DIOCT), was notified by the General Inspectorate of the Border Police, about the fact that a number of citizens of Honduras were found in October 2008 in city **B** ... in Romania by the control bodies of the Labor Territorial Inspectorate carrying out business activities in newspaper stands without legal documents; once being found, they stated that they were victims of trafficking for purposes of labour exploitation, being recruited in their country of origin under the promise of well-paid jobs in Romania, but at destination they were accommodated in unsanitary conditions, their passports were retained under the pretext of protecting them from possible theft, they have not been paid for the work performed, and when they asked their passports back in order to return to their country of origin, they were asked to pay an amount of approx. 4000 dollars, money that they obviously did not have.

Following the control, there were identified the following Honduran citizens who admitted they were injured person, being heard by handwriting in the presence of the certified interpreter of Spanish language: (1) R.A.J.N., (2) A.A.M.D., (3) L.L.M.G., (4) H.C.N.D., (5) M.O.E.E., (6) V. A.T., (7) G.A.N.E., (8) M.B.D.A., (9) P.G.A.F., (10) C.A.A.J., (11) M.P.E.E., (12) C.M.M., (13) F. G. A.

In the evidence produced in the case regarding the criminal activities conducted and during the inquiries, the court noted that in 2008 the above mentioned injured parties were recruited in the REPUBLIC OF HONDURAS by the "I.J.C.R." labor placement agency sponsored by the said J.R.E. who after a rigorous selection presented them to sign the employment contracts in English; the contracts mentioned that that they would be employed by the Romanian company SC "I.S." S.R.L. that was to provide them jobs as vendors at kiosks in malls in the city **B** in Romania or office work in IT.

Also, the Romanian employing company, according to the commitments given by the partner company undertook to obtain residence and work permits in Romania, to ensure accommodation and free shipping and also a good salary between 700 and 1200 USD/month according to their on qualifications and studies.

All injured parties alleged they had submitted to the recruitment agency in the Republic of Honduras the requested documents of studies, criminal records, medical certificates, etc. and after being told they were selected, they presented at the date and time indicated to board the plane that would ensure their transport to Romania, being instructed by the personnel of the recruitment company to declare the Romanian authorities that they were tourists. The injured parties arrived at the airport in Romania where they were welcomed by the defendant S.A.I.N., Human Resources Director of the employing company and also by the witnesses C.A.M. and D.G.N., employers of the same department within the company.

At the airport the foreigners faced difficulties, not being allowed to enter the Romanian territory, as they were not able to present their tickets for return to the country of origin; the maximum they could stay in our country being under the existing European legislation in force (see EC Regulation no. 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders) for 3 months, which prompted the shareholder of A. group of companies, the defendant A.H., to send to the airport to solve the problem the general manager of its group of companies, namely L.F..

L.F. informed the defendant A.H. about the reason why the foreigners could not enter the country, after which the latter called him at his place and proceed to the purchase of online tickets to be submit to the authorities.

On the same occasion, following the indications received from the defendant A.H., he compiled an invitation in writing which he signed and submitted to the border police workers in original, stating

that the foreigners in case were tourists, that SC "I.S." S.R.L. *"undertakes throughout their stay to provide them accommodation, three meals a day, domestic transportation and financial support"*, the purpose of their "visit" being *"visiting all tourist areas of Romania"* and the Romanian company *"takes full responsibility on their maintenance and their behavior throughout their stay in the country"*.

The witness L.F. signed the respective invitation as general manager of S.C. "I.S." S.R.L., although the witness G.R. was the real manager; also, on the back of the document he gave a written statement in which he declared he was taking full responsibility as written in the official invitation and also specified that those citizens would leave the Romanian territory on 17.09.2008 towards Madrid, as shown in their return ticket.

After carrying out these steps, the injured parties stated they have been accommodated in some places arranged by the company and not at the hotel as mentioned in the initial offer, so the women and the families were accommodated on a farm in the town of O... in Romania belonging to S.C. "I.S." S.R.L., and the other injured parties in a basement of a building in the city of B... in Romania, in an improvised dormitory with metal or bunk beds with access to a common bathroom (a former rearranged restroom) without hot water and without heat.

On 11.09.2008, the injured parties (L.L.M.G., C.A.A.J., M.P.E.E., A.A.M.D., V.A.T., G.A.N.E., R.A.J.N., H.C.N.D., C.M.M. and F.G.M.A.) were brought to the office belonging to the group of companies managed by A.H., and this in the presence of the defendant S.A.I.N. (native Spanish speaker who provided translation); he explained all that they would work newspaper stands for a monthly wage of 300 USD for the whole period of three years of the contract. They were given to sign several documents in Romanian language (a language unknown by all injured parties) and were told the respective documents were their employment contracts and standard forms expressing the agreement to leave the passports in the custody of the company on the pretext of their own protection or in order to obtain work permits, each of the foreigners being assigned to perform unskilled labor in street newspaper stands accompanied by one Romanian employee.

Prior to the arrival of the injured parties in the country, starting with July 2008, according to the statements of the witnesses heard in the case and the defendant S.A.I.N., the accommodation locations for the Honduran citizens had been prepared by the administrative staff of the company led by the defendant A.H.; according to the unanimous statements of the witnesses who prepared these location, they had all that was necessary for a fair standard of living (the same declared the witnesses R.C., L.F., M.C.A.).

The Court held that such claims of the document instituting the proceedings according to which the accommodation conditions were unsanitary and the allegation that once they arrived at the airport they were not accommodated at the hotel cannot justify the hypothesis of harmful living conditions.

The injured parties also claimed that those rooms were not heated, had no central heating but on the one hand the Court found that they stayed in Romania during summertime and there was no need of such installation, and on the other hand one of the locations was endowed with central heating, according to witnesses' statement.

From 11.09.2008, for about two weeks, the injured parties were transported from their accommodation to the employment places with the cars of the company, with a work program which began at dawn at 3:00 am and ended around 5:00 pm; after this hour they were provided with cards for public transport in Bucharest. The indictment retained as evidence of their exploitation that they did not receive warm clothes while the "temperatures were low for people coming from much warmer climates" but in September 2008, that one cannot claim that in autumn would need warm clothes, regardless of geographical area of origin, given the high temperatures in Romania. Moreover, the defendant S.A.I.N. claimed that he bought clothes for the injured parties from a shopping center in Romania.

Another issue mentioned in the document instituting the proceedings, which lends credence to the same idea of exploitation of the injured parties is the unpaid wages to the Honduran citizens, but

the whole the evidence administered in the case it can be noted that although the injured parties did not receive fabulous amounts of money, however it was distributed and in this respect the court held that the statements of the defendant S.A.I.N. and of the witnesses C.G.N., C.A.M.. Furthermore, the witness R.C. stated that although the injured parties did not take any package of food, they were buying their food.

The court concluded that the original intention of the defendant A.H. was to prepare the legal forms of employment of the victims, since he also employed a teacher of Romanian language to teach them Romanian; no evidence administered in the case denied the allegations of the defendants to the effect that the injured parties initially followed a period of training, during which they received 200 dollars in two months, under the prosecution claims.

Reported the facts retained, the court held that in this case there is no clear evidence for the exploitation of the injured parties by the two defendants because on the one hand, they received accommodation at a fair standard, they received money that, although in a reduced amount, allowed their daily living while their transport and accommodation were ensured, and moreover, they were in the same situation with other Romanian citizens employed by the same company or by other companies.

It is true that each of them was assigned to a newsstand where s/he worked alone, being advised to adapt quickly to the conditions of work and to learn the language, as they will receive more money as commission if they sell more newspapers.

Because on 10.10.2008, none of the workers received the promised salary, according to the promises made by the defendant H.A., the whole group decided to protest against the conditions of work, accommodation and remuneration, reflected by their failure to work on 11.10.2008. As a consequence, the human resources manager, the defendant S.A.I.N. had called one of the workers and the reason of their failure to work, so that the next day on 12.10.2008, the company S.C. "I.S." SRL made "**protocol**" payments countersigned by the witness I.B.R., through which the victims were paid sums of 150 RON, and after another few days with amounts of approx. 480-500 RON each worker, reaching the amount of 650 RON, equivalent at that time of approx. 200 USD.

It was noted that on 28.10.2008, the injured parties decided to go on strike and not to open the newsstands on that day in order to protest against improper working conditions and accommodation; also the temperatures had dropped a lot and some foreign citizens were ill because they were working and living in unheated spaces.

One of the company's employees sent C.F. and communicated them that around 2:00 pm all disgruntled employees must report to the office of the said A. H.. The injured parties who presented themselves at that time reproached the defendant A.H. the poor working conditions, which irritated the defendant A.H. who gave them two options: either still working in the same conditions or be thrown into the streets without passports until they paid amounts between 1360-2500 USD representing the transport and other expenses incurred by the company to bring them in Romania and performance of the steps to obtain a work visa.

On the same occasion, some of the injured parties have requested their passport from the defendants A.H. and S.A.I.N., but the defendant A.H. told them that the passports were no longer at the company, but "*at the police, and they were to be detained and imprisoned*".

On the same occasion, the defendant A.H. insulted and threatened them in English that they were to be arrested, while the defendant S.A.I.N. provided the translation into Spanish.

The Court held that this incident cannot be considered a component of the offense for which the 2 defendants were prosecuted, because on the one hand some injured parties had already made contact with the authorities giving statements on 17.10.2008 and on the other hand it was not confirmed

whether A.H took their passports or not in order to constraint the foreign citizens, since the witnesses heard in the case including D.G.N. said that the injured parties were to receive their passports on request after completing a particular form. Even in the conditions where it is alleged that after this meeting the defendant A. threatened the employees and they continued to work, it does not amount to the offence of human trafficking just because they were dissatisfied with the payment conditions and, in addition, as a constitutive element of the offence, the concept of exploitation involves an extended time in which the defendants benefit from the work of exploited persons without the payment thereof. As was noted above in the case it was held that the Honduran citizens received accommodation facilities, internet, mobile phone, free transport and money in return for the work performed.

On 31.10.2008, all thirteen injured parties were found carrying out gainful activities in the newspaper stands of the company belonging to the 2 defendants. At the same time, at the Romanian Immigration Office (*now the General Inspectorate for Immigration*), based on a minutes the defendant L.F. submitted a number of 13 passports which he stated they were available to the company and they were brought by an employee of the company to be handed over.

The Court considers *that nor in this case the offense established by the judgement could not be sustained given the short period in which they worked from their arrival in the country and until they were found by the police; moreover, they could not receive any money, except for the amount of 100 lei received on arrival in the country for a few days of work.*

The Court held that those retained in the case did not amount to the offense of trafficking in persons, as the case did not involve any exploitation activity unde the law.

Given the solution of the criminal case as well as the fact that in the case did not involve any form of work labor exploitation, the Court held that the civil action brought by the injured parties are unfounded, being therefore dismissed.

The Court judgment has been appealed by the Prosecutor's Office attached to the High Court of Cassation and Justice-DIICOT.

Note: The 13 injured parties in the case concerning the offense of trafficking in human beings have returned to the country of origin (the Republic of Honduras) and 12 injured parties were not present personally during the judicial phase in Romania. *Only one injured party (H.C.N.D.) returned to Romania to be personally present before the Court during the legal proceedings.* The Honduran citizen came to Romania with a *short-stay visa* with the main purpose to appear in front of the Court in Romania. H.C.N.D. received a writ of summons in Honduras from the Romanian authorities. Due to the lack of money to travel to Romania, he alleged he borrowed the amount of 3000 USD from Moneylenders in Honduras to be able to cover his expenses for visa application, flight tickets, current expenses for hotel accommodation and food. To be noted that H.C.N.D. did not speak any English or Romanian (but only a few words, not enough for a fluent conversation, to read or write in this language). The injured party spoke only Spanish fluently. The communication in the Court was performed with a translator appointed by the Court.

Shortly after arriving in Romania, the injured party H.C.N.D. presented himself at the General Inspectorate for Immigration - Asylum and Integration Directorate (GII-DAI) and applied for asylum under Law no. 122/2006 on asylum in Romania. The reasons invoked in the application for asylum and documented in the interview note were: he is afraid to return to Honduras because the family told him by phone that the persons from whom he borrowed the amount of 3000 USD threatened him with death if they find in Honduras if he doesn't return the money. He also stated he wanted to remain in Romania until the end of the proceedings involving the trafficking offense where he was injured party. *The asylum seeker H.C.N.D. presented to the General Inspectorate for Immigration the writ of summons received from the Court on the case involving the trafficking offense where he was an injured party.*

Tasks

1. As a prosecutor, please submit your legal arguments regarding the criminal offence of human trafficking.
2. As a lawyer of the victim, please submit your legal arguments underlying the fact that the person you are assisting is a victim of human trafficking and is entitled to bring civil action in the criminal proceedings.
3. As a judge, will you accept or dismiss the legal arguments of the Prosecutor's Office? Please motivate your decision.
4. Did the foreign citizen (H.C.N.D.) accomplish the necessary conditions to obtain a form of international protection (refugee status or subsidiary protection) under the national European and international laws? Did the foreign citizen accomplished the conditions to obtain the right for temporary residence during the judicial proceedings in Romania? Please bring arguments for the answers.

In this case, the Prosecutor's Office attached to the High Court of Cassation and Justice-DHCOT criticized the decision of the Court for illegality and groundlessness, for the following aspects:

- From all the material evidence given in question it results unequivocally that the injured parties were recruited by the IJCR Agency of the Republic of Honduras, with the object of employment placement.
- Since the recruitment the injured parties were informed that if they are questioned by the Romanian border authorities, they shall declare that they came in Romania as tourists and not for work purposes; this aspect was also noted from the fact the employing company, managed by the two defendants did not meet all the legal requirements to employ foreigners. *(the employing company had to prove that the vacancies cannot be taken by Romanian citizens and that, as employer, fulfilled its current payment obligations to the state budget).*
- Since the minimum wage in 2008 was 500-540 lei, the employment activity of the Honduran citizens with 300 USD per month in the first three months appears absolutely uneconomic; in addition, it there are added the expenses for accommodation and utilities, Romanian language courses, three meals a day, winter clothes, Internet, mobile phones, public transport season tickets, health insurance which were all paid by the employer.
- The evidence given shows that the employing company had arrears of salaries, which automatically led to arrears in payments to the state budget, these obligations being numerical aliquots of the gross salaries of the employees.
- The defendant A.H., after using in front of the border police the plane tickets that had been purchased online for Bucharest-Madrid-Honduras; they have not been used, being canceled.
- An examination of the witnesses' statements R.C., M.C.A., L.F. shows that the the employer did not ensure the injured parties conditions for a fair standard of living (e.g. the witness R.C. stated that the injured parties had for lunch a croissant for three people or three Eugenia biscuits) and they were living in poor conditions.
- The teacher V.C.L. who holded Romanian language courses to the injured parties said they had several shirts oane over the other and were complaining of inadequate housing conditions; the witness G.R., former interim CEO Interim showed that the injured parties were living in miserable conditions, the space looking more like a barrack with bunk beds, a bathroom and a kitchen with one table.
- Because on 10.10.2008, none of the workers received the promised salary, according to the promises made by the defendant H.A., the whole group decided to protest against the conditions of work, accommodation and remuneration, reflected by their failure to work on 11.10.2008. As a consequence, the human resources manager, the defendant S.A.I.N. had called one of the workers and the reason of their failure to work, so that the next day on 12.10.2008, the company S.C. "I.S." SRL made "protocol" payments countersigned by the witness I.B.R., through which the victims were paid sums of 150 RON, and after another few days with amounts of approx. 480-500 RON each worker, reaching the amount of 650 RON, equivalent at that time of approx. 200 USD. But

obviously nor this time have they fulfilled the promised payment of an amount of 300 USD/month for the work performed; as regards the remaining period up to 31.10.2008, when the criminal activity was interrupted by the intervention of the state agencies, they did not pay other sums.

- In the case it is significant that the passports of the injured parties were held in an abusive manner by the employer as a means of coercion and when some of the injured parties have expressed their desire to know under what circumstances can terminate the relationship with the employer, they were communicated that they had to pay about 4000 USD; also there were cases when, due to the working hours and lack of passport, the injured parties could not withdraw the money sent by their families.
- The evidence also shows that the Honduran citizens tried to find out if they could receive diplomatic support, but the Republic of Honduras has no diplomatic or consular mission in Romania.
- The witnesses' statements of V.A., R.C. and O.I. unquestionably show that the injured parties were recruited by misleading about the conditions of accommodation, food, salary, because there were no contractual work relations between them and the employer as provided by the Romanian law; thus, the injured parties lacked the material means of subsistence, they had no food ensured, not having even the opportunity to withdraw money from their families without the employer's consent, unlawfully holding their passports that were taken in an abusive manner from the victims of trafficking. It is essential to point out that the witnesses' statements should be examined in terms of their quality of former/current employees of the defendant A.H..
- The witness M.M.G. stated that he knew from I. that H.A. was not keeping his promises regarding the payment of most of the employees, not only of the Honduran citizens, the latter being treated very badly. The witness stated that the defendant is generally treating badly his employees and had the habit to hold the passports of the foreign nationals, regardless of nationality (Arab, Filipino, Indian) as a guarantee for not leaving the country without his consent. The witness stated that H.A. asked the foreign citizens to hand over their passports to B.I. in order to put them in a safe place in the safe box.
- The witness L. F. witness stated that he knew from A.C. that the passports were stored in a safe box and not at their holders.
- The witness C.A. stated that she took the passports concerned from the foreign citizens and then she handed them over to B.I. in order to keep them in a metal safe box located in the cashier offices; she also stated that she was not present when the passports were introduced in the safe box.
- According to the Romanian legislation on the matter, the identity documents can be seized only by the authorities and under certain conditions, such as arrest, provisional detention, imprisonment, admission to rehabilitation and social welfare institutions; any other form of confiscation constitutes a violation of one fundamental human right. *This infringement proves once again the defendants' intention to put the employees in a state of servitude, to prevent them from leaving Romania and to work in the improper conditions offered by the defendants.* However, once they arrived in a foreign country, deprived of passports and of minimum conditions for existence in a country whose language they did not know and where the Republic of Honduras has no diplomatic representation; the defendants, through their actions, violated the right of the injured parties to free movement, action, expression, and psychic manifestation.
- In inconsistency with the opinion of the first instance, it was found that it is irrelevant whether the state of servitude and exploitation of the injured party lasted a week, a month or a year. The offense of trafficking in persons is performed and produces immediate consequence once it was accomplished at least one of the material elements provided in the alternative content amounted to - recruitment, transportation, transfer, harboring or receipt of persons under one of the special conditions required for its commission - threat, violence or other forms of coercion, abduction, fraud or deception, abuse of authority or taking advantage of the person's inability to defend himself/herself or to express his/her will or by offering, giving or receiving money or other benefits aiming to achieve the consent of the person having control over another person for the purpose of exploitation.

With the occasion of the appeal the defendant A.H. formulated his defence through a statement which he sent to the Court of Appeal via E-MAIL and at the request of the the Prosecutor he was heard

by international Rogatory Commission achieved in Lebanon. *The defendant S.A.I.N.* was heard directly by the court of appeal. *The following evidence was also requested and produced:* the civil party H.C.N.D. was heard, the witnesses R.C., L.F., V.C.L., M.C.A., D.G.N., G.R., A.G. were heard.

The defendants requested through written conclusions as follows:

- S.A.I.N. requested a change of the legal classification of facts from the offense provided by Art. 12 para. 1 and 2 of Law 678/2001, applying Art. 41 para. 2 of the Criminal Code into the criminal offense under Art. 210 pt. 1 of the Criminal Code in conjunction with Art. 5 of the Criminal Code and under Art. 421 para 1 b) C.P.C. he requested the dismissal of the prosecutor's office appeal.

Regarding the request to change the legal classification of the act, he showed that this claim is based on the fact that since the date of the alleged facts and until present it appeared a new law that is more favorable because on the one hand the new law no longer criminalizes the act committed by two people as an aggravating circumstance, on the other hand there has been excluded from the definition of "exploitation of a person" the assumption regarding the execution of a work or the performance of services in violation of laws on working conditions, salaries, health and safety. The classification of the standard type of crime provided under Art. 210 of the Criminal Code - without amount for aggravating circumstances on the commission of the fact by two persons - affects the limits of punishment, which under the new legislation are lower. Under Art. 210 para 1 of the Criminal Code, the punishment is imprisonment from 3 to 10 years, less than the penalty provided in Art. 12 para 1 and 2 of Law 678/2001, which is from 5-15 years. As concerns the exclusion from the material element of the crime the assumption regarding the execution of a work or the performance of certain services in violation of the conditions of safety, health, employment and salaries. As provided for under Art. 182 of the New Criminal Code, exploitation of a person means the execution of a work or the performance of services forcibly. The provisions of Art. 182 of the New Criminal Code have no declarative character, being interpreted strictly. Essentially, he showed that non-compliance with the legislation on working conditions, salaries, health and safety no longer fall within the notion of exploitation of a person in the current legislation.

- *A.H. requested the dismissal of the appeal filed by the prosecution, since the evidence reprovided in the case during the appeal did not shift the evidence provided before the court of first instance (the tribunal).*

The Court of Appeal dismissed the appeal filed by the Prosecutor's Office as unfounded on the following aspects:

- First it should be noted that the evidence provided during the appeal did not change the facts as it was held by the first court, outlining the same objective reality with regard to the defendants' facts.
- Prior to the examination of the objective and subjective elements of the crime of trafficking in persons, the Court finds that all the grounds of illegality of the prosecution put forward mainly by the defendant A.H. that had already been submitted, will not be any more examined on appeal, as through the conclusion dated 23.10.2012 handed down under the Criminal Procedure Code of 1969; under the provisions of Art. 300 of the Criminal Procedure Code of 1969 there were rejected all the pleas raised by the defendants concerning the invalidity of the prosecution; under the provisions of Art. 300 of the Criminal Procedure Code of 1969 it was ascertained the regularity of the court's document instituting the proceedings, the said conclusion being final. *Therefore, the issues to be examined by the Court shall be limited only to the merits and legality of the decision made on the merits of the case by the first instance due to the elements amounting to the crime of human trafficking as labor exploitation.*
- To examine the objective and subjective side of the crime under Art. 12 of Law 678/2001, *first it must be specified the content of this crime.*

Under the provisions of Art. 12 of Law 678/2001 "the crime of human trafficking means the recruitment, transportation, transfer, harboring or receipt of persons by means of threat, force or other forms of coercion, abduction, fraud or deception, abuse of authority or taking advantage of the

impossibility of that person to defend or to express his/her will or by offering, giving or receiving of payments or benefits to achieve the consent of a person having control over another person for the purpose of his/her exploitation is punishable by imprisonment from 3 years to 10 years and interdiction of certain rights.

Human trafficking is a crime against *personal freedom*, committed by traffickers with the purpose of exploiting a person. Human trafficking violates the fundamental human rights and freedoms, from the freedom of movement, communication or expression, to the right of any human being to dignity, security, physical and mental integrity, and in extreme cases, violates even the right to life.

The generic legal object of this crime consists of defending the physical liberty of the person, ie his/her ability to move, to act according to his/her will and to the extent permitted by law. The physical liberty constitutes an important social value; therefore the actions affecting these social values ultimately harm the interests of the society in general, which is interested in the development and preservation of human rights and freedoms.

The special legal object is complex, consisting, on the one hand, of the social relations that refer personal freedom, and on the other hand, the social relations that refer to dignity, protection of bodily integrity or health, against the acts of his/her exploitation and transformation into a means of obtaining material benefits. The material object is the body of the person trafficked for the purpose of exploitation.

The material element takes the form of an action with several alternative ways.

The recruitment is the solicitation (selection) of a person who is likely to be exploited and determining him/her to become a victim of exploitation.

The transportation is the act of a person called carrier, of moving the victim from one place to another, with/without a means of transportation.

The transfer means the act of a person who requires and performs the change of the accommodation place of a another person or of the place where s/he is hidden or exploited. The transfer of a victim from a trafficker to another can be made at different stages of trafficking.

Accommodation means the act of a person who provides shelter, housing to another person for the purpose of his/her exploitation or to facilitate his/her exploitation.

The taking over means the action of a person to take up on his/her behalf another person for the purpose of his/her exploitation or to facilitate his/her exploitation.

In every form of the material element the law requires, as a prerequisite condition, the existence of a particular *purpose of the offence, precisely the exploitation of the victim*. Exploiting a person means:

- a) performance of a work or services forcibly, with the violation of the legal rules on working conditions, salaries, health and safety;
 - b) maintaining in a condition of slavery or other similar processes of restraint or servitude. Under the provisions of Art. 1 of the Slavery Convention signed at Geneva on 25 September 1926, 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. Thus, the owner owns, uses and manages the person subject to possession by subjecting him/her to various forms of exploitation.
 - c) forcing into prostitution, pornographic manifestations for the production and dissemination of pornographic or other forms of sexual exploitation;
 - d) forcing into begging;
- Another essential requirement that amounts to the crime of trafficking of adults is that the *criminalized actions* shall be committed by any of the following *methods* provided in the standard of criminality: threat or other forms of coercion, abduction, fraud or deception, abuse of authority or taking advantage of the person's inability to defend himself/herself or to express his/her will, or giving or receiving of payments or benefits for the purpose to achieve the consent of a person having control over the victim.

The immediate result. The act of the active subject should result in a state of danger for the relations regarding the person's freedom, the respect for individual rights, his/her dignity and physical and psychological integrity, being carried out by the commission of the criminalized activity itself.

The causal link. There must be a causal link between the offender's act and the immediate result; this is accomplished by the very commission of the action described by the incrimination rule (when the law does not require a material result).

What was specifically retained and in charge of the two defendants through the document instituting the proceedings, was that during September-October 2008, according to a common agreement previously established was that each of them had carried out material acts of recruitment, transportation, receipt and accommodation by deception, debt, threats, withholding of passports and refusing of their restitution for the purposes of their exploitation through work and with the violation of the legal rules on the conditions of work, salaries, health and safety and without employment contracts for a total number of 13 Honduran citizens.

- As correctly noted by the first instance, in case there is no evidence showing the exploitation or the purpose of exploitation of the injured parties.

First it is noted that the Honduran citizens had worked for the defendants for a short period of time; therefore, given this short time, there cannot be made a questionless appreciation with regard to the intention of the defendants. The form of exploitation attributed to the defendants, that of exploitation through work must have a certain duration, a certain consistency over time in which the defendants should have exploited the injured parties but there couldn't be made certain findings in this respect.

No evidence provided does show the defendants exercised acts of deception against the Honduran citizens by promising salaries of 700-1200USD/month, hotel accommodation and other facilities; these promises had been made by the IJCR labour placement agency in the Republic of Honduras without a proved agreement between this company and the Romanian company.

The mere fact of drawing-up invitation in writing, signed and submitted to the border police by the witness L.F. after his consultation with the defendant A.H. who confirmed the invitation of the Honduran citizens as tourists does not prove the defendants' intent to exploit the injured parties, whereas having no employment contracts with them, there was no other possibility to enter the country.

As it resulted from the statements of the witnesses heard, the injured parties performed at the beginning a period of training to get accustomed to the activities they were to carry out and to learn the Romanian language; for this reason the defendants hired a teacher to teach the injured parties notions of Romanian language.

As the defendants argued by defenders, the foreign citizens could not be immediately employed as it was compulsory to obtain in advance a work permit under the provisions of Art. 44 para 2 of the GEO 194/2002; the authorization involves verifications performed by the General Inspectorate for Immigration and is issued in maximum 30 days from the employer's request, term which may be extended by another 15 days under the law.

After obtaining the work authorization there shall be applied for a short-stay visa, under Art. 44 para 5 of the same law.

Although both the indictment and the written reasoning of the appeal show that Intelbiz company did not fulfill any of the legal conditions for the employment of foreign citizens, there has been no definite proof in this respect, as it is not proved that the company's requests to obtain a work authorization had been rejected by the competent authorities, for reasons related to its organization and functioning, especially since it turned out that Intelbiz has signed a consulting contract with "TS 2000" company on 01.08.2008 to obtain the foreigners' legal right to work.

Likewise, the evidence provided in the case did not show beyond any reasonable doubt that the foreign citizens had been promised certain conditions of accommodation at the hotel or three meals a day, as they claimed.

As the injured parties themselves stated during their hearing by the prosecution bodies, A.H. told them that they would earn 300 USD per month for the entire duration of three years of the contract and not 700 USD, as specified by the contract signed in Honduras.

The statement of the injured party L.L.M.G. is relevant in this regard, indicating that upon arrival in Romania, the defendant S.A.I.N. told them that the salary of the injured parties would be 300 USD throughout the contract and that they had been lied about the salary increase to 700 USD. The

same injured party reported that s/he received an advance of 150 lei and on 13/15 October another 485 lei.

From the statements of the other injured parties also results the same situation, namely the fact that they had learned from the recruitment company in Honduras about the salary of 700 USD/month, accommodation in double rooms and meals.

- In the Republic of Honduras, the injured parties signed the contracts with the recruiters in English, as stated the injured party C.M.M. claiming that her husband who knows English said that the agreement mentioned a working period of three years, the Romanian company would ensure accommodation, public transport but not food and also the fact that their passports were to be held at the company for the safety of the injured parties.
- Upon arrival in Romania, the defendants told them that they would receive salaries of 300 USD/month.

Therefore, it results that the defendants did not promise to the injured parties salaries of 700 USD/month and they ensured accommodation, but not in specific conditions.

- Regarding the accommodation conditions, as held by the first court, from the statements of the witnesses heard, it resulted that before that injured parties arrive in the country, the accommodation had been prepared at the House of the Free Press and in Otopeni; according to the statements of the witness heard these spaces even though endowed with a large number of beds, they were large and could provide everything that was necessary for a decent life, with bathroom, kitchen, internet access and computers.
- The fact that the spaces were not heated, as also noted by the first instance, it is not likely to lead to the harm of the foreign citizens, because they were accommodated in the respective location in early fall, when anywhere in Romania were used the central heaters. It was similarly revealed that the injured parties received were provided cards for the public transport and mobile phones with a number of minutes included.
- As concerns withholding of passports, it resulted indeed from the statements of the witnesses heard that they were kept at the company in a safe box, but they were returned on request when the injured parties needed them to go to the bank or other occasions. The reasons for withholding passports are not very clear, showing that since the signing of the contract with the recruitment company in Honduras the injured parties learned about this condition and that the passport were withhold for safety reasons and also for not going to other companies. The defendants claimed that the passports were withheld solely for translation and preparation of employment forms. What is certain is that the passports were withheld, but this, not corroborated with other data and evidence showing the defendants' intention of exploitation cannot amount to the offences that the defendants are charged with.
- Finally, as noted by the first instance, neither the conditioning of the defendant A.H. from 28 October 2008 - when amid the strike of the injured parties he offered them two options, either to remain at the company in the same conditions or to return the amount of money between 1360-2500 USD, accounting for transport and other expenses incurred by the company to bring the injured parties in Romania - did not amount to a threat or constraint of the injured parties, whereas the injured parties had already taken contact with the state authorities early on 17.10.2008, so the defendant's "threatening" was not one able to produce consequences.
- The only partial payment of the injured parties' salaries – considering the situation occurred one month and was not a long-term phenomenon to outline unequivocally the defendants' intention to proceed so throughout the period – does not amount to a material element of labor exploitation of the injured parties.
- The same applies to the five Honduran citizens who arrived in Romania on 11.10.2008 being accommodated in the building of the Free Press Square and who joined the protest of the others who arrived earlier; the short period of time during which they performed activities for the company managed by the defendants was not sufficient to outline any intention of exploitation by the defendants.
- The Court held that the first instance, after a correct examination of the evidence provided in the case, stated rightly, wisely the facts and concluded duly and legally on the absence of elements amounting to the crime of human trafficking.

- It does not appear that the actions of the defendants created a state of danger to the freedom of the injured parties, to their physical and mental integrity, as the injured parties had full freedom and denounce the facts to the authorities anytime, being proved that they did it when they considered they were victims of trafficking.
- The first instance court has also resolved correctly the civil actions brought by the injured parties, who joined the proceedings as civil parties, as the defendants themselves did not met the conditions of liability in respect of lawful acts. Any differences of money still to be recovered from these citizens, up to the amounts which have been agreed with the defendants for the period they had worked for the defendants's company can not be granted in criminal proceedings because they are nor linked to the liability in respect of lawful acts. In the absence of a crime attributable to the defendants, there are no grounds for compensation within the criminal proceedings under Art. 19 para 1 of the Criminal Procedure Code.

In light of these considerations, the appeal of the Prosecutor's Office is determined as unfounded and according to Art. 421 pt. 1 letter b of the Criminal Procedure Code, it will be dismissed as such. According to Art. 275 para 3 of the Criminal Procedure Code, the legal costs incurred in resolving the appeal remained in charge of the state.

The General Inspectorate for Immigration - Asylum and Integration Directorate

The Asylum and Integration Directorate dismissed the application for asylum, arguing that the person in case is an "economic migrant", that his request to obtaining a form of protection does not meet the requirements stipulated in Law no. 122/2006 on asylum in Romania for granting the refugee status or subsidiary protection. From the point of view of the Romanian authority, it is not about a well-founded fear of persecution under the Romanian law or according to the Geneva Convention on Refugees Status. The decision of GII-AID was contested by the foreign citizen *H.C.N.D. in court*, which also maintained the decision of GII-AID, with the motivation that he does not meet cumulatively all the conditions stipulated neither by the Law on Asylum in Romania nor by the Geneva Convention on Refugees Status.

CHAPTER 7

THE ROMANIAN IDENTIFICATION AND REFERRAL MECHANISM FOR VICTIMS OF HUMAN TRAFFICKING

Approved by Order no 335 /2009. Issuer Ministry of Internal Affairs in partnership with several Romanian institutions: Ministry of Education, Ministry Of Health, Ministry of Labor, Family and Social Protection, National Authority for Child Protection, Ministry of Foreign Affairs, Public Ministry, Ministry of Justice

It is the elaboration of a unitary mechanism coordinated by all institutions and organizations involved in anti-trafficking fight, fact that leads to the improvement of the identification capacity of victims, ensuring their protection and assistance, regardless of the institution or organization with which the victim comes into contact for the first time.

The identification process of victims needs to take in consideration two major perspectives

The Legal Perspective: human trafficking crime was mentioned in Law no. 678/2001 on preventing and combating human trafficking. Starting with 1 February 2014 the incrimination of this illegal act it is mentioned in the Romanian Criminal Code.

The victimology perspective: which needs to take into account the characteristics and particularities of each case.

The identification of a person as victim is the first step of this mechanism and several indicators need to be taken in consideration such as: sex, age, social characteristics, documents, place where the person was identified/found; the circumstances in which the victim was identified, signs that may indicate the presence of an abuse (physical or mental trauma) the evaluation/opinion of another organization or institution involved in fight against human trafficking or with legal attributions that need to be considered in the process of identification and referral in order to ensure the continuity and transparency of the decisional process.

Concrete modalities of identifying and repatriating victims of trafficking

Through judicial bodies. Through Romanian diplomatic missions and consular offices abroad. Through TelVerde (a phone line through which can be retrieved and referred assistance requests from victims or complaints about potential human trafficking offence). Other identification modalities: there are situations in which victims can be identified or referred to institutions/organizations by other citizens, former clients, labor inspectors, medical units' staff, school, local community, NGOs)

Referral Procedures:

- 1. The victim was identified by judicial bodies (police special units for combating organized crime, border police, The Directorate for Investigating Organized Crime and Terrorism DIICOT).**
- 2. The judicial body will notify the Regional Center of the National Agency against Trafficking in Persons (NAATP) for the evaluation of victims' assistance needs and to maintain a contact with her.** The representative of the NAATP will elaborate an initial evaluation and will ensure an immediate referral for assistance. A case responsible will be appointed to monitor victim's assistance process. The service provider will be notified and with the victim's agreement relevant information will be transmitted necessary for assistance.

- 3. The victim was referred and repatriated by IOM.**

The IOM representative will inform the representative of the NAATP Regional Center about victim's repatriation. He will discuss with the victim about potential collaboration with the judicial bodies. In the case in which the victim cannot receive assistance during the transit phase, the NAATP

Regional Center will be informed in order to ensure as soon as possible access to assistance services in the origin community.

4. The victim was identified by a foreign NGO and referred to a Romanian NGO

The Romanian NGO representative will inform the NAATP Regional Center for the coordination and monitoring of the assistance provided to the victim; will discuss with the victim about possible cooperation with the judicial bodies.

5. The victim is identified through the Romanian diplomatic mission or consular offices

In the situation in which the victim is in urgent need to assistance in that foreign country the Romanian diplomatic mission representative will contact a local institution or organization that provide assistance for victims. If the victim do not have any more identity or travel documents to attend his / her Romanian citizenship, the diplomatic mission will issue at request the papers necessary for the repatriation process and will inform in useful time the NAATP and Border Police about the repatriation of the victim.

6. The victim identified is a foreign citizen

Foreign citizen shall benefit without discrimination from all assistance and protection measures as the Romanian citizens.

The territorial structures of Border Police, General Inspectorate of Romanian Police will contact NAATP to evaluate the assistance needs of the victim. NAATP will contact as soon as possible the Romanian General Inspectorate for Immigration informing about the existence of a foreign victim. The victim will have to be transported in security conditions to a special accommodation for foreign victims in order to receive proper assistance. The Romanian General Inspectorate for Immigration has among its duties to regulate the legal situation of foreign victims in accordance with the legislation on aliens' regime in Romania.

7. The victim identified is a child

The General Directorate of Social Assistance and Child Protection (GDSACP) will have to be informed in order to take special protection measures. The representative of this institution will refer the case to a specialized center for child assistance, victim's abuse, neglect and trafficking and will maintain contact with the partners of the inter-institutional team. The representative of the NAATP Regional Center will maintain contact with the GDSACP in order to monitor the case. In the situation of unaccompanied minors' victims of trafficking, the General Inspectorate for Immigration will have to cooperate with several institutions and organizations specialized in child protection in accordance with Government Emergency Ordinance no. 194/2002 regarding the legal regime of foreigners in Romania.

CHAPTER 8

TRAUMA IMPACT ON VICTIM ABILITY TO PARTICIPATE IN THE CRIMINAL TRIAL

Synopsis: Understanding the psychological landscape of victims of abuse is vital, if one is to safeguard them, offer rehabilitation and redress. For the officer of law, mindfulness is required. This is pillared on the reality that the victim has been victimized by the abuser by means of **coercion**. They have been put in a distinct **psychological framework** which explains their mental health at the time they are rescued. Communicating with a victim needs rapid, and clear recognition of such network, trapped with landmines, i.e. triggers of trauma. This essay addresses such terms. It describes the axial elements of trauma-reaction, the spectrum of post-traumatic psychological syndromes and idioms of trauma, and provides guidelines for interviewing victims of abuse in the case of human trafficking.

Introduction:

Among crimes of purpose and intent, human trafficking (HT) is one of the oldest, heinous acts of man against fellow man. Using people for profit, and personal ends, occurred during most of humanity's history, while law and land were under a tyrant's mandate. Abusing, persecuting and taking benefit in the other, the weak, the subdued was a corollary of both statal despotism, but also the trade that comes with it. And while there are benefits that come with the modern state, the exercise of freedom and individual rights, stated in charters and guaranteed by treaties and constitutions, the trafficking of people, forced displacement and slavery, in their modern version, are perpetuated. Yearly, millions of persons across the Globe are being bought, sold, held in captivity for various purposes, their freedom to move hindered, their rights trampled, their lives endangered, their well-being denied. In numerous cases, these peoples are children, or young women used for sex trade, other times for menial jobs, such as working in illegal factories, or agriculture. They are subjected to various forms of cruel, inhuman or degrading (CID) treatments. Torture is frequently used upon victims of traffic, either in its physical, or psychological form, in the purpose of discourage flight, but also as means to overpower and destroy their humanity. By coercion, violence and mental submission, the trafficker is reassured that what he sees as "property" will continue to produce gain for him, or the organization he/she is part of. Chasing such individuals, as well as the dismantlement of criminal groups engaged in HT, is a trans-national, sometimes trans-continental effort on the part of authorities, and multi-disciplinary teams.

Sometimes, and not easily acknowledged by authorities – even in States with a good record for respecting human rights – inhuman or degrading treatment is applied to victims of human trafficking after rescue, when placed in shelter until time of trial, or after. From detention conditions, to how interrogation takes place by police forces, to the slowly moving cogwheels of justice, it is happenstance that victims will endure secondary traumas well after the end of their predicament. The possibility of being deported, when the victim is an illegal migrant, discourages disclosure, and open communication with authorities or legal counsel. The fear of repercussions, and the inability of State to provide safety during the phase of the trial, but also in the aftermath of it, are significant deterrents. And, finally, a rightful access to health, and especially mental health services, is sometimes denied, or difficult, to survivors. Under the crust of protocols everyday realities are hard, and frequently blatant hostility is manifest when state actors are questioned about their practices. Shame, stigma and frequent helplessness are reported both by victims, but also those who virtually released them, only to then surrender them to rigors of law.

This presentation provides knowledge, and insight to the burdens sustained by victims and survivors. Knowing such burdens will help parties involved in providing services for either persons at risk of being trafficked, or when rescuing victims, or when prosecuting persons accused of human trafficking, in the process of obtaining testimonies from victims but also securing them. Knowledge of this, by both legal and medical professionals, is mandatory if one is to enforce laws, policies, but also to avoid secondary traumatization of survivors in the process of gathering evidence of crime doing, to prosecute and convict traffickers.

Coercion is the key word!

The crucial word for all following, thus, is the condition of victims and survivors of trafficking to have been **coerced** into this position. Coercion is “an offer that you can’t refuse”. It is to be distinguished from its adjacent term, **exploitation**. Everywhere, even in civil societies, various actors working from a position of monopoly, may exploit their bargaining position, force unjust rules or law, or improper work conditions, low wages and thus exploit individuals. They don’t do this from a coercive position, though sometimes coercion may be involved. And while exploitation is reprehensible, it is not regulated by penal law but other canons. Amoral it is, but not illegal, though many times just as abusive. A mental note should be made, at any time, for the lawyer, the prosecutor, the judge that theirs **are** positions of power, and, as such, in dealing with victims of traffic they are empowered, but also seen as powerful, and attitudes that may evoke past exploitation of victim, by forcing the victim from such position, or limit rights or freedoms, may prove to be re-traumatizing and do just as much harm. The law needs to be just, but not *exploitative*.

Survivors of human trafficking have seen the worst of humanity. They have not only been exploited, but seduced, threatened, beaten, shamed, humiliated, dehumanized, used as chattel, sometimes transported over vast distances, other times kept under the eyes of their neighbors, under concourse of ignorance and hypocrisy of their fellow men.

An exploited person may be, part of exploitation or because of it, *coerced* by threat, punishment or denial of rights or freedoms. It is the threat that is the final, and necessary ingredient, for the trauma of being victimized, and for the crime of abuse. But for *coercion* to take place, it is furthermore necessary that the victim act on mandate of coercion, i.e. comply to the coercer’s demands. Unless the victim acts under coercion, or does not follow demands explicitly laid under coercion, then this crime cannot be reasonably statuated. Some authors have argued for another term, which is *coerciveness*, to name situations when such proposals are not met by success on the part of the coercer, but still indicate intent to coerce, thus providing the law with an argument for abuse.

When we say that the coercer leaves the coercee “no choice,” either by act or intent, we don’t necessarily mean that the coercee is literally unable to choose, but that for the coercee to choose otherwise than the coercer demands would be contrary to reason, in order to survive.

Biderman’s Framework of Coercion

The milieu established by the abductor, the abuser, the “boss”, the “kappo”, the coercer (see above) is that of systematic and total horror, terror and domination. These are achieved by creating a framework around the victim to subdue, annihilate and control the individual. Albert Biderman, more than 60 years ago, described this framework by which a person may coerce and enslave another, thus crystallizing an environment of abuse, in which trauma takes place. This framework is to be understood as being the underlying factor for future submission of the victim, at the cost of psychological damage to his/ her mind and soul. It also serves the layperson to mentalize, reflect upon the person they are interviewing either in proceedings or, later, in a court of law, and stay mindful whilst doing it. Irrespective of other medical, or psychiatric diagnoses, this is the regular moral landscape from where victims are rescued:

The most effective way to gain that cooperation is through subversive manipulation of the mind and feelings of the victim, who then becomes a psychological, as well as a physical, prisoner."
(Amnesty International Report on Torture)

1. Isolation: The victim is deprived of all forms of social support both from peers and family or friends. The coercer uses his/ her influence to make the victim **dependent**.
2. Monopolization of perception: The victim is made to fix one's attention on his/ her **immediate** reality and sense of Self. Outside stimuli which may compete with those controlled by the trafficker are eliminated (i.e. victims are housed in badly lit housing, far from cities, or made to stay indoors during the day, with curtains drawn). Actions not consistent with compliance are punished by limiting access to small privileges or basic needs, like food or hygiene.
3. Induced debility and exhaustion: is enforced by sleep deprivation, poor nurture, light exposure, improper shelter or environmental stress. It cultivates anxiety, despair, helplessness and worthlessness. The victim is made to believe that his/ her sense of self is futile, that his/ her humanity is spent, and the only chance for survival is attached to the coercer.
4. Occasional indulgences: Sudden gifts, or privileges, emotional showering of the victim with signs of gratitude are provided by the abuser to secure submission. This serves to further cement total dependence of the victim to the coercer, seen as a "master of fortunes", that may bestow boon on the loyal servant. Usually indulgences are employed when a risk appears (either by outside intervention from social workers, psychologists, even police forces), and are frequently effective.
5. Degradation: Psychological torture involves parceling out the victim's concern for various personality traits, physical complexes or behavioral problems, and then using those to further punish, shame and degrade the individual. He/ she is thus reduced to an "animal level". It is a worst form of abuse, having to do with the inner-core of the soul of a person, his/ her very humanity. It is meant to induce total capitulation.
6. Enforcing of trivial demands: once seen as omnipotent by the victim, the coercer/ abuser will cultivate an environment where he/ she responds to trivial demands (such as demands for soap, tooth-brush, new shoes, water or bread).

The triviality, banality of such, encircles and consecrates the Biderman framework. It is also the **root** of primary, but also secondary or even tertiary trauma. Secondary trauma happens when, in course of interrogation or interviewing the victim is lead to recollect and tell his story of trauma, which often triggers profound reactions. Tertiary trauma is that which is inflicted by the victim on his peers/ children/ group, thus creating a culture of trauma⁶. This profound shame and guilt the survivor has, recollections of his life environment during slavery or forced labor, over the course of displacement and while treated as chattel are what ignite his post-traumatic memories.

The ability to survive is extraordinary in all humans, even in the face of greatest dangers. What endures is vicarious elements of past life that plague the soul, and yield psychological distress. This stress takes shape and forms **syndromes of post-traumatic stress**.

These may range from:

- **Maladaptive coping mechanisms:** depression, anxiety, addiction, sleep problems, self-harm behavior, suicidality, to
- **Acute and chronic post-traumatic stress disorder:** a disorder in which the individual **re-lives** traumatic experiences by means of flashbacks, nightmares, intrusive thoughts, to which he/ she reacts by **avoidance** (either by not talking about it, or not engaging in various daily tasks that may trigger flashbacks) whilst suffering from **hyper-arousal and persistent neuro-vegetative stress:** feeling edgy, having angry outbursts or excessive startle reaction. These occur whilst the person reports blunted affect, disinterest in outside world matters, negative perceptions about Self, self-guilt and blame, and problems recollecting past events, including those about traumatic events.

⁶ Tertiary trauma is beyond the purpose of this essay, concerned mainly with primary and secondary events.

The medical health of the individual, furthermore, is impacted by being a victim of abuse. Frequent beatings leave scars and change tissue appearance. Blunt blows to the head create neurological damage/ TBI (traumatic brain injury) which may vary from mild to severe (hemorrhages/ strokes). Broken limbs, unhealed and unattended, recover partially, leaving the individual with temporary, or permanent, handicap.

What is most important is that all medical findings should be systematized in a clear, comprehensive manner, by respecting international standards. The gold standard, for the past 18 years, has been the Istanbul Protocol for the evaluation of victims of torture and abuse.

The Istanbul Protocol

Communication with victims should be done in proper conditions, and by properly trained persons. The international gold standard for interviewing – the IP (Istanbul Protocol) – provides guidelines for the examiner in conducting evaluations. Of most importance, these guidelines are binding for the medical professional, the psychiatrist, the psychologist, but they are **also** reference for the social worker, the lawyer, the police-officer, the prosecutor or judge. Same ethical standards should apply in the course of ascertaining the present state of a victim of HT.

We offer here only a brief abstract from the IP general guidance, with reference for future training⁷:

- “The purpose is to elicit information in a humane and effective manner. During the evaluation, examiners should pay attention to the psychosocial history of the alleged victim. Relevant psychosocial history may include inquiries into “...the person’s daily life, relations with friends and family, work or school, occupation, interests, future plans and use of alcohol and drugs.” Information about any prescription drugs is important, since the discontinuation of any medications during custody could affect the detainee’s health. Health professionals should be aware of the following considerations while conducting their medical evaluations.
- Informed Consent: Health professionals must ensure that individuals understand the potential benefits and potential adverse consequences of an evaluation and that the individual has the right to refuse the evaluation.
- Confidentiality: Health professionals and interpreters have a duty to maintain confidentiality of information and to disclose information only with the alleged victim’s consent.
- Setting: The location of the interview and examination should be as safe and comfortable as possible, including access to toilet facilities. Sufficient time should be allotted to conduct a detailed interview and examination.
- Control: The professional conducting the interview/examination should inform the alleged victim that he or she can take a break if needed or to choose not to respond to any question or to stop the process at any time.
- Earning Trust: Trust is an essential component of eliciting an accurate account of abuse. Earning the trust of one who has experienced torture and other forms of abuse requires active listening, meticulous communication, courtesy, and genuine empathy and honesty.
- Translators: Professional, bicultural interpreters are often preferred, but may not be available.
- Preparation for the Interview: Health professionals should read relevant material, to understand the context of the alleged abuse and to anticipate regional torture practices.
- Interview Techniques: Initially, questions should be open-ended, allowing a narration of the trauma without many interruptions. Closed questions are often used to add clarity to a narrative account or to carefully redirect the interview if the individual wanders off the subject.
- Past Medical History: The health professional should obtain a complete medical history, including prior medical, surgical or psychiatric problems. Be sure to document any history of injuries before the period of detention or abuse, and note any possible after-effects.

⁷ Available here: <http://www.ohchr.org/Documents/Publications/training8Rev1en.pdf>

- **Trauma History:** Leading questions should be avoided. Inquiries should be structured to elicit a chronological account of the events experienced during detention. Specific historical information may be useful in corroborating accounts of abuse. For example, a detailed account of the individual's observations of acute lesions—and the subsequent healing process—often represents an important source of evidence in corroborating specific allegations of torture or ill-treatment. Also, historical information may help to correlate individual accounts of abuse with established regional practices. Useful information may include descriptions of torture devices, body positions, and methods of restraint; descriptions of acute and chronic wounds and disabilities; and information about perpetrators' identities and place(s) of detention.
- **Review of Torture Methods:** It complements the trauma history to explore abuses that could have been forgotten or avoided by the alleged victim due to their nature (e.g. rape). The review is not intended to be an exhaustive checklist; it should be individually tailored according to the trauma history or to the relevant regional or local practices.
- **Pursuit of Inconsistencies:** An alleged victim's testimony may, at first, appear inconsistent unless further information is gathered. Factors that may interfere with an accurate recounting of past events may include: blindfolding, disorientation, lapses in consciousness, organic brain damage, psychological sequelae of abuse, fear of personal risk or risk to others, and lack of trust in the examining clinician.
- **Nonverbal Information:** Include observations of nonverbal information such as affect and emotional reactions in the course of the trauma history and note the significance of such information.
- **Transference and Counter-transference Reactions:** Health professionals who conduct medical evaluations should be aware of the potential emotional reactions that evaluations of trauma may elicit in the interviewee and interviewer. These emotional reactions are known as transference and counter-transference. For example, mistrust, fear, shame, rage, and guilt are among the typical transference reactions that torture survivors experience, particularly when asked to recount details of their trauma. In addition, the clinician's emotional responses to the torture survivor, known as counter-transference (eg, horror, disbelief, depression, anger, over-identification, nightmares, avoidance, emotional numbing, and feelings of helplessness and hopelessness), may affect the quality of the evaluation. Considering survivors' extreme vulnerability and propensity to re-experience their trauma when it is either recognized or treated, it is critical that health professionals maintain a clear perspective in the course of their evaluations."

Comments and conclusions:

While priorities may differ for the police officer, the prosecutor, the judge, the medical professional, the psychologist, at the end of the day justice is served when all work in a multi-disciplinary team, respecting each-others' expertise. The role of documenting abuse and torture rests on the forensic specialist, with an emphasis on forensic psychiatry and psychology. Recursive interviewing is a frequent trigger of secondary trauma for the victim, forced to tell a story again, and again, for meeting judiciary standards, often plagued by bureaucracy. Testimony of the survivor is needed by the prosecutor. It should be taken in a human, clear manner, as proposed by the IP. The prosecutor should state the reason for taking testimony and not engage, transferentially, in any sort of psychological counselling or diagnosis. This should be left for the professional. The same is to be expected from the lawyer, or the judge. Secondary traumatization may be even more damaging, as the crust of trust is broken, again, by those supposed to help, and shelter the victim, once rescued. Proper wording, with respect for the person's dignity and right to private life, is to be pursued by State and counsel during of proceedings and trial. The role of the expert cannot be emphasized enough.

It is to be understood by the officer of law that doctors are not to participate in any sort of abuse to the victim. The trampling of rights, the further exploitation of victims is to be reported by doctors who will refrain from either condoning, or be complicit to, such practices. In the course of documenting abuse the doctor will also note improper behavior of policemen while the victim is in detention, abuse by prosecutors or unlawful behavior of judges, especially in cases when any sort of discrimination is

observed, based on race, ethnicity, provenance, religion or orientation. The duty of the medical professional is for his/ her patient first, and foremost. It goes beyond the Hippocratic oath, having been statuated in declarations by the WMA (World Medical Association) on various occasions (Tokyo, Malta, Madrid). It observes the right of the victim to not pursue charges, or be forced in a testimony position against his/ her will. It observes the right of victim to decide whether to seek retribution or redress, once having been informed of this right. It observes the right of the victim to freely decide upon his/ her private life. State and counsel cannot, and should not, coerce victims into a legal bind. And when victims have engaged in criminal activity, being trafficked should provide a special circumstance for judgment in providing punishment, and service of law.

Further reading on the matter:

1. <https://plato.stanford.edu/entries/coercion/>
2. https://www.americanbar.org/content/dam/aba/multimedia/trafficking_task_force/resources/T_FHT_Toolkit/HumanTrafficking_Bar.authcheckdam.pdf
3. https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/UNITED_NATIONS_CONVENTION_AGAINST_TRANSNATIONAL_ORGANIZED_CRIME_AND_THE_PROTOCOLS_THEREO.pdf
4. <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168008371d>
5. https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/thb_amounting_to_torture_and_other_forms_of_ill-treatment_0.pdf
6. <http://journalofethics.ama-assn.org/2017/01/stas1-1701.html>
7. <https://www.ncbi.nlm.nih.gov/pubmed/28107156>
8. <http://journalofethics.ama-assn.org/2017/01/ecas3-1701.html>
9. <http://bmjopen.bmj.com/content/5/8/e008682.long>

”Loverboy” Syndrome

This section aims to briefly explain the issue of the victims of loverboy phenomenon, from a psychological perspective. Loverboy syndrome is one of the most common tactics that traffickers use in recruiting and grooming their victims. They recruit their victim through seduction and coerced them into commercial sex, domestic servitude, begging, criminal acts.

The abuser tells their partner that this exploitation is for benefit of their family, the relationship, for financial support or to support an addiction. Usually, the trafficker is a male and his victims are young girls. The abuser utilizes existing power dynamics and vulnerabilities to exploit their victim. A trafficker knows that once a girl is emotionally involved, she will do whatever she can to keep his affection. As a trafficker works to secure his victim, there are three main phases of recruitment that he will take before he is certain that she will not leave – the scouting, emotional dependency and exploitation phases.

The Scouting Phase

The process of recruitment into commercial sex or other forms of exploitation begins with the initial contact and bonding between the trafficker and the victim. Traffickers are experts at recognizing vulnerabilities in young girls, then using those vulnerabilities to connect with, manipulate, and exploit the victim. While traffickers are able to use many vulnerabilities to connect with a victim, they often look for girls who have low self esteem, are isolated from friends and family, have a history of sexual abuse, are homeless or in the foster care system, come from a fatherless or broken home, or those who have conflicts with their parents or guardians. Once the victim's vulnerabilities are identified, the trafficker works to fill the role that is missing, such as a father-figure, a boyfriend, or a caregiver.

Emotional dependency Phase

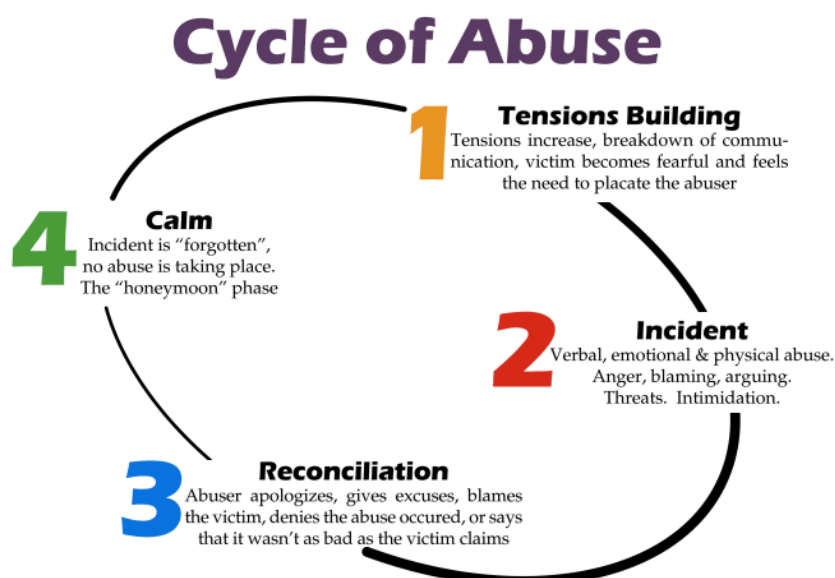
As the victim begins to trust and become closer to the trafficker, he continues to bond with her through false love and affection. Also known as the 'honeymoon' phase, he will shower her with expensive gifts and compliments, they will engage in physical intimacy, and he will promise her the opportunity for a better life. The more that the trafficker provides for the girl and as she grows to trust him, she moves further away from her family or care-givers. Soon, she finds that she is dependent on her trafficker for her physical and emotional needs and desires.

Exploitation Phase

Once the trafficker knows that his victim is completely dependent on him, he will manipulate her into commercial sex or other forms of exploitation. Typically, he tells her that he has financial difficulties and asks her to help earn money for them to live on, encouraging her to sleep with his 'friend', commit crimes, beg in order to make some extra cash. While the girl does not want to perform the tasks, she will often do so in order to make her 'boyfriend' happy, convinced that he loves her and wants what is best for her.

Through this process of recruitment and in the grooming through abuse that begins after, the trafficker and the victim begin to go through the process of trauma bonding, which is a strong emotional bond between two people, one of which harasses, beats, threatens, abuses, or intimidates the other. A similar form a Stockholm Syndrome, it is the trauma bond that makes it so difficult for victims to leave their traffickers and causes the victims to return to them even after they have escaped the life of being trafficked.

Cycle of Abuse: traffickers, like abusers, use cyclical violence to control victims by making promises of love or a better life and by using shame and manipulation.



Tensions Building

The tension-building period is marked by increasing frustration and agitation in the man in response to various stressors: the victim didn't earn enough money, didn't want to obey or she attempted to leave or to get help from someone.

He becomes irritable, frustrated, complaining, critical, blaming, or challenging. Typically, the girl tries to dissipate the tension by accommodating him – doing things she thinks will please him or calm him, apologizing for things that aren't really her fault so he won't feel bad. All these behaviors are a problem because she's taking responsibility for his unhappiness and internalizing her anger.

At other times she may react out of this tension and her own frustrations to say or do things that escalate the tensions and exacerbate his anger. She may develop symptoms of depression, anxiety, or physical complaints like headaches, upset stomach, or insomnia.

Incident

The abuser's rage eventually erupts in an out of control explosion of verbal abuse, violence or some other distressing incident, threatening and blaming the victim.

The victim may or may not try to fight back, escape, or get help. Some women are passive and completely detach during the violent episode, so much so that it all feels like a dream and she herself may quickly forget about it and try to move forward as though nothing happened. She may be in a state of shock and be unaware of the seriousness of the trauma or her injuries. Other women may become hysterical and incoherent.

Reconciliation

Right after the abuse she is probably upset, angry, or determined to leave, but commonly these feelings are overcome by her acceptance of his intense campaign to win her back with apologies, gestures of love, gifts, and promises to be better. Temporarily, her fragile self-esteem is boosted and she feels loved. Her romantic ideals are revived: this gentle, loving man is her real man, she just needs to keep him happy and under control in order to prevent future abusive episodes.

Calm

After their reconciliation a strong bond of idealism develops between the couple. This part of the cycle may seem pleasant.

The calm is deceiving — it's only on the surface and it won't last because it's based on a denial of the real problems. The calm is also destructive because it serves as a positive reward for the violence by reinforcing the cycle and enabling the couple to avoid dealing with the real underlying issues or developing effective conflict resolution strategies.

Further reading on the matter:

1. http://www.myria.be/files/Pages_from_Annual-report-2015-trafficking-and-smuggling-P1C2.pdf
2. http://www.cavis.es/sitio/index2.php?option=com_docman&task=doc_view&gid=147&Itemid=46
3. Walker, E. Lenore *The battered woman*, Harper & Row, NY (1980).

CHAPTER 9

TRAFFICKING IN HUMAN BEINGS AS CRIMINAL PHENOMENON IN BULGARIA

In the recent decades, the trafficking in human beings has become a serious criminal phenomenon. Many experts in this field define the crime as "the modern slavery". Human trafficking is a typical example of the crimes that are characteristic of the XXI century - the age of globalization. Recent studies show that between 500,000 and 2 million people worldwide are trafficked annually. In the beginning the victims of trafficking are mainly directed to the countries in the European Union for the purpose of sexual exploitation, as consequently the victims are trafficked around the world, for example to North and South America, Southeast Asia, Middle East. The main priority of the traffickers to the current moment remains the sexual exploitation due to the fact that it provides them maximum profits. Each year about 500,000 women and children are offering sexual services in the European Union, as about 200,000 are from Eastern Europe. According to UNICEF more than 60,000 children prostitute.

As a result of the criminal activity related to the trafficking in human beings for the separate countries, including Bulgaria can be indicated the following strategic risks:

- demographic destabilization- one of the most significant risks for Bulgaria considering the negative population growth in the recent decades;
- destabilization of the existing labor markets - the trafficked victims are removed from the legal markets and forcibly are drawn into illegal markets for sex and other services;
- increasing the size of the organized criminality - the organized trafficking in human beings can not exist isolated from the other crimes. It may be accompanied by drug trafficking, illegal arms trading and necessarily with money laundering;
- economic destabilization through "money laundering" - the accumulation of large profits from trafficking leads to origination of complex schemes of money laundering inside and outside the country, which is negatively affecting the economy.

The revenues generated by the criminal groups involved in human trafficking, rank immediately after those generated by trade in arms and narcotics. In this context, at European level in 2016 the accent was placed on the tracking of the financial flows reproduced by trafficking in human beings and the conduction of parallel financial investigations.

Another focus in the policies for combating human trafficking at European level was put on the impact of the migration crisis on the crime. On the one hand, the case appears to be the inosculation of migratory flows in which are falling irregular migrants, asylum seekers and human trafficking. On the other hand, intertwined are also the organized criminal networks bound by smuggling and those by human trafficking. However, with the migration crisis stands out a new vulnerable to the human trafficking group: that of the migrants seeking asylum and the economic migrants - citizens of third countries. High risk in the context of the new migration realities are also the unaccompanied children - migrants, nationals of third countries. The problem is particularly a topical issue for Bulgaria, due to the common border of the country with Turkey. Thousands of migrants from Syria, Iraq, Afghanistan, Pakistan and others are trying to reach Western European countries, passing illegally through the borders of Bulgaria. One of the existing channels for trafficking of migrants across Bulgaria is aimed at crossing the river of Danube and the transportation of the migrants on the territory of the neighboring Romania, from where they can continue their further way.

Within the frames of the European Union, Bulgaria appears to be the primary country of origin. The research show that the most common countries of destination for the victims from Bulgaria are Germany, Austria, Belgium, Italy, Spain, France, Switzerland, Turkey, the Netherlands, Norway, Sweden, Czech Republic, Poland and others.

According to GRETA data (Group of Experts to the Council of Europe Convention on Action against Trafficking in Human Beings) for the period 2013 - 2015 there is an upward trend to increase also the domestic traffic. For the presented period have been registered also a greater number of cases in which Bulgaria appears to be a transit territory or destination point. The report states that the Bulgarian citizens are involved in trafficking mainly for the purpose of sexual exploitation (77%), followed by trafficking for the purpose of labor exploitation (especially in sectors such as construction, agriculture and manufacturing goods) - 12%. Next place takes the trafficking in women for the purpose of selling newborns, as most rare are the cases of trafficking for deprivation of organs and body fluids.

The roots of the problem for the countries of Eastern Europe, including Bulgaria are:

- the poverty and the social inequality;
- lack or insufficient education among certain strata and groups of the population;
- lack of information;
- insufficient social experience;
- the attempts for safe migration others.

Although trafficking victims become persons from different social backgrounds and from different ethnic groups, the problem in Bulgaria is especially striking expressed and very often affects the people from the so called Roma / Gypsy ethnic group. The presence of compacted Roma population in certain areas of the country and the specific customs, culture, traditions and self-consciousness of this population contribute to a significant increase of the cases of trafficking among this category of people and it is manifested in two directions: both in terms of the large number of perpetrators of such crimes and in respect of the substantial victimization and the very high proportion of the victims.

Regarding the traffickers, according to the latest Eurostat report - not a few of them are EU citizens (about 69%), as for example, Bulgaria reports that most of the suspects are Bulgarian citizens. Giving guidance in this respect (and not only) are the series of reports and studies prepared by the project TRACE (Trafficking as a criminal enterprise), including "Future trends in the human trafficking in Europe". With regard to the traffickers and the criminal networks - it is expected that the increase in the social exclusion in combination with the not very good economic conditions will motivate the growth of the persons who could be bound with the crime of human trafficking. Meanwhile, the traffickers do not constitute a homogeneous group, but rather involve different types and groups of people with different background and profile. Usually the similarity between them is that they want to maintain a lifestyle that requires to exploit other persons in order to increase their profits. The traffickers will also operate in smaller schemes individually or as a "family business". There is an anticipation that in terms of the kids who grow up in families and environment involved in the business of trafficking in human beings, will exist a high risk that they themselves also will be involved in the crime.

CHAPTER 10

BULGARIAN POLICY FOR COMBATING TRAFFICKING IN HUMAN BEINGS

National Commission for Combating Trafficking in Human Beings	Policies, identification, protection, prevention, protection of the victims
Ministry of Labor and Social Policy	Policies, identification, protection
Ministry of Justice	Policies, prevention, protection of the victims
Ministry of Health Care	Health programs and medical assistance
Ministry of Foreign Affairs	International cooperation
Ministry of Education and Science	Educational programs and preventions
State Agency for Child Protection	Protection and care children
Ministry of the Interior	Investigation
State Agency National Security	Information gathering, counter risks to national security
Prosecutor's Office	Criminal prosecution
Court	Judicial investigation and punishment
NGOs	Prevention, care for victims, trainings

Under the Combating Trafficking in Human Beings Act the general policy and interaction of all relevant institutions and organizations in the field of combating human trafficking in Bulgaria is carried out and coordinated by the National Commission for Combating Trafficking in Human Beings, which is a collective body to the Council of Ministers of the Republic of Bulgaria.

The National Commission is chaired by a Deputy Prime Minister, as designated by the Council of Ministers. The composition of the Commission includes a deputy minister of foreign affairs, a deputy minister of labor and social policy, a deputy minister of the interior, a deputy minister of justice, a deputy minister of the healthcare, a deputy minister of education and science, a deputy chairperson of the State Agency "National Security", a vice president of the State Agency for Child Protection, a deputy chairperson of the Central Enforcement Commission for Anti-Social Behavior of Juveniles and Minors, as designated by the respective ministers, presidents. The composition of the National Commission includes the designated by the Head of the Supreme Court of Cassation, the Prosecutor General and the Director of the National Investigation Service, deputies of them. The meetings of the National Commission may be attended by representatives of non-profit legal entities and international organizations with agencies in the country, that operate in the area of prevention of the trafficking in human beings and protection of the victims of trafficking.

The National Commission for Combating Trafficking in Human Beings:

- organizes and co-ordinates the interaction between the relevant agencies and organizations for implementation of the Combating Trafficking in Human Beings Act;
- determines and administers the implementation of the national policy and strategy in the area of combating trafficking in human beings;
- develops on an annual basis a national program for prevention and countering of trafficking in human beings and protection of the victims of trafficking, and presents it to the Council of Ministers for approval;
- promotes organization for research, analysis and statistical reporting of the human trafficking data;
- participates in the international co-operation for prevention and countering of trafficking in human beings;
- organizes the conduction of information, awareness and educational campaigns aimed at persons from the risk groups for trafficking in human beings;
- develops training programs for officials to perform functions relating to the prevention and combating trafficking in human beings;

- manages and supervises the activities of the Local Commissions for Combating Trafficking in Human Beings and the Centers for protection and assistance of the victims of trafficking in human beings;
- registered individuals and non-profit legal entities who provide shelter to victims of trafficking in human beings.

For the realization of the regional policy and coordination to some of the municipalities in the country are created also Local Commissions for Combating Trafficking in Human Beings. Such territorial structures are functioning in the towns Blagoevgrad, Bourgas, Varna, Veliko Tarnovo, Montana, Pazardzhik, Plovdiv, Rousse, Sliven, as it is forthcoming in the current 2017 to be established a Local Commission in the municipality of Pleven as well.

In the Republic of Bulgaria are built and operate the following three coordination mechanisms:

- National Mechanism for Referral and Assistance of the victims of trafficking /Coordinator: the National Commission for Combating Human Trafficking /;
- Coordination Mechanism for Referral and Care of cases of unaccompanied children and children - victims of trafficking, returning from abroad / Coordinators: the State Agency for Child Protection and the Ministry of Interior /;
- Trans-national Mechanism for Identification and Referral of victims of trafficking /Contact Point for Bulgaria: the National Commission for Combating Trafficking in Human Beings /.

For effective combating the trafficking in human beings are not sufficient only and solely the efforts of the Police, the Prosecutor's Office or any other state body. The only way to combat this ugly phenomenon is the joint and coordinated work and constant interaction between all the above institutions and the civil society. In a broader aspect are needed complex social, economic, educational and demographic measures, not only at national but also at European and international level.

CHAPTER 11

BULGARIAN LEGAL FRAMEWORK

The crime "Trafficking in human beings" is a relatively modern crime which is regulated by Chapter II, Section IX of the Special Part of the **Penal Code of the Republic of Bulgaria** in Art. 159a - Art.159d. The corpora delicti of the respective offenses are included in the system of the Penal Code in 2002 /State Gazette number 92/2002 /. The criminalization of the human trafficking in the Bulgarian criminal law is a result of the implementation of the commitments on harmonization of the national legislation with the international instruments, ratified and accepted by the Republic of Bulgaria. Such acts are the Convention of the Council of Europe on Action against Trafficking in Human Beings /ratified by the Republic of Bulgaria in 2007/, the EU Framework Decision on combating trafficking in human beings of 2002 and the Framework Decision 2001/220.

Considering the commitments, in 2003 was adopted the special Combating Trafficking in Human Beings Act. In the additional provisions of this law are given legal definitions of terms related to this crime. Generally, the accepted in the Bulgarian legislation definitions are identical to those given in the international legal acts.

Significant in the matter, particularly in terms of protection of the rights of the victims of this type of criminality, are still the following laws:

- Penal Procedure Code;
- Crime Victim Assistance and Financial Compensation Act;
- Law on the Protection of Persons Threatened in connection with Criminal Proceedings;
- Legal Aid Act;
- Child Protection Act;
- Social Assistance Act;
- Law on Forfeiture in Favor of the State of Illegally Acquired Property;

Of fundamental importance is also the case-law, especially the compulsory one of the Supreme Court of Cassation of the Republic of Bulgaria. With the greatest importance is the Interpretative Decision № 2/2009 of the Supreme Court of Cassation.

According to the Bulgarian legislation "trafficking of people" is the recruitment, transportation, transfer, concealment or acceptance of people, regardless of the expressed by them will, when performing with the purpose of exploitation, while "exploitation" means the illegal use of people for acts of debauchery, for deprivation of body organ, tissue, cell or body fluid from the victim, for forced labor, for begging, or to be kept in forced obedience, or taking them into slavery or into a situation similar to the slavery /Combating Trafficking in Human Beings Act/.

Bulgarian criminal substantive law in the sphere of trafficking in human beings is very modern and is amongst the best legislations in the field in Europe.

According to the provision of Article 159a, Paragraph 1 of the Penal Code: "Who gathers, transports, hides or accepts individuals or groups of people in order to be used for acts of debauchery, for forced labor or for begging, for deprivation of a body organ, tissue, cell or body fluid, or to be kept in forced obedience regardless of their consent, shall be punished".

In compliance with that provision, the trafficker will be punished even if he/she has not used special methods - coercion, deception, etc., which are listed in the next paragraph as special elements of a qualified corpus delicti of the crime, leading to the imposition of a more severe punishment. The perpetrator will be liable to prosecution even in the cases when the victim has been aware of the activities into which will be involved, and has given his/her consent - which often happens in practice.

The crime is punishable even if the trafficking purpose was not achieved.

The special methods are contained in Article 159a, Paragraph 2 of the Penal Code and envisage the cases when the offense is committed:

1. regarding a person under eighteen years of age;
2. by using compulsion or by introducing the person in deception;
3. by kidnapping or illegal deprivation of freedom;
4. by using a state of dependency;
5. by misappropriation of power;
6. by promising, providing or obtaining benefit;
7. by an official within or in connection with performance of his/her duties.

This provision lists more severe forms of trafficking, for which the punishment is imprisonment for a longer period, as well as a higher fine.

According to Art. 159b of the Penal Code the cross-border trafficking is also a crime: "Who gathers, transports, hides or accepts individuals or groups of people and transfers them through the border of the country with the purpose under Art. 159a, Paragraph 1 shall be punished".

Art.159d of the Penal Code provides a heavier punishable corpus delicti when the offense constitutes dangerous recidivism or is committed by order or in fulfillment of decision of an organized criminal group.

The forms of the act of the crime trafficking in human beings are:

- **Gathering**- active actions on seeking, finding, attracting, recruiting, soliciting, arranging the victim or set of people for adapting in position creating prerequisites for their future exploitation. There is "gathering" also when the active part is the victim of the crime, not the perpetrator. The act of commitment "gathering" can be done by incitement to prostitution as well. The recruitment of the persons may have happened except by unlawful means, but also by such that are perfectly legal, for example: informal networks, friendly and family circles, advertisements for offering or accepting work through agencies that offer job, training, marriage or travel abroad, through promotion on the Internet or in the media, the use of intermediaries in pubs and other unlimited range of activities;

- **Transportation**- the physical relocation, transport of the victim or the procurement of transport. According to the Interpretative Decision № 2/2009 of the Supreme Court of Cassation the "transportation" takes place not only when it is actually transporting the victim, but also when are carried out actions needed to his/her transport. It is enough for the perpetrator to provide the transportation by purchasing a ticket, providing vehicle with a driver, sending to the airport, supply with travel documents, or other similar actions, moreover without having to be violated the regime of the border control;

- **Hiding** - is expressed in concealing the location of the victim from his/her relatives or the authorities;

- **Acceptance of individuals or groups of people**- is expressed in securing residence, place of employment, procurement of lodgings;

- **Transfer across the border of the country**- the physical relocation, transportation of the victim on the territory of a foreign state.

The punishability of all corpora delicti of trafficking, regulated in the Bulgarian Penal Code defines them as serious crimes. Provided are penalties depending on the different hypotheses - imprisonment from two to fifteen years, heavy fines in the amount of three thousand to one hundred thousand Levs, as well as confiscation of part or the whole property of the perpetrator.

Bulgarian law distinguishes between internal crime of trafficking (article 159a of the Criminal Code) and trafficking by crossing the national borders (transborder trafficking) (article 159b of the Criminal Code). Unlike the crime of smuggling, where a breach of border crossing regime needs to be present, legal crossing of the national borders is sufficient.

It is also a crime to hire as an employee a foreigner illegally staying within the territory of the Republic of Bulgaria, knowing that such foreigner is a victim of human trafficking.

There are concerns that human trafficking in the national law creates definitional ambiguity and it is not compatible with the definition from the Palermo protocol (UN 2000). The national interpretation excludes the '*means*' dimension of the international definition, which is one of the three

elements commonly accepted as constituting the crime of trafficking in human beings. This is viewed as beneficial by the Court of Cassation because the number of prosecutions and convictions can be easily increased and thus there is a 'trend favouring expansive interpretation of the crime of human trafficking' (Stoyanova, 2013a). This trend is also applied to the legal understanding embedded in Bulgarian law with regard to 'sexual exploitation' and 'forced labour', which both appear broader than the commonly agreed standard interpretations.

Furthermore, a particular feature of the national law in this area is the inclusion of 'selling the child of a pregnant women', which is interpreted as a form of exploitation regardless of the consent of the woman. However, due to ambiguities, the concept of exploitation does not preclude the victimisation of women who actively participate in and benefit from the whole transaction (Stoyanova, 2013a).

GRETA (2011) has a different take on this definitional issue in that it believes that by including in the definition of human trafficking the 'irrelevance of the consent of the victim', the Bulgarian legislations provide wider opportunity for a larger scale of right's approach to victims, including services and rights, in addition to wider prospects for investigations. Some scholars disagree by arguing that while the definition for the purposes of investigation is unusually broad the definition of victim in trafficking under the Trafficking Act is more narrow, whereby the 'means' matter, as will be explained further in the paper.

CHAPTER 12

THE LEGAL STATUS OF THE VICTIMS OF HUMAN TRAFFICKING IN BULGARIA

12.1. Profile of the victims of human trafficking in Bulgaria

In the context of the system of the international law the crime of trafficking in human beings is considered in two ways and from two points of view. On one side are the perspective of the perpetrator and the desire for detecting, detaining and punishing him/her, emphasizing on the methods and the means of the penal repression. On the other side stands the perspective of the victim/the injured and the strive for the care, the protection and his/her compensation. This second aspect requires much more complex and interdisciplinary methods and solutions and requires the implementation of a whole range of reciprocally supplementing measures. Namely the second aspect is the most vivid expression of the approach to the problem, based and viewed through the prism of the universal human rights.

The international standards to protect the rights of the victims of trafficking are defined in various international instruments, amidst which the main ones are:

- The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime /the so called Palermo Protocol/, ratified by law adopted by the 38th National Assembly of the Republic of Bulgaria on 12.04.2001;
- The Council of Europe Convention on Action against Trafficking in Human Beings, ratified by law adopted by the 40th National Assembly of the Republic of Bulgaria on 07.03.2007;
- Directive 2011/36 of the European Union on preventing and combating human trafficking and protecting its victims;
- Directive 2012/29 of the European Union establishing minimum standards on the rights, support and protection of the victims of crime.

The definition of victim under the international law, is introduced in the Bulgarian legislation and is contained in the Combating Trafficking in Human Beings Act: "Victim means any person who has become a subject of trafficking in human beings". The law defines the women and the children as people who are at highest risk of being involved in trafficking: "This law shall provide for... the measures aimed at protecting and supporting the victims of human trafficking, especially women and children". In a more narrow aspect Art. 74 of the Penal Procedure Code defines the victim as "the person, who has suffered pecuniary or non-pecuniary damages from the crime". A person may be considered a victim of human trafficking regardless of whether the perpetrator has been identified, arrested, tried or found guilty and regardless of the family relationship between the victim and the perpetrator.

The status "victim of trafficking" provides specific rights. Firstly, the identified victim is entitled to a period of rumination, right of /at least/ one month accommodation in a shelter for the duration of the period of rumination, right to free-of-charge psychological and legal assistance and right to decide whether to cooperate with the authorities. The victim also is entitled to one-time financial compensation from the state budget for suffered pecuniary damages. The victims who agree to give evidence to the authorities, also have the right to extend their stay in the shelter until the finalization of the criminal proceedings.

The victims who agree to participate in the criminal proceedings as "injured" have the following rights: to be informed of their rights in the criminal proceedings; to obtain protection for their security and that of their relatives; to be informed about the course of the criminal proceedings; to participate in the proceedings; to make requests /including on the evidence/, notes and objections;

to appeal against the acts which lead to the termination and suspension of the criminal proceedings; to have a trustee /i.e. to be represented by a professional attorney-at-law.

Finally, the victim involved in the trial phase of the criminal proceedings, may be constituted as a private prosecutor and a civil plaintiff, i.e. he/she has the right to file a civil claim against the defendant for compensation of the caused damages.

In summary, the victims of trafficking have at disposal the following groups of rights:

1. Rights of a victim under the Combating Trafficking in Human Beings Act -period of ruminaton, accommodation in a shelter, right of stay, right to be informed by the prosecutor about their rights.
2. Rights of an "identified" victim within the meaning of the National Mechanism for Referral and Assistance of the victims of trafficking, which includes short and long term psychological and social support.
3. Right to a state-funded legal aid.
4. Right to a state-funded compensation for pecuniary damages.
5. Rights of an "injured" and "witness" within the meaning of the Penal Procedure Code.
6. Right to file claims on compensation for pecuniary and non-pecuniary damages against the trafficker.

Actually however, self-identification as a victim in order to be provided access to the upper rights, is not possible. Although one may make a signal about the offense, in practice he/she will be recognized as a victim only after consideration of indicators for identification - the National Referral Mechanism. According to this mechanism NGOs make unofficial identification, which includes providing of psychological support and accommodation in a shelter/crisis center, and the formal identification is carried out by the competent in this aspect state bodies - the Police and the Prosecutor's Office. Moreover, in accordance with the international standards for protection of the rights of the victims of trafficking, the states have an obligation to duly identify the victims of trafficking, as the non-compliance of this obligation is likely to lead to a breach of the rights of the concerned persons by hindering their access to programs for protection and reintegration.

12.1. Profile of the victims of human trafficking in Bulgaria

According to the official statistics of the Prosecutor's Office of the Republic of Bulgaria **THE TOTAL NUMBER OF THE VICTIMS OF HUMAN TRAFFICKING** in the last years is as follows:

Year 2012	578
Year 2013	540
Year 2014	495
Year 2015	409

According to the TYPE OF EXPLOITATION OF THE VICTIMS OF TRAFFICKING in 2015:

Sexual exploitation	314
Compulsory labour	26
Compulsory obedience	6
Pregnant women, aiming trade of babies	17

According to the GENDER OF THE VICTIMS OF TRAFFICKING in 2015 are:

Women	380
Men	29

In connection with the trafficking in human beings Bulgaria fits into the overall profile of the states of the European Union, in which are specific the following allocations:

- 80% of the registered victims are women;
- Over 1000 children in the European Union (approximately 3 % of all the victims), have been trafficked for the purposes of sexual exploitation;
- 69 % of all the registered victims have been trafficked for the purposes of sexual exploitation;
- 95 % of the victims of sexual exploitation are women;

Bulgaria is among the countries with the highest relative percentage of the victims of trafficking, in relation to the whole population of a given country, as this proportion is extremely high especially among the individuals of female gender: 13.1 of 100 000 persons, which is more than 5 times in relation to the average value for the EU-28.

According to the data of the annual reports of the National Commission for Combating Trafficking in Human Beings and the analysis of the periodic studies, in the period 2012 - 2016 are registered increasingly more cases of victims of trafficking (women, as well as men), with specific needs like:

- Durable health problems and/or chronic diseases;
- Durable and/or lasting physical disorders and/or injuries;
- Victims with mental disorders and/or durable psychic/psychiatric disorders.

Steady remains also the trend that increasingly more men and boys are identified as victims of trafficking, seeking specialized assistance and support. Reported are also an increasing number of the registered cases of men with different sexual orientation and/or self-identification, involved mainly in the traffic with the purpose of sexual exploitation.

The main challenge remains the matter with the victims of trafficking with a different kind of addiction (alcohol or drug), as well as those, who have used intoxicants, which have led to the progress of the addiction.

The finding of solutions and a model for work remains as a challenge also in regard to the cases of victims of trafficking (formally or not formally identified), who are citizens of third countries, including migrants; individuals seeking protection, including those, who have already received official status; the challenges have also a merely legal nature and are connected with the coordination of the national and the different international regulations.

12.2. Non-liability of victims of human trafficking

In 2013 in the process of transposition of the Trafficking Directive, the Bulgarian Criminal Code has been amended to introduce a new provision on non-punishment of victims (Article 16a).

“An act shall not be considered culpably committed if performed by a person who is a victim of human trafficking and was forced to commit such act in direct relation to being such victim.”

Still, there are several existing provisions under which victims of trafficking, if not properly identified, may be prosecuted and punished:

- It is a crime if *“an adult capable for work, who for a long time does not engage in any socially useful work, but receives non-labour incomes in an illegal or immoral way, shall be punished by imprisonment for up to two years or probation.”* Under this provision prostitution is practically prosecuted in Bulgaria.

- Illegal border crossing is also a crime that due to the ease for proving (it is enough to cross the Bulgarian border without the necessary documents) may be a ground for punishment of victims of trafficking;

The Control of Juvenile Anti-social Behaviour Act allows for children between the age 8 and 18 to be punished by sending them to correctional institutions for up to three years for committing anti-social acts. Anti-social acts could be any “act that poses a threat to society and contravenes the law or morality and good manners”. Under this vague and out- dated definition fall prostitution, begging, vagrancy and other acts which might result from trafficking in human beings.

Good practices and recommendations in this respect would be:

- Revocation of the Control of Juvenile Anti-social Behaviour Act and undertaking a fully safeguarding approach to children victims of trafficking;

- In relation to children and women in prostitution, the Government should consider the European Parliament resolution of 26 February 2014 on sexual exploitation and prostitution and its impact on gender equality, most notably in relation to: (i) adopting “*a zero-tolerance approach based on prevention, protection of victims and prosecution of clients*”; (ii) ensuring “*special, age-specific educational awareness-raising and preventive campaigns be conducted in schools and colleges*”; (iii) funding “*organizations working on the ground with support and exit strategies, to provide innovative social services for victims of trafficking or sexual exploitation (...), aimed at helping vulnerable women and minors leave prostitution*”

12.3. Special protection of victims under the Act for Combatting Human Trafficking

Special protection is granted to victims who have declared their willingness to cooperate with the authorities for the duration of the criminal proceedings, including:

- permission to foreign nationals for long-term stay in the country;
- extension of the accommodation period in the shelters.

Victims are entitled to a reflection period of one month to decide if to cooperate. An obligation to investigation authorities is imposed to inform victims upon identification thereof, about the possibility to receive special protection. The act for granting special protection status is issued by a public prosecutor.

The special protection status may be terminated prior to the completion of the criminal process if:

- The victim has renewed their contacts with the perpetrators of the crime
- It is determined that the consent to cooperate given by the victim was fictitious;
- There is a danger to the public order and national security.

12.4. Special protection of children

Bulgarian law provides for special protection measures where the victim is a child. These measures include:

- Informing the State Agency for Protection of Children;
- Provision of proper protection and support;
- Accommodating child victims in separate premises from adult victims;
- Provision of education in public schools;
- Undertaking of immediate measures for finding the parents and ensuring or guardianship;
- Children are further entitled to a longer reflection period of 2 months upon making of such suggestion by the State Agency for Protection of Children.

12.5. Identification documents and residence permits

Victims of trafficking are entitled to repatriation assistance including in obtaining personal identification documents by Bulgarian diplomatic and consular offices abroad and by the Bulgarian Ministry of Interior.

Long-term residency permits to victims of foreign nationality can be granted only if they have declared their willingness to cooperate with law enforcement.

The maximum duration of temporary residency permits is the period of criminal proceedings. For this period, the victims are entitled to scope of rights as are foreigners residing permanently in Bulgaria.

12.6. Criminal Procedure Rights

Under the Bulgarian Criminal Procedure Code victims, including victims of human trafficking, are granted a series of rights.

5.1. Right to participate in criminal proceedings

A victim of trafficking may be involved in the criminal proceedings in several capacities:

- as 'injured party',
- 'civil claimant',
- 'private prosecutor,' including in the three capacities simultaneously.

a. Injured Party (victim)

In the capacity of an *injured party*, the victim in Bulgarian criminal proceedings has the following main rights:

- to be informed of his/her rights within the criminal proceedings including for the right to bring a civil claim;
- to obtain protection with regard to his/her personal safety and the safety of his/her relatives;
- to be informed of the progress of the criminal proceedings;
- to request the collection of evidence or to object to evidence;
- to appeal against acts resulting in the termination or suspension of the criminal proceedings;
- to have a lawyer.

In order for the rights of the victim to arise, the victim needs to make a request to participate in the pre-trial proceedings and indicate a mail address in the country.

b. Civil claimant

The victim is entitled to bring civil action for compensation to be reviewed by the court in the course of criminal proceedings. The right of the victim as a civil plaintiff are reviewed in detail below.

c. Private Prosecutor

A victim may participate in the proceedings as a private prosecutor maintaining the prosecution along with the public prosecutor. During the trial the private prosecutor may present evidence, make requests and arguments relating to the proving of the guilt of the accused and for determining the penalty. Those rights are specific for the private prosecutor capacity and differ from the rights of the civil claimant who can only participate on matters relating to the compensation.

5.2. Right not to cooperate

Bulgarian law does not make a clear statement on the right of victims of trafficking to refuse to cooperate in criminal proceedings. In the same time, no specific obligation binding victims to cooperate is set forth while there are explicit provisions for special privileges to be granted to victims who cooperate.

“Pre-trial authorities shall promptly inform the individuals who have become victims of human trafficking, upon identification thereof, about the possibility to receive special protection, if within one month the victims declare their consent to collaborate with the investigation.”

Thus, victims are granted the choice whether to make a report and provide witness statements in the proceedings. However, only cooperating victims have access to other basic rights such as extended accommodation in shelters, long-term stay in the country, financial compensation:

Individuals who have become victims of trafficking and have declared their willingness to collaborate for disclosure of the trafficking offenders shall be granted special protection status for the time of the criminal proceedings, including:

- Permission to foreign nationals for long-term stay in the country;
- Extension of the accommodation period in the shelters.

If the victim has not made a report on the crime, she or he may not be entitled to financial compensation and free psychological assistance.

Such reasons can be that witness statements cannot be provided due to risk for the victim to incriminate herself/himself or because he/she will incriminate close family members.

If the victim does not co-operate

It should be noted however, that during criminal proceedings the victim's eventual refusal to meet with the investigator or appear before court without a legitimate reason can lead to a fine and bringing into custody for interrogation. If the victim does not wish to participate in the criminal proceedings, he or she will still be required to provide witness statements. Under Bulgarian CPC witnesses are obliged to:

- appear before the respective body;
- state everything they know about the case and answer the questions asked;
- remain at the disposal of the competent authority as long as this may be necessary.

In case of failure to appear and provide witness statements the victim will be fined and may be compulsory brought in for interrogation. The victim may refuse to testify on questions, the answers to which might incriminate them, and has the right to consult a lawyer.

5.3. Right to protection of privacy and safety

The general provision guaranteeing protection of personal privacy is set forth in the Constitution of the Republic of Bulgaria:

“no one can be followed, photographed, videotaped, recorded or subjected to other similar actions without his/her knowledge or despite his/her explicit disagreement”.

This provision allows the restriction of photo and video recordings in the courtroom. In Bulgarian criminal proceedings, one of the main procedural guarantees of privacy is the option for conducting of hearings behind closed doors. This is possible among others in cases where:

- this is required in view of safeguarding the morality;
- where this is necessary for preventing the disclosure of facts pertaining to the intimate life of citizens;
- a witness is afforded special protection measures.

The court may decide to hold the hearing behind closed doors at its own initiative or at the request of the victim. Whenever a child victim is to be interrogated, the court may also decide to close the courtroom for public and the press.

A good practice applied by Bulgarian courts is excluding the general public from the court room as a general principle in cases of trafficking.

Another good practice is the introduction of the so called “blue rooms” – specialised facilities, equipped with one-way mirrors, used for interrogation of child witnesses and victims of crimes. This

is an initiative introduced by civil society organizations. The aim of the blue rooms is to ensure non-threatening and less traumatic experience of the children within the criminal proceedings, by avoiding their direct contact with the accused offenders and the repeated interrogations in the formal setting of the court room.

5.4. Physical protection of the victim

Personal physical protection can be provided to the victim witness upon request, including police escorts to hearings.

5.5. Hiding the identity of the victim

A good practice applied by Bulgarian authorities is the frequent use of secret identity in cases where the victim has showed fears of being intimidated or retaliated by the trafficker. The measure is applied by the prosecutor or the court upon the victim request.

In those cases the victim is given an identification code and has to be interrogated in a way to keep his or her identity secret. It should be noted, that a rule in Bulgarian criminal proceedings states that the indictment and the sentence may not be based only on testimony of witnesses with secret identity in view of the rights of the accused to a fair trial.

5.6. Interrogation through videoconferencing

Victims can be interrogated through audio or video link. In case of victims with secret identity, voice or image alternation, and any interrogation through a video conference shall be conducted with the witness's image having been altered. Prior to commencing the interrogation the judge verifies the correspondence between the identity and the secret identity of the victim. In view of the rights of the defense, the need of videoconferencing has to be well substantiated to be admitted by the court.

5.7. Complete change of identity

Existing legal alternative is the complete change of identity under the Act for Protection of Individuals at Risk in connection with Criminal Proceedings. It is applied if the other available mechanisms for protection of the safety of the victims are not sufficient, when the testimony of the victim witness is of particular importance of the case and especially in cases of organized crimes. Other special protection measures under this act include temporary accommodation in a safe place, change of residence, job, or school.

5.8. Ban to approach the victim

At the proposal of the prosecutor with consent of the victim or at the request of the victim, the court may prohibit the accused from directly approaching the victim.

12.7. Case Study (victims' rights in the criminal trial)

S. N. has been abandoned by her parents and grew up in homes for children, deprived of parental care. In the autumn of 2008 S. N. completed lawful age and left the home. In the city of Sofia she got acquainted with a young man, named B.I.. They started dating. On an undetermined date in November, 2008 S. N. has been brought by B.I. in the town of Pleven, in the house of his "relatives" K.K. and his son S.S.. Later B.I. departed and S.N. was left alone in the home of K.K. and S.S..

K.K. and S.S. decided to force S.N. to become a prostitute in their favour, thus earning money. Initially they both misled S.N. that they will care for her, that they will buy clothes for her and she will not lack anything. As far as S.N. was in dead-lock, she had no home and work, she agreed.

K.K. and S.S. every day forced S.N. to prostitute at the road to Sofia and every evening in front of the District Hospital of the town of Pleven. The tariff of the witness was 15 BGN for oral sex and 20 BGN for standard sex.

Regardless of the promises, that they will behave correctly with her and she will lack nothing, K.K. and S.S. started to impose on her permanent and regular torment. K.K. took the identity card of S.N. and made her an address registration at the address: the town of Pleven, District Pleven, 5 "Layka"

street, where was residing his brother – S.B.. K.K. and S.S. were taking all the money, which S.N. earned, living her only pocket money for cigarettes. They both often threatened and beat S.N. and forced her to prostitute, even when she did not wish or was in her monthly period.

K.K. and S.S. kept the witness S.N. in their home and forced her to prostitute until the spring of 2010. At that time they both decided to take S.N. out of the borders of the Republic of Bulgaria, with the purpose to prostitute in their favour abroad. They contacted their acquaintances in the Republic of Austria and arranged the stay of S.N. there. On an undetermined date in the spring of 2010 K.K. and S.S. took S.N. and one more girl to the city of Sofia by car. There they boarded both the girls in a plane to Vienna.

In the capital of the Republic of Austria - Vienna, S.N. and the other girl were met by an acquaintance of K.K. and S.S., who transported them to the town of Gratz. There S. N. was placed in a locale, where she started working as a prostitute. Her working time was from 12.00 at noon until 6.00 a.m. on the next morning, depending on the presence of clients. The tariff was 63 Euro for half an hour and 100 Euro for one hour, which included any sexual "services", depending on the wishes of the client. All the earned money was sent by S.N. through the money transfer system "WESTERN UNION" to K.K. and S.S. The greater part of the transfers were sent in the name of K.K., but there have been particular transfers in the name of S.S. and to the wife of K.K – T.K...

In the Republic of Austria S.N. was working as a prostitute until the summer of 2012. During her stay S.N. came back in the Republic of Bulgaria several times and she stayed in the house of K.K. and S.S. in the town of Pleven. In these cases S.N. handed over the earned and gathered by her money in cash to K.K. and S.S.. Several times S.N. tried to hide different amounts and to keep them for herself, but K.K. and S.S. always got to know and forced her to give them the money. S.N. had a permanent fear from both of them, because the same persons repeatedly exercised physical and psychic violence over her - they beat her and threatened her.

In the summer of 2012 S.N. definitely returned in Bulgaria. In the town of Pleven S.N. got acquainted with K.N.. S.N. escaped from K.K. and S.S. and started living with K.N. in the home of the latter in the town of Nikopol. Later on S.N. and K.N. contracted a civil marriage.

Regardless of the reluctance of S.N. to prostitute any longer in favor of K.K. and S.S., they both did not renounce her. On 23.11.2013 S.S. went to the town of Nikopol, where he met with S.N.. S.S. made S.N. by force to get on the car, by which he travelled and took her to the town of Pleven. In the town of Pleven K.K. was waiting for them. K.K. and S.S. took S.N.'s identity card and mobile. In the town of Pleven K.K. and S.S. were stopped by police officials and taken to the First Regional Office of the Ministry of Interior- the town of Pleven. K.K. and S.S. threatened S.N. and asked her to tell, that she has escaped from her husband, for the reason that the same person beat her. As she was afraid of them, S.N. submitted explanations, pointing out that she has really run away from the town of Nikopol and voluntarily joined K.K. and S.S..

After being dismissed from the police K.K. and S.S. took S.N. in their home in the town of Pleven. There they both announced to her, that she is going "to work" again for them, i.e. to prostitute and on the next day she will travel to the Federal Republic of Germany. S.N. refused, telling them that she was pregnant, she aborted and she is taking medicines, and she wanted to go back to her husband in the town of Nikopol. The defendants however gave her several blows and told her, that she has no right of choice and claims.

On 24.11.2013 K.K. and S.S. took S.N. by car to the city of Sofia. In Sofia S.N. and S.S. took a bus and left the territory of the Republic of Bulgaria, traveling to the Federal Republic of Germany. In Germany S.S. took S.N. in an apartment in the town of Horn-Bad Meinberg. Several days later K.K. joined them.

In the Federal Republic of Germany, the town of Horn-Bad Meinberg K.K. and S.S. forced S.N. to prostitute for them. S.N. worked in a bar, where she addressed potential clients, offering them sexual services. Her tariff was 50 Euro for half an hour and 100 Euro for one hour, which included any sexual "services", depending on the wishes of the client. K.K. and S.S. were constantly controlling S.N., taking from her all the earned money. Both of them started to impose permanent and regular torment on her, forcing her to work every day, almost without days off.

By the received from prostitution money K.K. and S.S. acquired real estates in Bulgaria, bought a number of luxurious motor vehicles and a great quantity of golden jewelries.

Shortly before Christmas K.K. was searched on the phone by the police. K.K. and S.S. got frightened that they may be wanted and on 24.12.2013, together with S.N. came back in the Republic of Bulgaria, returning to their home in the town of Pleven, District Pleven. In the town of Pleven S.N. managed to escape and turned back to her husband K.N. in the town of Nikopol, District Pleven. In Nikopol S.N. went on prostituting, but for her husband K.N..

For the reason that K.N. received threats from K.K. and S.S., he filed a signal to the police.

Questions Related to the Case:

1. Are there committed crimes and what is their legal qualification?
2. Which is the competent Prosecutor's Office to perform the investigation of the case?
3. What steps should the Police and the Prosecutor's Office undertake in regard to protect the rights of the victim S.N.?
4. May S.N. be forced to cooperate and testify?
5. Has the injured the right of a free-of-charge legal assistance and how could be guaranteed access to such an assistance?
6. Of which mechanisms and legal procedures can S.N. take advantage, in order to receive protection of her personal safety, identity and good name?

CHAPTER 13

LAW AND PRACTICES RELATED TO LEGAL ASSISTANCE AND LEGAL AID TO VICTIMS OF HUMAN TRAFFICKING IN BULGARIA

“Legal aid is a service which the modern state owes to its citizens as a matter of principle. It is part of the protection of the citizen’s individuality which, in our modern conception of the relationship between the citizen and the State, can be claimed by those citizens who are too weak to protect themselves ...”

13.1. Primary legal aid

When the right arises

The right to free legal consultation for victims arises from the moment of their identification as victims. This is the time, when the state authorities are obliged to inform them of their right to legal aid, the services to which they can turn in order to exercise that right, and the terms and procedures for obtaining legal aid free of charge.

Procedure and competent authority

The competent authorities organizing the provision of legal aid are the National Legal Aid Bureau and the regional Bar Associations. The National Legal Aid Bureau keeps a National Legal Aid Register for the lawyers designated to provide legal aid at the district of each district court.

In order to be granted free legal aid, the victim should file a request to the Bureau along with the required supporting documents.

The decision to grant legal aid is taken by the President of the Bureau within 14 days after submission of all required documents. This decision is then forwarded for appointment of an attorney to the competent Bar Association depending on the court district where proceedings would legally take place.

Eligibility criteria for provision of primary legal aid

Pursuant to the Legal Aid Act victims of human trafficking are entitled to free legal aid if *“they do not have means to pay and wish to avail themselves of the assistance of a lawyer”*. However, the act does not give particular instructions on the manner of proving the lack of means to pay for legal assistance.

Based on information from the National Legal Aid Bureau, the *“documents based on which [primary] legal aid is granted are: court decisions, declaration for family and property status of the person, the data in which as well as the circumstances under article 23, paragraph 3 and article 22, paragraph 1 of the Legal Aid Act shall be established by documents issued by the competent state and municipal authorities.”*

Article 22, paragraph 1 of the Legal Aid Act makes a reference to the eligibility requirements for receipt of monthly social assistance benefits according to the procedure established by Article 9 and Article 10 of the Regulations for Application of the Social Assistance Act.

According to article 9, paragraph 1, entitled to receive social assistance benefits are persons with income for the preceding month lower than the state guaranteed minimum income. Further, it is required that the victim or her/his family does not possess any type of real estate and is registered as unemployed with the respective Unemployment Bureau. In cases of victims of trafficking, there are less stringent conditions for registration as unemployed: victims of trafficking have to register as

unemployed within three months as of their return in the country, or as of the end of their stay in temporary shelters, or after completion of the criminal proceedings if the victim cooperates.

13.2. Legal representation in pre-trial phase of criminal proceedings

The pre-trial phase of criminal proceedings includes the pre-trial activities of the prosecutor and the organs of the pre-trial investigation (investigators and the organs of the police investigation). Its aim is to establish the objective truth of the circumstances on the case, to collect and secure the evidence, necessary for making the decision whether to take the suspect to court and for the completion of the court proceedings in the trial phase with a just sentence.

The Bulgarian Criminal Procedure Code and the Legal Aid Act do not explicitly regulate the right of the victim to be assigned a legal representative during the pre-trial phase. In practice, however, prosecutors review the qualification requirements for granting free legal aid and determine on granting legal aid to victims of crimes in a similar manner as free legal aid is granted to the accused. The legal grounds used for the purpose is the provision of article 75 of the Criminal Procedure Code on the rights of the victim, encompassing among others the right to legal counsel.

13.3. Legal representation before court

Procedure and competent authority

In criminal trial, the court is the competent authority to rule on the provision of free legal aid to the victim in its capacity of ‘injured party’, ‘private prosecutor’ and/or ‘civil claimant’.

The legal preconditions for appointing a counsel by the court are (i) presentation of evidence of not having sufficient funds to hire a lawyer, and (ii) if the interests of justice so require.

The Legal Aid Act further elaborates on the conditions for granting legal aid, setting forth the following circumstances to be considered by the court:

- income accruing to the victim or their family;
- property status, as certified by a declaration;
- marital status;
- state of health;
- employment;
- age;
- other circumstances.

After the court rules on the granting of legal aid, the ruling is immediately sent to the Bar association within the district of the court for appointment of an attorney.

13.4. Legal aid to children

Legal representation of children is subject to special regulation. Provision of legal assistance by the state is one of the main elements of child protection contained in the Child Protection Act. Children have the right to legal aid and appeal in all proceedings affecting their rights or interests.

Legal representative of the child – parent or guardian, must accompany the child in legal proceedings and is empowered to request legal aid on behalf of the child. If the child’s parents are unknown, the legal representative of the child is the director of the crisis centre, shelter or home where the child is placed. The social assistance directorate is empowered to bring claims to the court for deprivation or limitation of parental rights in the interest of the child or enter as a party into such court proceedings. In criminal proceedings against parents – traffickers, a special representative – an attorney-at-law is appointed to a child whose interests are in conflict with his/her parents or guardian.

Children-victims of trafficking may be examined in close session and if necessary by a videoconference. After giving their testimonies, witnesses who are underage shall be removed from the courtroom, unless the court rules otherwise.

A critical analysis of the status of victims and the identification of the victim of trafficking finds that the issue of identification of victims in Bulgaria is narrowly linked to the problems with the definition. There appear to be two definitions of human trafficking, for the purposes of criminalisation

on the one hand and for the purposes of identifying individuals as victims for affording them protection and assistance on the other. Both have different scopes, resulting in a situation where the individual could be deemed simultaneously a victim and not a victim for the purposes of prosecution and victim assistance respectively. This raises the serious question as to whether victims, from the perspective of the criminal trial, will receive adequate assistance in their capacity as victims of human trafficking (Stoyanova, 2013b)

The identification procedure in Bulgaria comprises of two stages – informal identification, which could involve a self-referral by a potential trafficked victim and a formal identification, which requires the endorsement of the pre-trial authorities and the prosecutor, or of the Ministry of Interior in the cases of third country nationals (TCN). The informal identification, which can also be carried out by a CSO or any institution as a matter of fact, leads to access to a specialised shelter for the period of 10 days, which could be extended up to 40 days with the permission of the local branch of the NCCTHB (Dottridge 2010).

The formal identification procedure concludes with the granting of a ‘special protection status’. The Bulgarian authorities have indicated that the status of a victim of trafficking issued by another MS is recognized in Bulgaria subject to a procedure. A victim of trafficking can request a special protection status, but cannot receive it automatically solely on the basis of having been given the status of a victim of trafficking in another country. None of the authorities making decisions with regard reasonable grounds are independent organisations but rather bound by the State’s interest in prosecution.

The GRETA (2011) report points out that the identification system in Bulgaria is not sufficiently effective as it risks to leave out those who do not want to co-operate with the authorities and take part in the judicial proceedings against the alleged traffickers. The victim of identification according to Stoyanova (2013b) is regulated at the national level with one sole objective in mind vis-à-vis criminal investigation and prosecution.

The present system of identification precludes victims of trafficking from the possibility to be identified on the grounds of personal circumstances or vulnerabilities, and this has direct implications for the implementation of the provision of Directive 2011/36/EU pertaining to attention to victims with ‘special needs’. In this regard, the TIP (2015) reports that the police have not proactively searched for signs of trafficking among women detained for prostitution, which is linked to the prevalent form of trafficking crime in the national context.

The issue of identification of victims in Bulgaria is narrowly linked to the problems with the definition. There appear to be two definitions of human trafficking, for the purposes of criminalisation on the one hand and for the purposes of identifying individuals as victims for affording them protection and assistance on the other. Both have different scopes, resulting in a situation where the individual could be deemed simultaneously a victim and not a victim for the purposes of prosecution and victim assistance respectively. This raises the serious question as to whether victims, from the perspective of the criminal trial, will receive adequate assistance in their capacity as victims of human trafficking (Stoyanova, 2013b)

The identification procedure in Bulgaria comprises of two stages – informal identification, which could involve a self-referral by a potential trafficked victim and a formal identification, which requires the endorsement of the pre-trial authorities and the prosecutor, or of the Ministry of Interior in the cases of third country nationals (TCN). The informal identification, which can also be carried out by a CSO or any institution as a matter of fact, leads to access to a specialized shelter for the period of 10 days, which could be extended up to 40 days with the permission of the local branch of the NCCTHB (Dottridge 2010).

The formal identification procedure concludes with the granting of a ‘special protection status’. The Bulgarian authorities have indicated that the status of a victim of trafficking issued by another MS is recognised in Bulgaria subject to a procedure. A victim of trafficking can request a special protection status, but cannot receive it automatically solely on the basis of having been given the status of a victim of trafficking in another country. None of the authorities making decisions with regard reasonable grounds are independent organisations but rather bound by the State’s interest in prosecution.

The GRETA (2011) report points out that the identification system in Bulgaria is not sufficiently effective as it risks to leave out those who do not want to co-operate with the authorities and take part in the judicial proceedings against the alleged traffickers. The victim of identification according to Stoyanova (2013b) is regulated at the national level with one sole objective in mind vis-à-vis criminal investigation and prosecution.

Furthermore, according to international monitoring bodies, there are not enough measures protecting victims against secondary victimization. The US TIP 2015 reports that prosecutors and judges lacked sensitivity when interacting with victims trafficked for sexual exploitation:

Victims were often required to give testimony in the presence of the alleged trafficker, and alleged traffickers were permitted to confront victims in court and question them through the judge, including inquiries into victims' previous sexual relationships.

This is in direct violation of the EU standards (the Anti-Trafficking Directive) providing that the parties shall ensure that victims are protected against secondary victimisation through visual contact with the accused, testimonies in open court and unnecessary questioning into their private life. Another international body recommend to Bulgaria, among other matters, to provide sensitivity training to prosecutors and judges working with victims trafficked for sexual exploitation (GRETA 2011).

CHAPTER 14

SPECIALIZED SERVICES TO THE VICTIMS OF HUMAN TRAFFICKING IN BULGARIA

To the end of 2016 at the National Commission for Combating Traffic in Human Beings are functioning 5 specialized services for victims of human trafficking, as with the purpose of better ensuring of support part of the services are functioning in complex: 3 services of residential type (shelters) and two consulting services (centers) in the regions of Varna and Bourgas. By opening these services, taking into account the specific needs of the victim and the specific character of each particular case, the state is financing the greatest number of specialized services (only and solely for the victims of human trafficking) since the adoption of the Combating Trafficking in Human Beings Act (which regulates the engagement of the state for providing of services for victims of human trafficking) in 2003.

The total capacity of the services is 14 persons, as from the beginning of the year totally 15 women have been placed under care in the region of Varna and totally 6 in the region of Bourgas, 1 of them in the service of follow-up reintegration.

Additionally should be taken into consideration also the undisputable role of the NGOs, granting services, which have been financed through a state-authorized budget and usually the target group/clients of the centers are women and/or children, victims of different forms of violence and of the crime “human trafficking”. Those injured who have suffered such violence, could get help and support in the different crisis centers in the country, which are managed by state structures at the municipalities, as well as by NGOs, as “the crisis center” remains a complex of social services, which address the needs of this target group. The total number of the crisis centers, functioning on the territory of Bulgaria in mid 2016 is 22. Out of them 14 are designed for juveniles, who are victims of violence and/or human trafficking and their capacity reaches 145 places. The rest 8 crisis centers meet the needs of the adult victims of violence and/or trafficking and dispose with totally 66 places.

CHAPTER 15

FINANCIAL COMPENSATION FOR VICTIMS IN BULGARIA

15.1. Legal Framework

The Law on Assistance and Financial Compensation to Victims of Crime / LAFCVC / entered in force from 01.01.2007. It was adopted on the basis of Directive 2004/80 / EC of 29 April 2004 and applies to crimes committed after June 30, 2005. The Law allows victims of crimes to get financial compensation for damages to their property, damage directly caused by the crime. The Law does not provide for compensation for non-pecuniary damages suffered by victims of crime. The Law also does not provide for full reparations of all damages occurred to the victim.

Art. 3 of this Act shall be entitled to receive financial compensation are: victim of property damage by the offense, and if he/ she died – his/ her heirs or the person, with whom the victim is in actual cohabitation. Pecuniary damage to be compensated, should be a direct consequence of the offense and consisting in: treatment costs, excluding costs to be borne by the budget of the National Health Insurance Fund; lost income; costs of payment and litigation expenses; loss of means of subsistence; funeral expenses; other pecuniary damage.

The compensation is determined by the body to the Minister of Justice - namely the National Council for Assistance and Compensation to Victims of Crime. Characteristic of this type of financial compensation is that it is limited in amount. According to Article 13, paragraph 1 of LAFCVC, the maximum amount of financial compensation may not exceed 10 000 Levs, regardless the actual pecuniary damage as a result of the crime. The financial compensation for pecuniary damages will be paid once.

For obtaining financial compensation for pecuniary damages the victim should apply to the National Council within one year from the entry into force of acts: conviction, including in cases where the case was heard in absentia; Agreement to resolve the case in pre-trial proceedings; prosecutorial or court instrument by which criminal proceedings have been terminated, except where termination is pursuant to Art. 24 para. 1, p. 1, 7 and 9 of the Criminal Procedure Code (ie the act was not committed or is not a crime, missing complaint of the victim to the prosecutor as provided in the special part of the Criminal Code in cases of private character, in the cases provided in the special part of the Criminal Code, the victim or prejudiced legal person up to the commencement of the trial before the trial court filed a request for termination of criminal proceedings); prosecutorial or court instrument by which criminal proceedings were suspended due to non- disclosure of the offender.

The amendments to the law of July 2016 has expanded the scope of violent intentional crimes for which LAFCVC provides compensation. Attempted murder was added and for the crimes molestation and rape the additional requirement – to have caused severe damage to health, was deleted. The final version of the law covered crimes terrorism; murder; attempt to kill; intentional grievous bodily harm; fornication; rape; human trafficking; crimes committed on behalf or pursuant to a decision of an organized criminal group; other violent intentional crimes of which resulting in death or serious injury.

Providing financial compensation in cases of agreement in the pre-trial phase is added with this in mind that when you enter into such an agreement for caused injuries, material damages directly caused are not examined, because these crimes do not include such damages as intrinsic feature, and such evidence is not collected in pre-trial proceedings. The nature of these crimes causes primarily non-pecuniary damage and PPC provides for notification of victims about the agreement in view of

the possibility of bringing a claim for moral damages against the offender. Where in the order of the court approving the agreement is recorded that no material damages resulted from the crime, it does not mean that the victim did not make treatment costs but for which evidence was not collected, and its amount is not established. In cases of severe injuries pecuniary damage as treatment costs could arise before, during and after the approval of the agreement and the victim should not suffer prejudice because of significant gaps in the procedural rules.

The compensation may not be granted as provided for restrictions in art. 15 of the Act, ie when the victim has been convicted of an offense under Art. 3, para. 3 in the last five years before the application for financial compensation; the offense was committed in a state of strong irritation that is caused by the victim; the act is committed by exceeding the limits of self-defense; the victim has received compensation in another way; the victim has not informed the competent authorities of committing the crime. When the victim contributed to the occurrence of the criminal result, this leads to a reduction in financial compensation would have received. Minister of Justice immediately after the payment of financial compensation file a recourse against the offender or his/ her heirs for reimbursement of the money.

According to TIP (2015), no victims received compensation during 2014, whereby opinions were expressed that the procedure continues to be overly bureaucratic and authorities do not always inform victims of their right to apply for compensation and legal aid. The problem of the lack of effective compensation came into focus at the second round of evaluation by GRETA (2016).

The Council proposes a possibility for introduction of an earlier payment of financial compensation to victim, even before the criminal process has ended. Another practice that may improve the access to compensation is to regulate the possibility for victims to apply electronically.

An important shortcomings of the system are that pain and suffering are still not compensated and free legal aid to claim compensation by the State is not permissible.

15.2. Case Study

In Sofia City Court on the grounds of Art.622 and 623 of CCP are formed three cases for recognition of a foreign judgment authorizing enforcement in connection with trafficking cases, considered and decided by the District for criminal cases of Vienna, Austria, and the issuance of writs of execution for the amounts awarded.

By judgment of 21.03.2012 of the District Court for criminal cases of Vienna, Austria, in a criminal case № 142 Hv8-12 f, entered into force on 21.03.2012, it is recognized that five Bulgarian women have suffered from trafficking from criminal group, and were forced to engage in prostitution on them as was physical violence.

In their capacity as civil plaintiffs in criminal proceedings, these women victims were awarded different amounts of compensation that should be paid by the defendants in the following amounts:

- B. P. - the amount of 1000 Euros;
- G. Y. – the amount of 10 000 Euros;
- K.G. – the amount of 10 000 Euros;
- M.A. - the amount of 5 000 Euros;
- T. T. – the amount of 10 000 Euros.

Only three of the injured women have applied to the Sofia City Court for recognition of the foreign judgment and allow its implementation as follows:

- At the request of B. P. was instituted case № 14893/2015 of the SCC;
- At the request of M. A. was instituted case № 14894/2015 of the SCC;
- At the request of G.was Y.instituted case № 14895/2015 of the SCC.

Cases are developing differently due to different circumstances for each of the victims, as well as due consideration by different judges.

Case № 14895/2015 of the SCC - has already issued the order of 12.17.2015 recognizing the foreign judgment and admitting the execution of the verdict in the criminal case in so far as the defendants were ordered to pay G.Y. the amount of 10 000 Euros. This order is subject to appeal before the Sofia Appellate Court within two weeks of receiving notice of its preparation, so now we are awaiting the response of the defendants - will appeal the order or not, in order to follow its entry into force and then issuing writ and taking enforcement actions to obtain the amount awarded.

Case № 14894/2015 of the SCC - formed on the application of M. A. – we are expecting the decision of the Court.

Case № 14893/2015 of the SCC - formed on the request of B. P., by Order of 01.12.2015, the court asked to justify legal interest in the application, in accordance with the provisions of the new Art.622a of the CCP adopted with changes in the CCP / SG 50 / 03.07.2015 / under which changes to a judgment given in another Member State of the European Union shall be enforceable without the need to issue an executive sheet, the bailiff proceeded at the request of an interested party on the basis of a copy of the judgment certified by a court ruled it and the certificate issued in accordance with Art.53 of Regulation / EU / № 1215/2012, which repealed Regulation / EU / № 44/2001, ie – alleviates the procedure, without the need to ask Bulgarian court recognition and enforcement of foreign judgment.

In this regard, we filed a request with which the reasoned legal interest by submitting this request for recognition of a foreign judgment and allow the implementation of the provision of § 16 of the Transitional and Final Provisions of the Amendment of the Code of Civil Procedure - SG 50 / 03.07.2015, under which judgments given in proceedings instituted before January 10, 2015, included in the scope of Regulation / EU / № 1215/2012, to be recognized and enforced by the previous order, namely under the repealed Regulation / EU / № 44 / 2001.

In this sense, the provision of Art.66, paragraph 1 of the Regulation / EU / № 1215/2012, published in Bulgarian in the Official Journal of the European Union of 20.12.2012, the section "Legislation" - L 351 according to which this Regulation applies only to legal proceedings instituted after January 10, 2015 Paragraph 2 of Art.66 of Regulation / EU / № 1215/2012 also provides that notwithstanding Art.80, Regulation / EC / № 44/2001 shall continue to apply to judgments within the legal proceedings instituted before January 10th, 2015, included in the scope of the Regulation.

Therefore, applications are referred to the Regulation / EC / № 44/2001 and we present a certificate under Art.54 of this Regulation in Bulgarian translation, we believe that our request should be considered under Regulation / EC / № 44/2001.

By Order of 22.12.2015, the court ruled that actually the provisions of Regulation / EC / № 44/2001 should apply, giving us a final opportunity to present a certificate under Art.54 of this Regulation.

In the present certificate under Art.54 of Regulation 44/2001. B. P. was recorded wrongly as E. P., as she was recorder iduring the handling of the case, where on page 5 of the original sentence presented / but in the Bulgarian translation is p.4 / t.3.f recorded as E.P.. Under this same name she was taken by pimps-accused and operating in Vienna, which is why that name appears in the verdict of the court.

The difference in names B. P., who made the request for recognition of a foreign judgment and E. P., who is the victim, according to the sentence may appear obstacle for issuance of a writ of execution, as there is no identity.

We have explained this fact to the court with a request from 01.08.2016, and currently expect the court's decision.

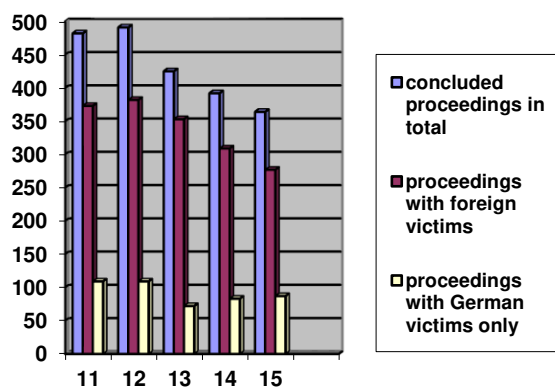
- Mandatory practice for the SCC: repealed Regulation / EC / № 44/2001:
- Decision № 294 of 11.13.2012, stated on case № 33/2012, the SCC.
- Decision № 33 of 17.02.2012, stated on case № 601/2011, the SCC.

CHAPTER 16

FACTS AND NUMBERS ON HUMAN TRAFFICKING IN GERMANY

The Federal Government of Germany claims to proceed actively against human trafficking in Germany. Working in the field of human trafficking for years it is known that there will only be police investigation proceedings, prosecutions, trials and finally convictions and imprisonment, if the financial means are adequate enough to build a control system. Without controls no cases. In recent there has been a decrease of cases not because of a lesser crime rate, but because of fewer controls.

Concluded investigation proceedings in the year 2011-2015⁸



The decrease of concluded investigation proceeding from 2014 in comparison to 2015 amounts to minus 7%. The average figure during the last 5 years was 431 proceedings. This number has been fallen short of since 2013. Less than a quarter of the victims are German. Most cases were conducted in the state or Berlin (84), followed by Nordrhein-Westfalen (78), then Hamburg (46), Niedersachsen (32), Bayern (25), Baden-Württemberg (17), Hessen (17), Rheinland-Pfalz (15), Sachsen (15), Bremen (10), Sachsen-Anhalt (7), Saarland (5), Schleswig-Holstein (5) Mecklenburg-Vorpommern (4) Brandenburg (2) ad Thüringen (2).

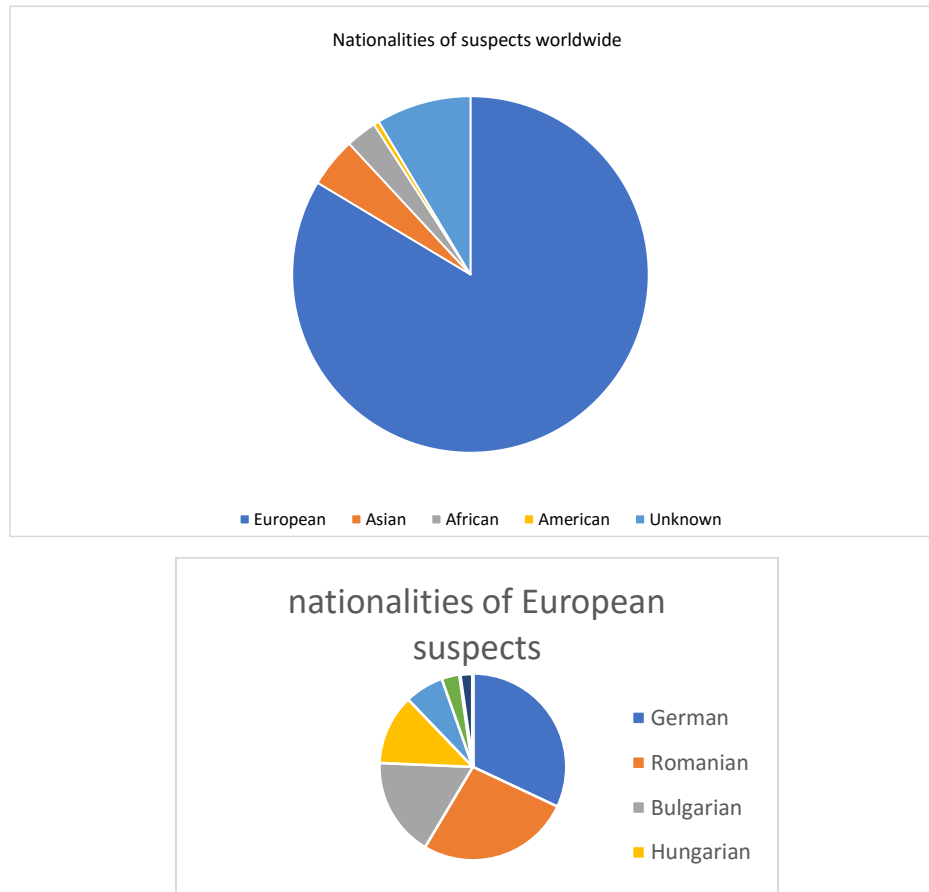
Human trafficking is accompanied by other crimes. In Germany there was an increase of more than 20% of other crimes in 2015 in comparison to the previous-year period in proceedings concerning human trafficking. In 217 of all 364 investigation proceedings (equivalent 60%) there were indications found to 307 other sorts of crimes. The majority of the crimes accompanying human trafficking are offences against sexual self-determination (118 cases), followed by violent crimes (94) such as offences against a person (bodily harm). But also cases of unlawful imprisonment (24), drug abuse (21), smuggling (17), weapons offences (13), property crime (10) and forgery (10), were registered.

The majority of cases were initiated by police controls. It can be said that it is very important that the police force is present in the red-light-districts. The prostitutes will only call out for help and are willing to file charges, if they know the police. It is the achievement of the police that in more than 44 % of the cases in 2015 it was the prostitute herself or accompanied by a person of a NGO who was searching the contact to the police. In 56% of the cases though it was the police who by controlling the kerb, the sex clubs, the brothels, the apartment for prostitution etc. discovered victims of human trafficking. These facts and numbers show how important the role of the policeforce is. If the police fails because of lack of financial means or manpower, there won't be any legal reconditioning.

In 2015 proceedings were carried out against 573 suspects. This amounts to an increase of 13% compared to the previous year. The majority of the suspects are Germans followed by Romanians.

⁸ Bundeslagebild Menschenhandel 2015, BKA

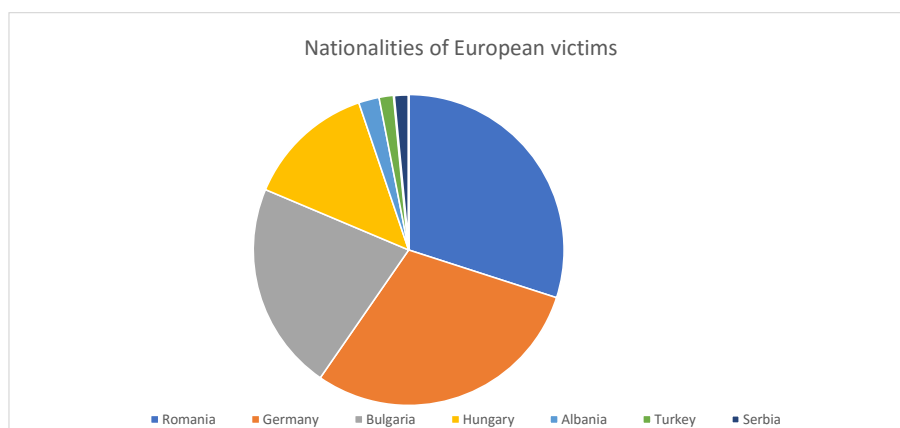
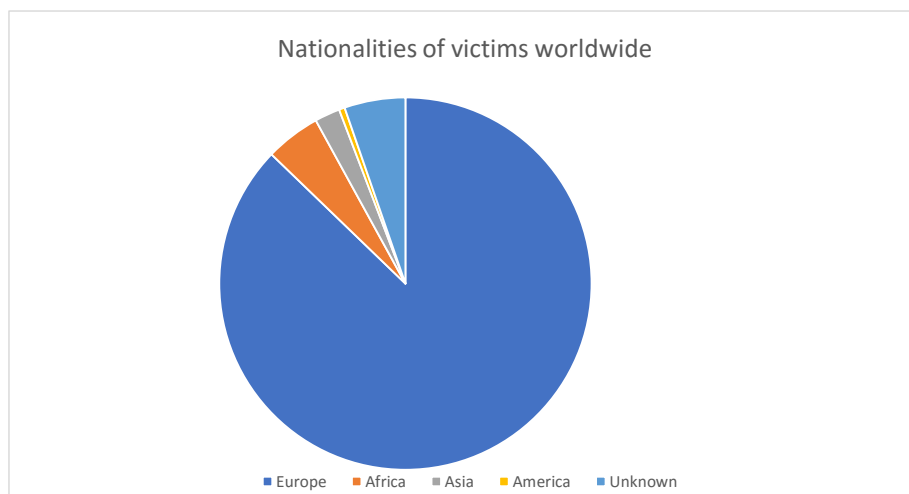
Nationalities of the suspects and victims⁹



Of all suspects against whom investigation proceedings were conducted 83,6 % were European, 4,5 % Asian, 2,8% African, 0,5 % American and 8,6% of unknown origin. The major groups of suspects origin from Germany (142) and Romania (118) followed by Bulgarian suspects (76), Hungarian (54) Turkish (30), Serbian (14) and Albanian (10). More than three quarters of the suspects were male (422) while 22% were female (126). A lot of the female suspects might have been victims of human trafficking themselves. Especially Nigerian women and girls become so called Madams after having been trafficked to Germany, held in sex clubs for a while and after having paid their debts are released by their Madame only to start organising other Nigerian women and girls to be smuggled to Germany by male countrymen and to be exploited in sex clubs.

The numbers and figures of suspects correspond with the origin of the victims.

⁹ Bundeslagebild Menschenhandel 2015, BKA



The majority of European victims in 2015 were Romanians (98) followed by Germans (97), Bulgarian (71), Hungarian (44), Albanian (7), Turkish (5) and Serbian (5) victims.

If we think about victims of human trafficking, we picture a young woman or a girl. However, 4 % of the victims are male. This causes complications for the NGOs who deal with the male victims as often in Germany funds to pay for the help for victims exist for female clientele only.¹⁰

In nearly 50% of the cases the suspects had some kind of relation to their victims. Actually 20% of the suspects were family related to their victims.

The members of the government and persons in charge shouldn't talk about new laws to be able to fight human trafficking, but rather look forward to assign enough financial means to the police force, to the prosecution, for legal help to fight human trafficking.

¹⁰ I the following text I refer to victims as being female for simplification purposes only

CHAPTER 17

GERMAN LEGISLATION ON HUMAN TRAFFICKING

17.1. Criminal Law

The EU Directive on preventing and combating trafficking in human beings and protecting its victims (Directive 2011/36/EU) has now been implemented by Germany, which leads to a comprehensive reform of provisions regarding trafficking in human beings in 2016. The definition of trafficking in human beings has therefore evolved in the German criminal law.

As per the new criminal system, the concept of trafficking in human beings has fallen in line with the international definition and its status in German criminal law has changed. It is now illegal for anyone to use another person's predicament or vulnerable residence status in a foreign country to recruit, transport, pass on, accommodate or take in this person in order to exploit him or her. In the case of persons under 21, they do not have to be in a predicament or in a vulnerable situation. Actual exploitation through labour, begging or criminal offences has been included in the definition of labour exploitation (§233 of the German Criminal Code – new). The law came into force on 15 October 2016.¹¹

In the German Criminal Code (Strafgesetzbuch, StGB) the law states the criminal liability for felonies and misdemeanour. Felonies are unlawful acts punishable by a minimum sentence of one year's imprisonment (Section 12 I StGB) while misdemeanours are unlawful acts punishable by a lesser minimum term of imprisonment or by fine (Section 12 II StGB). The distinction is of importance because in some cases legal aid to the victim will only be granted in a case of a felony.

The criminal acts of human trafficking are regulated in Chapter 18 *Offences against Personal Freedom*. Section 232 StGB protects a person's self-determination, in the sense of freedom about his or her determination concerning labour, including practice of prostitution or prostitution-like work as well as socially despised or illegal employment. The legislation changed in 2016.

Section 232 StGB states that human trafficking is:

- the exploitation of another person
- by utilising her or her predicament which can be either
 - personal or
 - economic
- **or** by utilising the person's helplessness inflicted by his or her stay in a foreign country
- **or** who is regarded to be a person under the age of 21
 - recruiting
 - transporting
 - passing on
 - accommodating or
 - hosting this person
- 1. if this person is going to be exploited while
 - practising prostitution
 - working

¹¹ <https://www.kok-gegen-menschenhandel.de/en/human-trafficking/>

- practising begging or
- committing offences
- 2. if this person is going to be held in slavery **or**
- 3. if an organ of this person shall be removed illegally

The punishment for human trafficking is from 6 months up to 5 years imprisonment. If the victim is under the age of 18 or threatened by force, or if the offender is acting cunningly, commercially or is kidnapping the victim or putting severe bodily harm upon the victim, the punishment can go up to 10 years imprisonment. As in all cases, the minimum sentence is a 6-month imprisonment and so human trafficking is only a misdemeanour and no felony under the new German law. Only if some of the legal requirements coincide, the penalty has to be over one year imprisonment.

Section 232a StGB deals with forced prostitution. Under this rule forced prostitution is:

- the exploitation of another person
- by utilising his or her predicament which can be either
 - personal
 - or economic
- **or** by utilising the person's helplessness inflicted by his her stay in a foreign country
- **or** inducing a person under the age of 21 years
- to
 - commence
 - or continue prostitution
- or to commit acts with the perpetrator or with another person by which she is sexually exploited.

The penalty for this misdemeanour is 6 months up to 10 years imprisonment. Forced prostitution becomes a felony, if the victim is under the age of 18 or threatened by force, or if the offender is a member of a gang or is acting cunningly, commercially or is kidnapping the victim or recklessly putting the victim in danger of death or putting severe bodily harm to her.

Section 232 criminalises the trafficking of a human being whose self-determination is about to be interfered by the criminal himself or by a third party no matter whether in present times or in the future. The victim has to be in a predicament which can be either personal or economical. The situation must be of dire straits for the individual such as economic devastation, homelessness, illness, personal exceptional situation like divorce, loss of a family member etc. These facts must be suitable to hinder the victim in her capability to decide or act and therefore be vulnerable and defenceless against attacks on her personal freedom including sexual self-determination. It doesn't matter for the punishability whether her situation is self-inflicted or caused by external reasons. Therefore those persons who make irrational decisions are protected by the law, too. Merely poor conditions in one's home country are not enough to justify the existence of a predicament though. If a person from a poor country illegally lives in Germany and is afraid of deportation this may justify the assumption of the exceptional situation Section 232 requires. Section 232 also covers cases such as a woman or girl afraid of being deported back home after having been sent to Germany to an arranged marriage which then fails and therefore is going to be discriminated against, if returning can put this person in a situation in which she can be easily exploited. The predicament doesn't necessarily have to be real and may be just subjectively felt. The difficulty here is to differ between dramatic exaggeration of a life crisis and the objective evaluation of the situation of a person when returning home.

Not only if a person is in a predicament but also the helplessness of a victim due to his or her stay in a foreign country may be a factual condition for the crime of human trafficking. This may be the case if the victim is incapable to understand or speak German and has no money.¹² This alone

¹² Judgment of the Federal Criminal Court of 05th July 2005 2 StR 131/05

occurs in many other cases, too (au-pair, seasonal workers, asylum seekers); therefore it is necessary to overall evaluate the individual situation of a victim. Personal dependence, taking away the victim's passport, social isolation are indications for affirming the helplessness related to being in a foreign country.

17.2. Financial compensation for victims

a. Civil Law

A victim is entitled to claim financial compensation for material and immaterial damage from the damaging party (culprit). If the culprit is not willing to pay voluntarily, the victim has two possibilities of legally claiming for compensation. She can file a suit at a civil court or can take action against the defendant in a criminal case if the indictment has been admitted (Adhäsionsverfahren/Compensation for the aggrieved person Section 403 pp StPO (German Code of Criminal Procedure). The risks and difficulties of a civil trial is the lack of witnesses or evidence on the victim's side. The burden of proof lies with the plaintiff. If the defendant denies the plaintiff's demands in saying nothing has happened without witnesses or objective proofs, the claim will be dismissed. Whereas, if an aggrieved person raises a claim against an accused in a criminal trial, the burden of evidence is easier to be achieved. The victim herself serves as a witness in a criminal trial. Therefore, if a court finds the accused guilty, it will as well order him to pay compensation to the aggrieved person. It is recommended though to claim the damage to be enforced on basis of the cause in a criminal trial as criminal judges tend to award a lesser amount of money for immaterial damages than a civil judge. If in a criminal trial the damage is enforced on the basis of the cause you can put a figure on it later, and if the accused and the aggrieved person can't reach a settlement out-of-court, the aggrieved can turn to a civil court and fight for a higher amount of money.

b. Crime Victims Compensation Act (Opferentschädigung OEG)

Section one of the OEG states that any person who, within the territory of validity of this Act or on board of a German vessel or aircraft, has sustained a personal injury as a result of wilful, unlawful physical assault against himself or any other person or as a result of the lawful defence against such an assault, shall be entitled, upon application, to compensation on account of the resulting health damage and economic damage, as provided for by the Federal War Victims Compensation Act, which shall be applied mutatis mutandis. The application of this provision shall not be excluded on the grounds that the assailant has acted in the mistaken belief that his action was justified. This sounds great, but in reality especially victims of human trafficking are not granted any financial aid mainly because most of them weren't physically assaulted. Most of the offenders force the victims of human trafficking by using threats or psychological means to exploit them. The OEG demands the use of physical force though. Only if a victim has been attacked physically, there are realistic chances of achieving compensation paid by the state. Without rape, hitting, cutting or an equivalent physical abuse the victim is left empty handed.

But if there was a physical attack during the time the victim was beneath the violence of the offender, the next obstacle to get a state compensation is that in most cases of human trafficking the damage results in psychological problems due to the stress under which the victim had to live during the deprivation of liberty. Not the beats will have caused the damage, but the stress. The OEG requires a direct link between the physical attack and the damage though. And only if a certain degree of damage is achieved, a person is entitled to a pension.

Foreigners are entitled to a pension in the same way as Germans are, if they are EU citizens. If they are not, compensation will only be granted to those citizens of states which are granting German citizens' compensation vice versa.

CHAPTER 18

DEALING WITH VICTIMS OF HUMAN TRAFFICKING IN GERMANY

A victim of human trafficking is always under pressure. First under the pressure of her tormentors and once an official criminal investigation has started under the pressure of serving the case as a witness. She worries about whether the police, the prosecutors and judges will believe her or not. She is afraid of the future and asks herself what is going to happen to her during the procedure and thereafter. She fears acts of revenge by the culprits. She suffers the loss of most or all of her former social contacts or if she comes from abroad never had any chance to build them up in Germany. She feels being left alone, not knowing what her rights are or where everything will lead up to. It is therefore necessary to create a protected surrounding where the victim feels safe and comes to a rest. But this isn't the job of the police. It is essential that social workers are engaged in the case, preferably those who have experience in dealing with victims of human trafficking. In Germany there are various organisations who have specialised in social work on that behalf.

In Germany more than 37 member organisations have formed an NGO network against trafficking in human beings, KOK - Bundesweiter Koordinierungskreis gegen Menschenhandel e.V. This is a unique network as it represents a broad variety of different groups, including faith-based organisations and sex workers' rights groups.

“Statement: KOK aims to promote the human rights of trafficked persons and other migrants experiencing violence. It addresses trafficking and other forms of violence against migrants as a severe violation of human rights. KOK believes that the crime of human trafficking is deeply rooted in racism and sexism, and strategies to fight human trafficking have to be embedded in a wider framework including both phenomena. The network is active against all bodies, organisations and legislation which exclude migrants from social, political and economic participation. It believes in equal rights and opportunities for all, including persons working in prostitution and other informal economies.

Activities: KOK co-ordinates the endeavours and efforts of its member organisations and other stakeholders involved in the issue of human trafficking. It transforms the experiences gained in grassroots counselling centres into political strategies. KOK informs policy makers, scientists, civil society and governmental and intergovernmental stakeholders on the complexity of anti-trafficking policies, and guarantees knowledge sharing across different levels. Some of the KOK's core activities are political lobbying, as well as work in relevant committees and public relations.

The work carried out by KOK is supported by the German Ministry for Family, Senior Citizens, Women and Youth.”¹³

Without a tight network of persons involved in dealing with injured witnesses it is very difficult to run a case successfully. If a victim finds herself alone, she most probably is going to withdraw herself from the case by leaving the scene. This is very easily if the victim originates from a foreign country. So it is crucial for a case that every person dealing with the victim knows his/her job well. Sometimes a victim might even feel safer returning to her tormentors rather than to stay in a situation she doesn't know.

A victim of human trafficking who has been exploited for quite a while can't stand too much pressure on her by law enforcement. Therefore police officers and detectives should be well trained in

¹³ <https://www.kok-gegen-menschenhandel.de/en/member-organisations-counselling-centres/>

dealing with victims of severe crimes, too. It isn't always necessary to have a female police detective interrogating a female victim of human trafficking, but it might be helpful. Each interrogator should be well trained in the methodology of victim interrogation and must know how to avoid a behaviour which will cause secondary victimisation.

18.1. Psychological-social criminal proceeding companionship¹⁴

In Germany a new legislation has been coming into force on January 1st 2017. Victims of severe crimes and especially victims of human trafficking are entitled not only to legal support by an attorney of their choice but also to be accompanied by a psychological-social criminal proceeding companion during the legal proceeding. A psychological-social criminal proceeding companion has to have either a degree in psychology or in social sciences. He/she has to obtain a post degree in psychological-social criminal proceeding companionship. The psychological-social criminal proceeding companion has to act neutrally meaning he/she is not allowed to interfere with the case. Her/his field of duty is a non-legal companionship before, during and after a criminal procedure for victims with special needs, with the goal of keeping the burden as low as possible and to prevent secondary victimisation. It has to be guaranteed that no manipulation of the victims' testimony takes place. Therefore it is essential that the companion had received a special training including legal knowledge.

Most lawyers, prosecutors and judges are quite critical about this new institution of witness support. We will have to evaluate the program after a while to find out whether it is accepted by the witnesses themselves and by the lawyers dealing with a case.

18.2. Social support

The psychological-social criminal proceeding companionship is not replacing the social support a victim of human trafficking is in need for. This support has to start on a very low level preferably on the kerb or in a brothel itself. If police detectives are on the street on a regular basis, a victim of human trafficking gets to know them on her own terrain. This helps building up trust and might therefore lead to willingness to confide to the detective and to file a case against the culprit.

But as stated before neither the police nor lawyers are serving well as social workers. They are needed to meet the victim's needs. For this it is essential that police, lawyers and social workers co-operate. And of course money are needed to provide NGOs or public institutions with the financial means to be able to work and help professionally. If there are no money to give shelter, necessary medical treatment nor a subsistence minimum to a victim it will be very difficult to fight financially well equipped criminals.

18.3. Legal support

A defendant is entitled to hire a lawyer. As financial capability on their behalf often seems to be limitless they are able to engage high quality lawyers. If governments are not willing to finance legal aid for the weak ones, there is no equal opportunity for the victims. Therefore it is absolutely essential that a victim's attorney is paid by the state budget independently of how the victim decides to conduct herself in a case. Once a lawyer is appointed, it has to be guaranteed that he/she will receive a correct and fair payment independently of the victims' behaviour. But most important is that well trained lawyers act on the victim's side.

¹⁴ Lyndian in KammerReport Hamm 2016 Heft Nr. 5 S. 4ff; <http://www.rechtsanwaltskammer-duesseldorf.de/assets/Uploads/Kammer/KammerMitteilungen/KMD4-16.pdf>

In Germany the prosecutor's role in an investigation and a trial is neutral. All facts *pro* and *contra* the case have to be evaluate by him/her. Of course the nature of a person representing the accusation is more or less on the side of the victim against the defendant, but a prosecutor will never be able to represent a victim's interests in a court room efficiently. If the victim chooses to join the indictment, she can only be thoroughly represented by her own barrister in the court room. He/she serves as a private accessory prosecutor and has the right to be present at any time during the trial and to cross-examine witnesses, to submit evidence, to hold a final speech, etc. Therefore a private accessory has more or less the same rights in the criminal procedure as the defendant. Only a qualified lawyer though will be capable to exercise the victim's rights in a court room.

In addition to the capability to represent a client in a criminal case, the victim's lawyer should have legal knowledge in fields of law such as social law, law on civil compensation, family law or law concerning foreigners.

In all cases we have to try to keep the access to law for those who need it most.

18.4. Case Studies

Case One: A typical case

a) Factual background

A meets S in the small Romanian town where she lives. He works in Germany and promises to get her a good job either in the catering industry or as a live-in housekeeper. A is a single mother with a toddler. She leaves her child with her mother and goes to Berlin with S. She does not speak a word of German and has never travelled. On their arrival in Berlin, S takes her to a flat in which another Romanian woman, B, is living. She is romantically involved with S and works as a prostitute. S and B announce to A that she is also expected to prostitute herself. They claim there are no other jobs available and that she now owes money to S for organising her travel. A sees no other way out than to engage in prostitution. B briefs her and works with her over the following weeks in various brothels and on the kerb. S takes her to work and picks her up. She is required to hand over all her earnings to S, who claims he is keeping a detailed account and will revise them with her after three months. Although A is in a dreadful mental and physical state, she has to work every single day, even when she is on her period or ill. B has days off and can keep part of the money. When A refuses a punter because she has already worked for him and he was aggressive, S hits her. She says that she can no longer bear this and wants to return to Romania; S threatens to tell her mother she is working as a prostitute and suggests things will not look good for her child if she leaves. A continues working. Four months later, she shares her story with a Romanian-speaking punter who calls the police.

b) Preliminary investigation

The police retrieve her from the brothel where she is working and take her to a police station that specialises in the field of trafficking in human beings and procuring. A is questioned for six hours through an interpreter. The police also get in touch with a specialised counselling centre whose staff join them at the police station. The counselling centre organise temporary accommodation in a safe house.

The police is in permanent contact with the prosecutor. After A's first questioning, the police detective in charge of the file at the

➤ Not in all German Police precincts these special units exist. Where they are installed, cases are more successfully handled and do lead to more preliminary proceedings and convictions.

➤ During the preliminary proceeding the prosecutor is in charge of the case. It is him/her who applies for the arrest

criminal police unit passes it on to the prosecutor, who obtains a search warrant for S's flat from the court. Seven hours after the initial questioning, four police detectives search S's flat; they secure a strong body of evidence, seize € 25,000, two sports cars registered on his name, and many documents relating to bank accounts. S is taken into custody. He refuses to be questioned. On the basis of A's initial questioning and the evidence – in particular records regarding A and other unidentified persons' activities – of A's passport, that was found in S's flat, the prosecutor asks for an arrest warrant to be issued against S. Before the end of the following day, S is brought before an examining magistrate who issues an arrest warrant against him. S is put on remand. B is also arrested, but she is free to leave after extensive questioning. A is questioned again five times by the police and spends hours driving around Berlin with criminal police detectives identifying locations relevant to the case. Using other strains of evidence, the police manage to identify two other trafficked persons and to question one of them, who is still in Germany.

A got contact with a counselling centre which in the meantime helps A to find a lawyer who will represent her. A also receives medical care and psycho-social support from the counselling centre. A hires a lawyer who can act for her even during the preliminary investigation. In particular, she requests that she will be informed immediately if S is released. Two weeks later, S applies for a review of his detention, but he is not released.

Approximately three months later, A is granted access to the file through her lawyer. This is how she finds out that three other trafficked persons worked for S in very similar conditions before her. She also

warrant or a telephone monitoring in court. The magistrate is responsible to issue the warrant etc.

- If an unlawful act has been committed and the principal or a secondary participant has acquired proceeds from it or obtained anything in order to commit it, the court shall order the confiscation of what was obtained. This shall not apply to the extent that the act has given rise to a claim of the victim the satisfaction of which would deprive the principal or secondary participant of the value of what has been obtained. (Section 73 German Criminal Code, StGB)
- Aggrieved persons may avail themselves of the assistance of an attorney or be represented by such attorney. Legal counsel appearing at the aggrieved person's examination is permitted to be present. But not only a lawyer is permitted, also a person whom they trust who has appeared at the examination shall, at their request, be permitted to be present, except where this could endanger the purpose of the investigation. The person conducting the examination decides in this case. If access is denied, the reasons for denying the request has to be documented in the files. (Section 406f German Code of Criminal Procedure, StPO)
- This applies also prior to preferment of public charges and without declaration of joinder.
- A lawyer may inspect, for the aggrieved person, the files that are available to the court or the files that would be required to be submitted to it if public charges were preferred, and

discovers that S is claiming that she and the other trafficked persons worked for him voluntarily and of their own accord, and that he only acted as their driver and made sure, at their request that nothing happened to them. Four months after the formal complaint, the prosecutor presses charges against S with four counts of serious trafficking in human beings, “authoritarian procuring” [<i>dirigistische Zuhälterei</i>], bodily harm and intimidation before the Criminal Division of the Regional Court [<i>Landgericht</i>] in Berlin. B is charged with aiding and abetting serious trafficking in human beings and authoritarian procuring.	may inspect officially impounded pieces of evidence, if he can show a legitimate interest in this regard. In the cases where he is entitled as a private accessory prosecutor, there is no requirement to prove a legitimate interest. (Section 406e German Code of Criminal Procedure, StPO) ➤ There have been decisions by the High Court of Hamburg [Hanseatisches Oberlandesgericht Hamburg] refusing the right for the aggrieved person to get the files. The court claims that an aggrieved person would automatically be influenced in her testimony, if she reads the file. Objections that it is the lawyer who gets the files on not the client himself were rejected. This decision has been discussed controversially and the majority do tend to grant inspection of the record to the lawyer ➤ After pressing charges the prosecutor hands over the file and case to the seized court (§170 (1) German Code of Criminal Procedure, StPO) ➤ Whosoever for his own material benefit supervises another person’s engagement in prostitution, determines the place, time, extent or other circumstances of the engagement in prostitution, or takes measures to prevent the person from giving up prostitution, and for that purpose maintains a general relationship with the person beyond a particular occasion shall be liable to imprisonment from 6 months to 5 years (§181a (1)2. German Criminal Code, StGB)
--	---

c) The trial

Five and a half months after S was detained, the trial against S and B begins. Twelve hearings are scheduled for the case;	➤ In case of remand detention, it is obligatory to handle the case without undue delay. As long as a judgment has not been given imposing imprisonment or a custodial measure of reform and prevention, remand detention for one and the same offence exceeding a period of six months shall be executed only if the particular difficulty or the unusual extent of the investigation or some other important
---	---

A is to be heard as a witness during the second hearing. She has joined the public prosecution as a “private accessory prosecutor” [*Nebenklägerin*] and has been granted legal aid, which means she does not have to pay for her lawyer. She has also received a translation of the bill of indictment at her request in her mother tongue. A waives her right to be present during the entire trial and asks her lawyer to represent her during the hearings. They have discussed the course of action that is to be taken during the trial, and the lawyer knows which points are particularly relevant for A.

During the first hearing, the court offers S a plea bargain, if he agrees to plead guilty. He would be handed down a prison sentence between three years and eight months *and* four years and two months, if he was to plead guilty to all charges. His lawyers announce that the defendant refuses the offer as he claims to be innocent.

reason do not yet admit pronouncement of judgment and justify continuation of remand detention. (Section 121 German Code of Criminal Procedure, StPO)

- Whoever is aggrieved by an unlawful act pursuant to trafficking in human beings or like in this case controlling prostitution may join a public prosecution or an application in proceedings for preventive detention as private accessory prosecutor (§ 395 (1) 4. German Code of Criminal Procedure, StPO)
- Upon an application of the private accessory prosecutor an attorney shall be appointed as his counsel, if she has been aggrieved by an unlawful act pursuant to sections 181a of the Criminal Code and had not attained the age of 18 at the time of the act or cannot sufficiently safeguard his own interests himself (Section 397a (1) 4. German Code of Criminal Procedure, StPO). In cases of trafficking in human beings you can usually claim to be in such a position. Like in this case where the defendant was represented by more than one lawyer. Also A has psychological difficulties, she is afraid and overburdened.
- In suitable cases the court may reach an agreement with the participants on the further course and outcome of the proceedings. The subject matter of this agreement may only comprise the legal consequences that could be the content of the judgment and of the associated rulings, other procedural measures relating to the course of the underlying adjudication proceedings, and the conduct of the participants during the trial. A confession shall be an integral part of any negotiated agreement. The verdict of guilt, as well as measures of reform and prevention, may not be the subject of a negotiated agreement. The court shall announce what content the negotiated agreement could have. It may, on free evaluation of all the circumstances of the case as well as general sentencing considerations,

	also indicate an upper and lower sentence limit. The participants shall be given the opportunity to make submissions. The negotiated agreement shall come into existence if the defendant and the public prosecution office agree to the court's proposal. The court shall cease to be bound by a negotiated agreement if legal or factually significant circumstances have been overlooked or have arisen and the court therefore becomes convinced that the prospective sentencing range is no longer appropriate to the gravity of the offence or the degree of guilt. The same shall apply if the further conduct of the defendant at the trial does not correspond to that upon which the court's prediction was based. The defendant's confession may not be used in such cases. The court shall notify any deviation without delay.
--	---

The indictment is read out and S gives his statement regarding the allegations through his lawyers. He claims that A and B worked of their own free will. According to S, he told her back in Romania that she would be working as a prostitute and that she already prostituted herself in her home country. He explained that the reason he kept her passport and her money in Germany was that she asked him to do so. She was free to move around as she wished and worked autonomously. S says nothing about the other trafficked persons, but denies any involvement. S answers none of the questions. B refuses to give evidence before the court and makes it known that she was questioned unlawfully after she was arrested and that she was not duly notified of her rights.

Due to the principle of orality, evidence required to hand down the judgment must always be presented orally during the trial. The content of the case cannot simply be put forward: witnesses must be questioned in person and additional evidence must be physically exhibited or introduced through statements by investigating officers.

A is heard as a witness. As she is not severely psychologically compromised, she is questioned in the presence of the defendant. Her fear of the defendant is not sufficient for her testimony to be carried out through video-conference or for the defendant to be excluded.	➤ The court may order that the defendant leave the courtroom during an examination, if it is to be feared that a co-defendant or a witness will not tell the truth when examined in the presence of the defendant. The same shall apply if, on examination of a person under 18 years of age as a witness in the defendant's presence, considerable detriment to the well-being of such witness is to be feared or if an examination of another person as a witness in the defendant's presence poses an imminent risk of serious detriment to that person's health.
---	---

At her lawyer's request, the public is excluded during her hearing. A is very afraid. There are relatives and acquaintances of the defendant waiting at the courtroom door; despite not speaking to her directly, their presence is very threatening to A.

A tells her lawyer and the court that she no longer wishes to testify. She is notified that this is forbidden, as she has no right to refuse to give evidence or to remain silent unless the testimony given up to that point was incorrect.

After extensive consultation with her lawyer, A decides to testify. She is questioned over three hearings.

When the defendant is present again the presiding judge shall inform him of the essential contents of the proceedings, including the testimony, during his absence (Section 247 German Code of Criminal Procedure, StPO).

- The public may be excluded if circumstances from the private sphere of a participant in the proceedings, a witness or a person aggrieved by an unlawful act are mentioned, the public discussion of which would violate interests meriting protection. This shall not apply if there is an overriding interest in public discussion of these circumstances. The public should be excluded if a witness under 18 years of age is to be examined in proceedings relating to criminal offences against sexual self-determination (sections 174 to 184g of the Criminal Code) ... or to criminal offences against personal liberty pursuant to sections 232 to 233a of the Criminal Code. The public shall be excluded if the preconditions of subsections (1) or (2) exist and the person whose private sphere is affected applies for such exclusion. (Section 171b Courts Constitution Act, GVG)
- Witnesses shall be obliged to appear before the judge on the date set down for their examination. They shall have the duty to testify if no exception admissible by statute applies (§48 German Code of Criminal Procedure, StPO)
- This situation happens quite often. Victims of trafficking in human beings suffer a lot during every interrogation. They have to remember some of their worst experiences. It is natural that victims refuse themselves repeating their story of suffering over and over again. Here the skill of a lawyer to act as moderator is required to explain the legal situation of the client and therefore his/her obligations on the one side and the necessity of her testimony to the court without which there won't be a conviction.

On top of questions regarding the events themselves, A is asked numerous questions regarding her previous biography and her present life. Her lawyer intervenes several times to have questions dismissed. Most of the questions, however, must be answered, as they are justified by the need to assess A's credibility as a witness. She is therefore asked whether she engaged in prostitution in Romania, what her life was like in her home country, what she has told her relatives at home, and why she is still living in Germany. She is also asked what she is doing at the moment and answers truthfully, explaining she is still working as a prostitute. In the meantime, the defence has produced notarised "statements" from several people in Romania claiming that A already worked as a prostitute in Romania. A continues to deny this.

- The principle of the witness's obligation to answer truthfully to all posed question has limits set by a verdict of the Federal Court of Justice in 2005 (*"The respect for the human dignity of a witness must also be taken into account in regard to the primary obligation to ascertain truth. Evidence of his private and intimate life is only admissible after careful examination of his indispensability. ... The principle that a sprawling enlightenment is not required is of particular importance here"* BGH 1 StR 498/04).

During the trial, A's child is brought to Germany with the help of the counselling centre and reunited with A. This lifts a lot of pressure and fear from her shoulders. She also tells her family she was forced to engage in prostitution in Germany, which is also a relief. However, she does not mention her current activity.

After A is heard, the other trafficked persons were to be heard as witnesses. They have all moved back to Romania since the deed. They are all summoned as witnesses through the mutual legal assistance agreement and are requested to come to Berlin to testify. Only one of them comes to testify. At the last moment, she also hires a lawyer who supports her during her testimony.

- Joinder shall be admissible at any stage of the proceedings. It may also be effected for the purpose of seeking an appellate remedy after judgment has been given (Section 395 (4) German Code of Criminal Procedure, StPO).

As the deed she was subjected to occurred 6 years previously, the witness cannot remember all the details. For example, she cannot give any information regarding the timeline or price of her services; she cannot state any precise locations either. However, like A, she explains that she was approached in Romania, promised she would work as a live-in housekeeper, and only in Berlin told that she was expected to work as a prostitute. S did not confiscate her passport and after three weeks' work, she managed to flee back to Romania with the help of an acquaintance. S never hit her or threatened her after her return to Romania; she never received any money from him either and never asked for any out of fear. The two other trafficked persons do not respond to the summons and refuse to testify before the court.

The court then hears police officers, witnesses from brothels, punters and neighbours. The financial investigations regarding A and B's revenues are also presented. The defence, the prosecution and the lawyer of the private accessory prosecution file many applications to examine additional evidence to hear additional witnesses. Some of these are accepted. The scheduled hearings are insufficient; additional hearings are needed. As the two other trafficked persons did not testify, the cases regarding these witnesses and the expected sentences are dropped.

A. requests a consolidated civil and criminal procedure through her lawyer so that the defendant is sentenced to pay damages for injury and compensation. The sum is to cover the unpaid revenues as a prostitute as well as damages for the mental and physical hardship suffered. This totals € 38,000.	➤ The aggrieved person or his heir may, in criminal proceedings, bring a property claim against the accused arising out of the criminal offence if the claim falls under the jurisdiction of the ordinary courts and is not yet pending before another court, in proceedings before the Local Court irrespective of the value of the matter in dispute. (Section 403 German Code of Criminal Procedure, StPO)
--	--

After 35 hearings, the examination of evidence is concluded and the prosecution, the private accessory prosecution, and the defence give their closing statement, which includes all the points they consider particularly relevant. The prosecution request that the court sentence S to five years and three months in prison and order the seizure of his money and vehicles on two counts of serious trafficking in human beings and authoritarian procuring. They also request that the court sentence B to a two-year prison sentence, which can be suspended, for aiding and abetting the crime. In her closing statement, A's lawyer stresses the huge strain on A and goes through the details of the evidence. She does not request any particular sentence other than for S and B to be punished and to pay damages for injury and compensation.

S's defence requests his acquittal and alternatively a prison sentence which can be suspended (i.e. 2 years maximum) for authoritarian procuring. As a further alternative, they request he to be spared remand since his permanent residence is in Germany and he will not flee and has already spent one year and eight days on remand.	➤ If a person is sentenced to a term of imprisonment not exceeding one year the court shall suspend the enforcement of the sentence for a probationary period if there are reasons to believe that the sentence will serve as a sufficient warning to the convicted person and that he will commit no further offences without having to serve the sentence. The court shall particularly take into account the character of the convicted person, his previous history, the circumstances of his offence, his conduct after the offence, his circumstances and the effects to be expected from the suspension (Section 56 German Criminal Code, StGB).
--	--

B's defence requests that she to be acquitted.

S is sentenced to a five-year prison sentence for serious trafficking in human beings and authoritarian procuring and is ordered to pay € 30,000 in damages for injury and compensation. He is therefore spared remand pending his incarceration and is released from prison on the day of the hearing. However, he must report to the police three times a week and deposit his passport.	➤ The trial has lasted several month. Before the hearing started, S had been on remand for 5 ½ months already. As a rule a convict who has received a prison sentence serves to thirds of it (here: 3 years and 4 months). One third of the sentence (=20 months) will be suspended. A convict stays on remand after a sentence if the court expects
---	---

	him that he will escape. It depends from court to court at what length of the remaining sentence they will think there will be automatically a risk of absconding.
--	--

B is sentenced to a suspended prison sentence of one year and six months for aiding and abetting serious trafficking in human beings and authoritarian procuring. She is ordered to pay damages for injury and compensation jointly with S.

d) Appeal

S and B appeal against the ruling. The case goes to the German Federal Court of Justice [*Bundesgerichtshof*]. Thirteen weeks after the ruling, the written grounds for the judgment are delivered and the defence justify their appeal.

In the meantime, S has failed to report to the police and has disappeared. A new arrest warrant is issued against him. He is arrested five months later in Romania and extradited.

Seven months after the Federal Court of Justice ruling, the appeal is dismissed and the judgment obtains legal force.

A is paid out € 20,000 of the seized money. She agrees with B to be paid out € 100 per month.

Case two: “Loverboy”

a) Factual background

B is 17 years old. Her relationship with her parents is very fraught. She is not attending school regularly and has bulimia. She has been staying with various friends for 4 weeks. Her parents simply cannot control her. She meets M at a party. M is a well-groomed 28 year old. He gets her a drink. B instantly falls in love. He is different from the other guys she has met recently in that he flirts with her a lot but without being pushy. They exchange mobile numbers. Over the next few days, they write frequently. M is very interested in everything B tells him. He asks about her family problems, her school situation, her worries and fears, her ex-boyfriends and relationships. B is thrilled. They send each other photos; at one point, she sends him photos in which she is half-naked. M does not write much about himself – he is very guarded in this respect. After a few days, they speak on the phone for hours about everything and nothing. M gradually opens up. He talks about his ex-wife, who has left him but who is now claiming alimony through the courts, and is refusing to let him see their three-year-old daughter. This is destroying him emotionally.

When they end up meeting, they have a lovely romantic evening. M takes her out to a little restaurant with candles on the tables, excellent food and great conversation. B has never had such great conversations with people her age. After the meal, they simply go upstairs to a room above the restaurant. Small hotel, small room. M is a wonderful, generous lover. He has already left when B wakes up the next morning. He has left a sweet note. They send each other messages over the following days, but unfortunately M does not have time for another date. Eight days later, they finally manage to get together. However, M is tense. He mentions financial problems and an argument with his ex. He is worried about his daughter, who is not being looked after properly by his ex. B is delighted that he is sharing his worries with her. She offers help; M is touched. Once again, they go to a small hotel and have sex.

After that, M does not get in touch for three days and does not react to B’s messages. B is worried that he is fed up with her and writes more and more desperate-sounding messages. On the fourth day, M answers: “Baby, I have too many problems! It has nothing to do with you. You’re great! Forget me.” B is desperate. She writes numerous messages and offers her help. “I’ll help you whatever

it takes! Do you need money? How much?” Three hours later, M answers: “Thanks baby, but I need 10,000 €. I just don’t know how I’ll manage.” B thinks about what she could do. Her parents would never help her, and she herself does not have that amount of money. She does not know how, but she writes to M that they will find a solution. M and B meet. He is looking terrible. He tells her his ex-wife is blackmailing him. He has to give her money or he will not be allowed to see his daughter. However, she does not need the money. She is working as a prostitute, which always earns her a very good living. He knows the business as they used to work together. He now just does not know where to get the money from. There is a possibility, but he cannot expect this from B – he does not even want to ask her. But as she is such a good person, he feels he can trust her, which is why he is just asking, he says, whether she has a friend who would want to work with him as a prostitute. It is not as bad as people think and he knows the business. B spontaneously offers to work for him. M refuses vehemently. He says this is out of the question because she is far too young. However, she manages to convince him and he accepts. He can show her everything. He says he will organise everything, take care of her security and make sure she has all she needs. B agrees and is even delighted. She would do anything for him. On that very day, they go to a brothel where Nadja, an old friend of M, works. She asks B how old she is. B answers 21. M has told her she must always say she is 21 or their plan will fall through. Nadja briefs her and reassures her. She is very understanding. Everything goes fine. By the end of the day, B has served four clients and hands over all her earnings to M. M takes her to a flat that a friend has just vacated. He tells her she can live there for the time being. He says he will pick her up the next day. The next day, M tells her he has decided she would be better off serving more exclusive clients, as she is so young and beautiful. He will take her. Over the following few months, B works in various flats, brothels and the houses of private clients. She earns around 400 € per day. Not one single client asks her how old she is. After two days, M no longer has the time to drive her around. The new person in charge of this is U, who also takes care of everything in terms of organisation. He presses B to hand over at least 15% of her earnings to him, and to give M the rest. M sends her messages at least 10 times a day saying how awful it is for him not to see her and how much he regrets that she has to work for him. Over the next few weeks, they meet a few times. He always looks gloomy, but he says he feels better when he is with her. He is incredibly grateful and shows her photos of his daughter.

B's health is going downhill. She loses more weight, is drinking a lot, and not sleeping well. M looks after her and gets her medication. One day, he brings cocaine to help her get through the days. After nine weeks, B meets X, an old friend, on the street. X is obviously alarmed and invites her to tea. B tells her about her problems and what she is doing. She breaks down. After two hours, M phones her. Since she does not pick up the phone, he texts her every three minutes. U also desperately tries to contact her. M gets angry and threatens to break up with her if she does not turn up. However, B cannot go back. When M threatens to publish the photos of her naked and to inform her parents and school, X phones the police.

b) Preliminary investigation

B gives a statement to the criminal police, but refuses to go home. She is referred to a group home for girls through a specialised counselling centre. B's parents are informed and want to pick her up. B refuses to speak to them. She is taken into care and assigned an official guardian.

- A minor is given a guardian if she/he is not subject to parental custody or if the parents are not entitled to represent the minor either in matters affecting the person or in matters affecting property. (Section 1773 German Civil Code, BGB)

B spends the following few weeks in bed, sleeping or crying. From time to time, she receives visits from the police and testifies as agreed with her official guardian. She ends up being questioned for a total of 15 hours.

The police want to have B's mobile analysed. B says she has lost it. She cannot live without it. Two days later, the police is granted on behalf of the application by the prosecutor a search warrant by a judge to examine B's possessions in the group home, to find the mobile phone. B has hidden it well, so they can't find it.

She is very worried as M has not been in touch. She finally manages to contact Nadja, who tells her M has been arrested. She cries on the phone, tells her how dreadful M is feeling and that he is never going to see his daughter again. B feels broken-hearted.

B then tries to commit suicide, but is found in time. The therapist tells her she is addicted to M in the same way one is addicted to a drug. B tries to withdraw her statement from the police. However, serious trafficking in human beings is a crime that is prosecuted ex officio, i.e. it is not up to the person who files the complaint to decide whether the offence will be prosecuted or not. The public prosecution is determined to pursue proceedings.

B goes back to the police and stresses she did everything of her own free will and that she does not want M to be prosecuted. She is told that in compliance with § 232 of the German Criminal Code [*Strafgesetzbuch*], whether she agreed to work or not is irrelevant. All that matters is that she was under 18, that M made her engage in prostitution and that he exploited her.

B requests the right to a visit to see M in custody. The public prosecution rejects her request.

➤ **Indicting Authority and Principle of Mandatory Prosecution** means that the public prosecution office shall have the authority to prefer public charges. Except as otherwise provided by law, the public prosecution office shall be obliged to take action in relation to all prosecutable criminal offences, provided there are sufficient factual indications. This means that once the prosecution obtains knowledge of a crime, it is obliged to lead an investigation no matter whether the aggrieved person wants to contribute or not.

➤ A prisoner on remand is entitled to receive visits. They have to be permitted either by a judge or if the prisoner agrees by the prosecutor. A judge or prosecutor won't grant the victim to see the accused person in jail.

She carries on working and pays money into M's special account while in custody. She also pays for his lawyer.

M's lawyer tells her that M did not commit an offence if he did not know she was under 21 and if the money she gave him was a donation.

B goes to the police and tells them that M did not know that she was under 21. She gives a statement saying that he did not want her money and that she forced him to take it. The police officer registers her statement and strongly advises her to get a lawyer as she may otherwise commit a serious offence.	➤ This is a good example showing what the police should do. If the detective hadn't given this advice and if B hadn't gone to see a lawyer, this would have been the end of the case. Even if a witness has the duty to give testimony, a judge will hardly use all legal power he has against a 17 year old girl. Also if you force somebody to give testimony involuntary, the credibility will not be very high.
---	---

B confides to her social worker, who refers her to a lawyer. B tells the lawyer that she wants to get M out of custody. The lawyer begins by requesting access to the file and convinces B to wait until this has been granted.

After consulting the file, the lawyer tells B that M has denied that he had anything to do with B engaging in prostitution. He has declared that she forced herself upon him and that he was never interested in her. B finds out that M was living with Nadja and that Nadja stopped working when B started. She also discovers that M has no children.

Through access to the file, she learns that she was not the only girl working for M. There were four other young women whom he made submissive in the same way at the same time. B is also told that people like M are called "loverboys".

B commits another very serious suicide attempt. Once again, she is saved. Over the following weeks, she becomes a little more stable and, with the help of the caregiver in charge of her case and of her therapist, begins to understand what has happened to her. Little by little she distances herself from M.

Three months later, M is indicted for serious trafficking in human beings.

c) The trial

Five months after that, the trial begins before the regional court [<i>Landgericht</i>]. The court is composed of three judges and two jurors.	➤ As a rule although determined to be the exception the composition of the court consist of 4 judges (two judges and two lay judges. Although the criminal divisions shall be composed of three judges, including the presiding judge, and two lay judges (grand criminal divisions); It shall rule that it will be composed of three judges, including the presiding judge, and two lay judges if, ▪ it has jurisdiction as a criminal division with lay judges (<i>Schwurgericht</i>), ▪ the order of placement in preventive detention, its reservation or the order
--	---

	of placement in a psychiatric hospital is to be expected, ▪ or the participation of a third judge appears necessary due to the scale or complexity of the case. In all other cases the grand criminal division shall rule that it will be composed of two judges, including the presiding judge, and two lay judges. The participation of a third judge shall as a rule be necessary if the main hearing is expected to last longer than ten days.
--	--

B's therapist does not consider it is wise for B to testify before the court at this point in time. However, she is obliged to make a statement as there are no reasons for her not to testify. However, B is now 18 and the court is concerned about excluding the defendant. The psychological certificate issued by the therapist she is seeing is not recognised by the court. The court orders a court psychiatrist to assess B's capacity to testify and in which conditions. B has an appointment with a court psychiatrist. B wants to show herself at her best and does not want to admit any weaknesses. The psychiatrist therefore certifies that B can testify in the presence of the defendant. On the third day of the trial, B must be helped into the court room. Her legs buckle under her. She does not dare to look in the defendant's direction. Her lawyer is sitting next to her. Before the presiding judge has finished notifying the witness of her rights, the	➤ B's lawyer requests that the defendant be excluded from the testimony in accordance with § 247 of the German Criminal Code. ➤ The following shows what might happen if a court is not trusting the victim's lawyer enough. The psychiatrist who most probably didn't know the complex situation of the client did certifies on insufficient information. ➤ The setting during an interrogation is very important. In a courtroom the witness usually is confronted with either the judge's bench on either side the prosecution and the defendant and his legal team and behind him the audience, if present (German style) or the prosecution and defendant (American style). Confronting a victim vis-à-vis won't lead to the desired result which is that the victim feels free to talk about what happened. Giving some visual freedom to a victim while giving testimony can help her/him a lot to articulate him-/herself. ➤ The presiding judge shall conduct the hearing, examine the defendant and
--	--

defendant's lawyer asks to speak. He explains that his client would like to speak before the witness. This right is granted despite B's lawyer's objection. M begins speaking with a broken voice and tells B she should testify and must not be afraid of him as he will never do anything to her. Even if nobody believes him, he loved her more than anyone else before. It was different with the others – she was the only one he really loved.

take the evidence. (Section 238 German Code of Criminal Procedure, StPO) This entitles him to determining the order in which the process participants may speak. The moment he realises that somebody misuses his right e.g. to bias a witness he/she can cut him (the defendant in this case) off. Cutting off one of the participants has to be very carefully judged but in this case it seemed to be obvious that the only purpose of the defendant's declaration was to influence the witness.

B breaks down. She cannot speak, starts shaking all over and falls apart. She has to be taken to hospital.

The expert psychiatrist who was already heard, explains to the court that he now deems it necessary for the witness to testify in the absence of the defendant. (Section 247 German Code of Criminal Procedure, StPO).

Two weeks later, B testifies in the court room. M is in an adjoining room and follows the testimony via a video link. In the meantime, the three other victims have been heard. One of them, Y, is present throughout the rest of the trial. She is 19. Just before B is to testify, Y approaches B in the corridor and asks if they could meet. B's lawyer intervenes, saying that she does not think this is a good idea right now. Y understands this, but calls out to B: "I always thought I was the only one he loved. How wrong you can be!"

B testifies about every single detail she can remember. At this point, she does not know that M used the same means to convince the other women to work for him. Her lawyer had access to the whole file, but she had agreed with B to reveal only parts of it to avoid jeopardising B's credibility during her statement. B is questioned for six hours by the presiding judge. On the following day, she is questioned by the public prosecutor, then by her own lawyer. After three hours, the defendant's lawyer begins his questioning. The first question puzzles B: she is asked why she did not mention that she had engaged in prostitution when she was 15. It is not true, but the lawyer asks nevertheless. In the following hours, numerous questions are objected to by her lawyer, but many are approved by the court. For example, she is asked if she had fun when she was serving punters, and why she did not tell M she was under 21.

- It is not wise to give a witness access to a file. It is not illegal though. In a case of one word against the other the credibility of a witness is on the test bench. A testimony is considered genuine, if it is unaffected. A witness seems to be authentic, if he/she is not trying to retell what he/she read but of what he/she has been lived through.
- Also, it is not wise to inform the witness what the defendant has told to the court. If the defendant himself blames the witness that he/she did something wrong, the witness will try to justify him-/herself rather than to tell the court what in his/her memory has happened.
- As above mentions the psychological-social criminal proceeding companionship could have helped in this case. The stress B was put on was too much for her.

When she is finally released at the end of the day, B breaks down once again. The specialised counselling centre staff take her to the hospital's crisis intervention centre.	
---	--

The trial continues for 23 days. M is sentenced to a prison sentence of five years and six months on four counts of serious trafficking in human beings in accordance with § 232 of the German Criminal Code and “authoritarian procuring” [*dirigistische Zuhälterei*] in accordance with § 18a of the German Criminal Code.

d) Appeal

M appeals against the verdict. The appeal is rejected by the Federal Court of Justice [*Bundesgerichtshof*] four months later.

The verdict is therefore *res judicata* and M is moved to the detention centre.

Damages for injury and compensation

During the trial, B did not want to claim damages for injury and compensation and carry out what is known as a consolidated civil and criminal procedure [*Adhäsionsverfahren*]. At that time, her feelings towards M were very mixed.

Two years on, she goes back to her lawyer to find out more about the possibility of claiming compensation. Because she is living on benefits, she fills in a form to receive legal aid. The lawyer claims €12,000 in lost earnings and €10,000 in damages for injury. B is granted the maximum amount of legal aid and M ends up agreeing to the payment. Thanks to this judgment based on the defendant's acknowledgement, B has 30 years to enforce the judgment.

CHAPTER 19

STRATEGIES IN SWEDEN TO COMBAT HUMAN TRAFFICKING AND PROTECT VICTIMS RIGHTS

Human trafficking is internationally accepted as being a violation of human rights values. It is estimated that up to 4 million people are exploited through trafficking each year (UNHCR 2006).¹⁵ Reports suggest that up to 87% of trafficking is for sexual exploitation (UNODC, 2009).¹⁶ As a gross violation of human rights, the aim is therefore, to develop strategies internationally, regionally and domestically to significantly reduce the amount of trafficking (European Commission, 2009). Following the signing of the United Nation's *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children*, which came into effect in 2007, Sweden has incorporated its principles into its domestic law. The state has over the years adapted and refined its legislation accordingly and has dedicated its efforts to combating human trafficking.¹⁷

Anti-Trafficking efforts in Sweden include:

1. Prosecution of the traffickers
2. Implementing preventive measures for the victims of human trafficking – including accessible and easy means of reporting to relevant authorities when suspecting trafficking and educating and encouraging public awareness on the issue.
3. Implementing protective measures – involving all measures necessary to ensure that victims feel safe and protected once removed from the trafficking environment.

Coordination of Sweden's anti-trafficking efforts

The anti-trafficking efforts in Sweden are overseen and coordinated by:

- National Coordinator – County Board Stockholm
- Ministry of Justice / Ministry of Social Affairs / Ministry of Labour / Ministry of Foreign Affairs
- Swedish Ambassador against THB
- National Rapporteur: Police Authority
- National Task Force against prostitution & human trafficking (NTM)
- Specialized units within the Police Force
- NGOs and the Swedish Civil Society Platform

¹⁵ UNHCR 2006.

¹⁶ This percentage should be regarded as an estimate because sexual trafficking is arguably more visible than trafficking for labour purposes.

¹⁷ Isabelle Johansson. Swedish Anti-Trafficking Policy: Official Framework and Local Practices. Malmö University. Faculty of Culture and Society. 2014. Internet: <https://dspace.mah.se/bitstream/handle/2043/17671/MA%20Thesis%20-%20Isabelle%20Johansson%20-%20final.pdf?sequence=2>

CHAPTER 20

SWEDEN NATIONAL REFERRAL MECHANISM

The County Board Administrative Board in Stockholm has created a National Referral Mechanism-manual. The manual is in essence, a step in creating a single, unified approach among all relevant authorities in their specific dealings with the unique nature of human trafficking and the victims it creates. In coordinating all efforts, the manual also serves to ensure the protection of the victim's rights. The focus areas are as follows:

1. **Identification** – informing relevant authorities (police, social services) when suspecting or coming into contact with a victim of human trafficking. According to the *Police Act 1984:387* the police are required to inform social services of the victim and are to coordinate efforts in providing shelter and safety.
2. **Initial support and protection** – social services are required to inform the victim of their rights and all the support available to them in the form of housing, financial aid, clothing, legal avenues, residence permits etc.
3. **Long-term support and social inclusion** – cooperation between all relevant authorities such as the social services and the housing facility in assisting the victim in future plans. Should the victim wish to return home, contact is to be made with his/her country government. The social services will, upon consideration of all input from authorities in contact with the victim, develop an “individual treatment plan” which addresses the needs of the victim. This plan is valid for 6 months or for as long as legal proceedings may last. Furthermore, along with other organizations such as Platform Swedish Civil Society against Human Trafficking, the social services assists victims in adapting to life in Sweden.
4. **Return (IOM)** - The Return Program for Human Trafficking Prostitution (ÅMP) is tasked under the County Administrative Board in Stockholm. A victim is required to apply for the return program and all applications are sent to IOM Helsinki, which will then assume responsibility over the case. Upon acceptance of request, the return program provides assistance in arranging transport and support for the journey back home as well as assisting in their reintegration (support services, housing etc.) in the country of origin. Relevant authorities and/or organisations are contacted to ensure to the well-being of the victim once they return.
5. **Criminal proceedings** – *The victims' rights in the prosecution and court phase.*

Reported crimes of trafficking and purchase of sexual services in Sweden 2015 ¹⁸

Reported Crimes 2015 The Whole Country	No.
0418 - Human trafficking for sexual exploitation of children under 18 years	11
0419 - Human trafficking for sexual purposes by person 18 years or older	47
0470 - Human trafficking for forced labour of children under 18	4
0471 - Human trafficking for forced labour with person 18 years or older	17
0472 - Human trafficking for begging with children under 18	5
0473 - Human trafficking for begging with person 18 years or older	50
0474 - Human trafficking for organ trafficking with children under 18	0
0475 - Human trafficking for organ trafficking in person 18 years or older	0
0476 - Human trafficking for war service with children under 18	1
0477 - Human trafficking for military service in person 18 years or older	0
0478 - Human trafficking for other purposes with children under 18 years	20
0479 - Human trafficking for other purposes with a person 18 years or older	24
0609 - Procuring incl. roughly	82
0610 - Purchase of sexual acts from children under 18	134
404 - Purchase of a sexual service (beginning in June 2006 aged 15 years or older and Date of effect May 2007 18 years or older)	523

¹⁸ Human Trafficking for sexual and other purposes, Police Report 2016. Internet: https://polisen.se/Global/www%20och%20Intrapolis/M%C3%A4nniskohandel/Manniskohandel_Lagesrapport_17webb.pdf. (Swedish)

Prosecuted crimes of human trafficking in Sweden 2015 ¹⁹

Type	Guilty verdict district court	Waiver of Prosecution	Punishment	Total
Human Trafficking (all forms)	2	–	–	2
Procuring	11	–	–	11
Gross Procuring	4	–	–	4
Purchase of sexual services	112	1	217	330
Purchase of sexual acts of children	39	–	1	40

Few Swedish trafficking cases

- Very low number of convictions
- The legislation under evaluation
- 179 crimes reported to the police during 2015
- Only two persons convicted for human trafficking for sexual exploitation: one man & one woman from Romania during 2015
- 2009-2012 there were 19 indictments for trafficking crimes and 7 final verdicts
- 2008-2013 there were 175 complaints regarding trafficking for sexual purposes and 230 for other purposes registered by the Swedish police but in 2013 only two persons were convicted of trafficking crimes.
- Countries of origin in most cases Lithuania, Nigeria, Romania, Russia, Serbia and Thailand.

Challenges regarding prosecution in trafficking cases in general in Sweden

- The absence of reliable victims or witnesses
- The difficulty to ascertain and prove *beyond reasonable doubt* intentions and awareness
- The victims' difficulties to describe their situation in a coherent way
- The Swedish courts require – regardless the Swedish statutes and the underlying conventions – that the prosecutor must *prove the suppression of the victim's free will*

¹⁹ Human Trafficking for sexual and other purposes, Police Report 2016. Internet: https://polisen.se/Global/www%20och%20Intrapolis/M%C3%A4nniskohandel/Manniskohandel_Lagesrapport_17webb.pdf. (Swedish)

CHAPTER 21

SWEDISH LEGISLATION ON HUMAN TRAFFICKING

Crimes against liberty and peace - Chapter 4. 1 a § Penal Code (2010: 371)

In cases other than those referred to in § 1, anyone who by unlawful coercion, deception, exploitation of anyone's vulnerable location or with other such improper means: recruiting, transporting, transferring, harbouring or receiving a person in order that he or she will be exploited through: sexual exploitation, removal of organs, military service, forced labour or other activities causing distress for the victim, shall be sentenced for **human trafficking** to imprisonment for no less than two and not more than ten years. Whoever commits an act referred to above, against a person under the age of 18, will be convicted of human trafficking even if no such improper means specified herein have been used. If the offense referred to in the first or second paragraph is considered severe, a perpetrator can be sentenced to prison terms of up to four years.

Procuring - Chapter 6. § 12 Penal Code (2004: 406)

A person who promotes or improperly financially exploits a person's engagement in casual sexual relations in return for payment, shall be sentenced for procuring to imprisonment for at most, four years. If a person, who holds the right to the use of premises, has granted the right to another to use it and subsequently learns that the premises is wholly or to a substantial extent, being used for casual sexual relations in return for payment and omits to do what can reasonably be done to terminate the arrangement, he or she shall, if the activity continues or is resumed at their premises, be considered to have promoted the activity and shall be held criminally responsible, in accordance with the first paragraph. If a crime provided for in the first or second paragraph is considered severe, imprisonment for at least two and at most eight years shall be imposed for 'severe' procuring. In assessing whether the crime is 'severe', special consideration shall be given to whether the crime concerned a large-scale activity, brought significant financial gain or involved the ruthless exploitation of another person.

Important to note, although prostitution is legal in Sweden, this act criminalises the owners of apartments and other property, who knowingly allow the use of their property for the purpose of prostitution.

Understanding Sweden's Purchase of sexual services act - Chapter 6 § 11 Penal Code (2011: 517) as an anti-trafficking strategy

According to Sweden's 'Sex purchase Act': *A person who, otherwise than as previously provided in this Chapter, obtains a casual sexual relation in return for payment, shall be sentenced for 'purchase of sexual service' to a fine or imprisonment for at most one year. The provision of the first paragraph shall also apply if the payment was promised or given by another person.*

Since 1999 Sweden has made it illegal to 'buy' sex. The logic behind this decision and how it relates to human trafficking for sexual purposes is demonstrated in two research studies which conducted an analysis of cross country datasets as empirical data from a variety of sources.²⁰ The aim

²⁰ For further information see, Niklas Jakobsson and Andrea Kotsadam. The Law and Economics of International Sex Slavery: Prostitution Laws and Trafficking for Sexual Exploitation. (June 2010) Revised May 2013. Internet: https://gupea.ub.gu.se/bitstream/2077/22825/4/gupea_2077_22825_4.pdf and Seo-Young Cho, Axel Dreher and Eric Neumayer. Does Legalized Prostitution Increase Human Trafficking? World Development Vol. 41 pp. 67-82, 2013 Internet: http://www.lse.ac.uk/geographyAndEnvironment/whosWho/staff%20profiles/neumayer/pdf/Article-for-World-Development-_prostitution_-anonymous-REVISED.pdf.

of both studies was in essence, to determine whether there is a relationship between prostitution legislation and the prevalence of human trafficking for sexual purposes. Evidence suggests that when choosing states in which to traffic, traffickers behave in the same way as legitimate businessmen, driven by a need to increase profits. Cost and profit determine the viability of their 'business' in a given area.²¹ In other words, where there is a market, trafficking will essentially flourish. The existence of such a market (for sexual exploitation) in a given country, is seen to be directly related to the legislation that surrounds the buying/selling of sex. The Swedish government has reported a decrease in trafficking since the new 'sex law' came into effect.²² Trafficking and the amount of street prostitution has significantly decreased. Furthermore, a survey has shown that buyers have effectively been deterred from buying sex as a result of the legislation.²³ Criminalising buyers means that there are too many obstacles for traffickers to overcome and which subsequently makes it too costly (e.g. investing in effectively being able to conduct business discretely for their customers who may fear being caught and having to operate from many different locations).

²¹ UNODC. (2009). Global Report on trafficking in persons. Retrieved from UNODC: https://www.unodc.org/documents/Global_Report_on_TIP.pdf

²² Friesendorf, C. (2007). Pathologies of Security Governance: Efforts Against Human Trafficking in Europe. *Security Dialogue*, 38(3), 379-402.

²³ Kousmanen, J. (2010). Attitudes and Perceptions about Legislation Prohibiting the Purchase of Sexual Services in Sweden. *European Journal of Social Work*, 1-17.

CHAPTER 22

THE VICTIMS RIGHTS IN THE PROSECUTION AND COURT PHASES IN SWEDEN

22.1. Legal Framework

In principle, the general rights of victims of human trafficking do not differ from that of victims of other crimes and hold the following rights:

Legal representation/counsel

Victims of crimes as described in *Chapter 4* and *6* (these include victims trafficked for sexual and non-sexual purposes) of the *Penal Code* (Brottsbalk 1967: 700) will have a counsel appointed once a preliminary investigation has been initiated. The state pays for the appointed counsellor (within legal proceedings), who has the task of supporting and advising the victim concerning legal matters.

Pre-trial preparation

A victim of crime has the right to be informed of how the trial process will be carried out. In an attempt to make victims feel at ease and secure, the victim further has the right to visit the courtroom with an authority representative (prosecutor/social service/police) before the trial.²⁴

Interpreter

A victim of crime is entitled to have an interpreter present when dealing with all relevant authorities involved in entire legal proceedings as stipulated in the *Administrative Procedure Act Section 8*. Within the court process, the *Swedish Code of Judicial Procedure Chap 5, Section 6* guarantees that should: *a party, a witness, or any other person who shall be heard by the court be incapable of understanding and speaking Swedish, an interpreter may be engaged to assist the court. If a public interpreter for the language in question serves at the court, he shall be assigned. Otherwise, the court shall assign a suitable person to assist as interpreter in the case.*

Information Protection

As a means of protecting the victim, he/she needs to be informed of their right to have their identity remain anonymous to the public and “to be heard” in court in the absence of the suspected offender. The perpetrator may however, still be able to hear the victim’s testimony. Should the victim not wish to be present in the courtroom, he/she may have their testimony be recorded on a media device. Furthermore, the victim holds the right to not disclose information on their own criminal activity.²⁵

²⁴ National Referral Mechanism: Protecting and supporting victims of trafficking in human beings in Sweden. Report 2016:29 Länstyrelsen Stockholm. Internet: <http://www.nmtsverige.se/sites/default/files/National-referral-machanism-trafficking.pdf>

²⁵ National Referral Mechanism: Protecting and supporting victims of trafficking in human beings in Sweden. Report 2016:29 Länstyrelsen Stockholm. Internet: <http://www.nmtsverige.se/sites/default/files/National-referral-machanism-trafficking.pdf>.

Witness Support

Victims of a crime, including human trafficking are entitled, according to *Chapter 20, Section 15 of the Code of Judicial Procedure*, to having a person of his/her choosing to be present throughout the legal proceedings to offer them support.

Information regarding perpetrator

In order to protect the victims' safety, the victim has the right to be informed of any changes concerning the perpetrator after court proceedings (e.g. release from prison).

General Social Services

According to the *Social Services Act (2001: 453)*, each municipality has a duty to provide assistance and support to victims of crime within their districts. In terms of the act, municipalities are required to attend to; members of society and more particularly, the needs of women who are or have been victims of violence or other abuse by family members and children who have witnessed violence or other abuse by or against related adults, who may be in need of support and help. Municipalities are expected to provide victims with basic needs from shelter, financial aid to any "psychosocial" support they may need.²⁶

Residence permits for victims of human trafficking

According to Sweden's *Aliens Act 2005*. Section 15: Upon application from the person in charge of a preliminary investigation, a **temporary residence permit** valid for at least six months shall be granted to an alien staying in this country, if:

1. It is necessary to enable a preliminary investigation or a main hearing in a criminal case to be carried out;
2. The alien has shown a clear intention to cooperate with the investigating authorities;
3. The alien has severed all relations with the persons who are suspected of crime concerned in the preliminary investigation, and
4. Considerations of public policy and security do not indicate that a permit should not be granted.

If the alien wants a reflection period in order to recover and be able to take a decision on whether he or she wants to cooperate with the investigating authorities; the investigating authority in charge of the preliminary investigation shall issue an application for requesting a temporary residence permit valid for 30 days. However, the conditions specified in the first paragraph, points 1 and 4 must be satisfied. A residence permit issued under the first paragraph may be renewed if the person in charge of the preliminary investigation requests this and the conditions specified *there are still* satisfied. A residence permit issued under the second paragraph may be renewed if the person in charge of the preliminary investigation requests this, a longer reflection period is needed on special grounds and the conditions specified in the first paragraph, points 1 and 4 are satisfied.²⁷

In accordance with the above law, a victim of human trafficking who has been granted a temporary residence permit holds the same health and social benefits as native Swedes. It is the responsibility of the 'investigation leader' to inform the victim of their right to a residence permit.²⁸

²⁶ Social Services Act chapter 5. § 11.

²⁷ Aliens Act 2005: 716, Chap 5, §15. Internet:
<http://www.swedenabroad.com/SelectImageX/286331/Aliensactinenglishtransl.pdf>

²⁸ European Migration Network. Identification of victims of trafficking in human beings in international protection and forced return procedures in Sweden. 2013. Internet:
http://www.emnsweden.se/download/18.3dfbd3e6142328511b166c6/1484748708540/Identification-of-victims-of-trafficking_SWEDEN_Final_2013-3.pdf

Furthermore, the *Aliens Act (2005:716) Chapter 5, Section 15* allows for victims of trafficking to work in the country without a work permit.

The above residence permits are only temporary and are valid for as long as the criminal proceedings may last. Although trafficking in itself is not sufficient grounds to be granted permanent residence, a victim of human trafficking may apply for Swedish residence in “exceptionally distressing circumstances” in the asylum procedure.²⁹

Special circumstances of child victims

Within court proceedings, children under the age of 15 are not required to be in court and are instead, videotaped by relevant authorities.³⁰

Unlike in the case of their adult counterparts, minors who are witnesses of, or victims of human trafficking have a lower threshold in being granted residence permits on the basis of “exceptionally distressing circumstances” under the *Aliens Act Chapter 5, Section 6*.

According to Swedish legislation, should a minor be granted a residence permit, he or she is entitled to have a legal representative appointed when making a claim of a human trafficking offense. In addition to receiving a legal representative, ‘child victims’ who are in possession of a Swedish residence permit receive the same social and health benefits as native Swedes and are further permitted to attend a school within their district. The government supplies local municipalities with funds to ensure this. According to the *Social Services Act*, once an investigation is initiated, a legal guardian who will be responsible for an unaccompanied minor’s well-being, will be appointed.³¹

Should an individual with custody of an ‘unaccompanied minor’ be a suspect in a crime against a child, the victim is then entitled to have a “special legal representative” appointed, who, above the authority of standard legal counsel, can make decisions for the victim.³²

So as to uphold the human rights of children and their ‘best interest’, minors can be taken to a special children’s home (Barnahus) when involved in a legal investigation. These dedicated homes were established to allow all relevant authorities required in addressing the child’s overall needs, to be in one location at the same time. Specialist police officers, doctors, social workers, psychologists etc. are all under one roof so as to provide a safe and ‘child-friendly’ environment for traumatised minors.³³

²⁹ Ibid.

³⁰ National Referral Mechanism: Protecting and supporting victims of trafficking in human beings in Sweden. Report 2016:29 Lännstyrelsen Stockholm. Internet: <http://www.nmtsverige.se/sites/default/files/National-referral-machanism-trafficking.pdf>.

³¹ Eriksson, Maja K. FRA Thematic Study on Child Trafficking. *FRA European Union Agency for Fundamental Rights*. Internet: https://fra.europa.eu/sites/default/files/fra_uploads/524-Child-trafficking-09-country-se.pdf. Pg 8-9.

³² Center for the Study of Democracy. Assisting and Reintegrating Child Victims of Trafficking: Improving Policy and Practice in the EU Member States. Internet: <http://www.brottsoffermyndigheten.se/Filer/B%C3%B6cker/Assisting%20and%20reintegrating%20child%20victims%20of%20trafficking,%202013.pdf>, pg. 28.

³³ Center for the Study of Democracy. Assisting and Reintegrating Child Victims of Trafficking: Improving Policy and Practice in the EU Member States. Internet: <http://www.brottsoffermyndigheten.se/Filer/B%C3%B6cker/Assisting%20and%20reintegrating%20child%20victims%20of%20trafficking,%202013.pdf>.

22.2. Case Studies

Case 1 – Case No. B 2042-16 Appeal of Örebro district court's ruling July 15, 2016 in Case No. B 1208-16.

Relevant parties: *Plaintiff*, RH (Romanian national). *Prosecutor*: Deputy chief prosecutor Thomas Ahlstrand, International Public Prosecution Office in Gothenburg. *Special representative*: Peter Sivenius, lawyer.

Perpetrator 1: AU (Romanian national). *Attorney and Public Defender lawyer*: Gunnar Wikberg.

Perpetrator 2: RMM (Romanian national). *Attorney and Public Defender lawyer*: Anders Bohmanmansson. *Attorney and Public Defender by substitution lawyer*: B-O Ullsåker.

Case details

The evidence and information given by RH proved that the perpetrators, AU and RMM, at the beginning of January 2015, had recruited, transported and housed RH in their home to exploit her for sexual purposes. AU and RMM retained half the revenue from RH's prostitution, totalling up to approximately 10 000 SEK.

Statements made by sex-buyers as well as a written statement served as proof that RH had offered sexual services in return for payment. Her sexual services were offered on an internet website called 'Real Escorts', which through acquired evidence (mainly in the form of user address, telephone numbers, IP addresses, credit card information, bank transfers, intercepted telephone calls and SMS') was found to be administered by RMM and AU.

RMM and AU were found guilty of trafficking during three different periods. Each period is considered as a crime and is therefore regarded as three cases of human trafficking. RMM and AU were therefore, individually convicted of human trafficking during the period, partly from around January 1 until May 2015, and for about one month during September-October 2015, and partly from mid-February 2016 to March 13, 2016. None of the three crimes were considered as minor.

The Court of Appeal Verdict

The Court of Appeal changed the district court judgment in judging RMM:

- Under Chapter 4 § 1 a first and second paragraph of the Penal Code for three cases of human trafficking (period 2015-01-01--2016-03-13) determines the length of the sentence to imprisonment of three (3) years six (6) months;
- A ban was instituted on RMM from the kingdom, forbidding her to return here before 2026-09-20. RMM was sentenced to remain in custody until the prison sentence was enforced. A violation of the ban could lead to imprisonment not exceeding one year.
- RMM was sentenced to pay, jointly with AU, financial compensation to the victim with the amount of 125 000 SEK, plus interest.

The state bear the cost of the Court of Appeals for the defender and the special representative.

Legal problems arising during the judicial proceedings:

Oral evidence. The District Court and the police were not able to contact the plaintiff RF and summon her to the oral hearing.

Solution:

The prosecutor asked the District Court to use the interrogation from the preparatory hearing in the District Court.

General legal problems arising during judicial proceedings:

Moral Dilemma:

- The need to gather enough evidence concerning the crime and therefore not interfere too early
against
- The moral difficulty to passively watch a situation of oppression and exploitation.

Investigating

The investigation starts in two different ways:

1. The victim contacts the police, seeking for help

Or

2. The police become aware of a situation, for instance through the Social Services, the Migration Board, internet surveillance or observations by civilians.

First protective measure

If the victim contacts the police:

First protective measures:

- The physical security of the victim must be secured.
- Shelter provided by Social Services or NGO
- Possibility for the prosecutor to demand a temporary resident permit from the Migration Board or a permit for a 30-days reflection period.
- On demand from the prosecutor, the District court appoints a lawyer for the victim, who is paid for by the state. The lawyer takes care of the victim's legal interests.
- The police try to get a full statement from the victim.

If the crime is detected by the police:

First protective measures:

- Secret surveillance
- Internet surveillance
- Telephone tapping (needs decision by the district court)
- Arresting sex buyers, interrogations and coercive measures

The second protective measure

- The arrest of the suspects, followed by temporary detention, the suspects kept incommunicado
- The court decides on the detention, scrutinizing on a regular basis (every 14th day)
- House searches
- Collecting bank accounts, money transfers
- Searching mobile phones, computers
- Hearing witnesses
- Often need for international legal assistance (rogatory letters)
- Interrogating sex buyers, who can be subject to coercive measures in order to collect evidence.

The court proceedings

- Oral procedure – all statements necessary for the process must be made and presented again.
- The victim can be present in person but also possible with vide conference or hearing of evidence.
- Court proceedings are public, but the interview with the victim can be held in camera.
- The defendants can be placed in another room during the interview with the victim.
- No possibility of shortened processes or plea bargains between prosecution and defence.
- All evidence obtained during the investigation must be presented for the court (victim's and defendant's statements, hearing of witnesses and any other kind of evidence).
- Special feature of trafficking proceedings for sexual purposes in Sweden: they often include attached cases against the sex buyers.

The victim during the court proceedings

- On demand from the prosecutor/the police and the victim's lawyer, the court organizes the proceedings in a way that the security of the victim is not endangered.
- The victim's lawyer is present during the whole process, filing the victim's demand for financial compensation from the defendants.
- The victim's identity and situation can be kept confidential to the public, even after verdict

Case 2 – Case No. B 10040-15 Appeal of Södertörn District Court's ruling 29 October 2015 in Case B 5756-15

Relevant parties: *Plaintiff:* LA (Romanian national). *Prosecutor:* Jan Tydner, Public Prosecution Office in Stockholm. *Agent and counsel:* Attorney Lisa Von Trier.

Perpetrators: MC and LFR (Romanian nationals). *Attorney and Public Defender:* Lawyer Solveig Sörlén.

Case details

The case began when the police discovered several sex advertisements on the internet. Through the phone number listed on the ads, the police attempted to contact the advertiser. Contact was later established through SMS and the police were referred to an address where they had found prostitution activities taking place in the basement. At that time it became evident that MC, LFR and LA were involved.

Investigations were consequently expanded, through covert surveillance of the dwelling and through SMS and telephone intercepts of the involved mobile phones. The extended investigation period ranged from 10 April to 27 April 2015. The investigation led investigators to the conclusion that LA worked as a prostitute and that MC and LR controlled the arrangements. On April 27, 2015 while on their way out of the country, the police arrested MC and LR. During a raid, the police seized cash, jewellery, several mobile phones and a computer.

Investigators found that some of the phones were linked to various sex ads on the internet. Telephone records show a variety of messages and phone calls with prospective and actual buyers of sex.

Furthermore, in interviews conducted with LA, it was revealed that she is from a village in north-eastern Romania, and she lived there under difficult conditions. It has further emerged that LA has limited knowledge of the world around us, that she has never travelled outside her village and that she only knows Romanian. At the end of 2014, contact was made between LA, MC and LFR via the Facebook page "Norske Masasje", "Norwegian Massage". LA was then offered a job in Norway. MC and LFR were at the time in Oslo where they had travelled together from Spain. LA realized that she had been misled by MC and LFR about the work and also about how much she would earn.

Due to LA being unable to pay for travelling costs, she became indebted to them. The debt ratio increased with time since LA would also be required to pay for the costs accommodation and subsistence.

While in Norway for a few days, both LA and LFR had prostituted themselves. However, when the three of them arrived in Stockholm during the period from 23 January to 27 April 2015, only LA was expected to prostitute herself. The prostitution operation in Sweden was conducted initially from various hotels and apartments but was moved in February to a different location where the three of them lived together. During the crime period, MC and LFR controlled LA's prostitution and had no other income other than that earned through LA who had only been allowed to retain a small portion of the money she earned.

There were reports that another Romanian woman during one week in March 2015 also had prostituted herself at their home. The woman, who was in Romania, did not wish to participate in the investigation.

Telephone records of phone calls, SMS messages, cellphone tower records had all served as proof of the prostitution business. Phones found in the possession of MC and LFR were linked to contact numbers placed on sex service ads and furthermore, phone records showed evidence of communication with sex-buyers. In addition, a computer found during the raid of their home contained logins to the escort page 'Real Escort' during January-April 2015.

It was alleged that MC and LFR, based on the above evidence, had committed a crime in, first and foremost, human trafficking with regards to LA and that the crime of gross pimping would be considered if a conviction in human trafficking could not be made.

The Court of Appeal Verdict

Appeal changed District Court ruling in respect of LFR in:

- a) Indicating the period for crimes 2015-01-23 - 2015-04-27;
- b) Determining the sentence to imprisonment for 2 years 2 months

District Court ruling

Challenge: To ensure financial compensation to the victim from the perpetrators:

MC and LFR were sentenced to pay financial compensation to the victim LA with 82,200 kr plus interest.

Solution: Sequestration

Stockholm District court ruled for sequestration, to seize property (jewellery, necklace, bracelets, earrings etc.) that belonged to MC and LFR and to hold it until payment could be ensured.

CHAPTER 23

FINANCIAL COMPENSATION FOR VICTIMS OF HUMAN TRAFFICKING IN SWEDEN

Compensation for victims of human trafficking does not in principle differ from compensation for victims of other crimes. On reporting a case to the police authorities, the police and the prosecutor are obliged to inform the victim of the possibilities of receiving compensation and that the prosecutor, on request of the victim, should present a claim for damages to the court.

Under 13a § and 14§ of the *Preliminary Investigations Act (Förundersökningskungörelsen)* a victim can make a claim for compensation only once the crime has been reported to the police.³⁴ Compensation for victims of violent crimes is ensured under the *Criminal Injury Compensation Act (Brottsskadelag 2014: 322)*. Under this act, a deciding board, the Crime Victim Compensation & Support Authority (Brottsoffermyndigheten) has the task of attending to the needs of victims and furthermore, has the responsibility of overseeing and making decisions regarding victim compensation. According to the act, victims can be compensated if the crime took place within Sweden or if it happened to a Swedish resident outside the state's borders. Along with the *Liability Act (Skadeståndslag (1972:207))*³⁵ a victim of a crime such as human trafficking, is entitled to compensation for physical as well as psychological "damages" caused to the victim. A claim for this type of compensation should be filed within 2 years following the conclusion of court proceedings. As the authority in matters of compensation, the Crime Victim Compensation & Support Authority is not obliged to uphold a court's decision on damages. However, following hearings and deliberations, the board makes independent decisions regarding compensation for victims.³⁶

Rules for paying out compensation under the Crime Victim Compensation and Support Authority³⁷

One must have examined the other possibilities for compensation from personal insurance or through the Swedish Enforcement Authority before laying a claim with the authority. One cannot obtain criminal injuries compensation if damages have already been paid. The application for criminal injuries compensation must be submitted to Brottsoffermyndigheten within three years after:

- Offense
- Preliminary investigation was closed or
- Judgment after the trial "gained legal force" and can no longer be appealed.

Under the criminal injuries compensation, a victim has the right to claims of:

Personal injury - A personal injury can be physical or mental. The severity of the personal injury is to be determined during a medical examination.

The victim may for example, be compensated for:

³⁴Preliminary Investigations Act (Förundersökningskungörelsen) Internet: <https://lagen.nu/1947:948>

³⁵ The Liability Act (Skadeståndslag (1972:207)) Internet: <https://lagen.nu/1972:207#P3>

³⁶ Brottsskadelag (2014: 322) Internet: <https://lagen.nu/2014:322#R8>

³⁷ Crime Victim Compensation and Support Authority (Brottsoffermyndigheten) Internet: <https://www.brottsoffermyndigheten.se/>.

- Costs for medical care and counselling;
- Loss of income;
- Resultant physical and psychological suffering (pain and suffering);
- Permanent damage (deformity and disability).

Property damage - Victims can also receive criminal injuries compensation for damage of items as clothes and glasses worn at the time of crime. However, one cannot get criminal injuries compensation for lost or damaged money, jewellery, watch, cell phone or wallet.

It is difficult to obtain criminal injuries compensation for damage to property or the so-called ‘pure economic loss’. Property damage refers to the damage of objects, for example by vandalism, or the loss of items through theft. A pure economic loss is a financial loss arising without anyone suffering a property damage or personal injury, for example, a victim of fraud.

Violation – To claim this kind of compensation, one must by law, be a victim of a serious violation of one’s freedom or peace. Crimes in this regard include, assault, robbery, trespassing and the vast majority of sexual abuses.

The application for compensation should be submitted with a copy of the police report and any judgment, medical certificates, receipts and other documents as proof.

****Minors*** - In terms of compensation for a crime victim, child victims of or witnesses to a violent crime, either within Sweden or outside its borders (only individuals with Swedish residence), are entitled to claim for compensation for a trafficking offense which has been reported to the police. Furthermore, under the *Criminal Injury Compensation Act*, the minor is entitled to initiate a claim for compensation up until the age of 21 thereafter, no claim can be made unless the circumstances are deemed justified.³⁸

Compensation claim from home country

Should a victim return to their home country, his/her legal representative may demand damages from the perpetrator on the victim’s behalf during the court proceedings (after victim has completed the necessary requirements for the trial proceedings). Following a conviction and a determined amount by the court, the perpetrator is required to pay the victim in damages. The victim can furthermore, obtain assistance from Swedish Enforcement Authority (Kronofogdemyndigheten) to assist in receiving this payment. Upon receiving a letter of confirming the court’s judgement, the Swedish Enforcement Authority takes up the matter as the debt collector.³⁹

Compensation for victims choosing to not take part in legal process

In cases where victims are identified “outside the legal process” such as, by members of society or NGOs in cases where the “perpetrators cannot be identified” the social service may assist in providing the victim with a small amount of funds in the form of an “emergency assistance” to provide for the victim’s daily needs.⁴⁰

Working with prosecutors/police/courts/other authorities abroad in transnational cases.

Swedish transnational legal cooperation is guided by three frameworks, Eurojust, the European Judicial Network and the most commonly used, European Mutual Legal Assistance (MLA) regime.⁴¹

³⁸ Penal Code (Brottskadelag 2014: 322) Internet: <https://lagen.nu/2014:322#R8>

³⁹ Swedish Enforcement Authority (Kronofogden) Internet: <https://www.kronofogden.se/Wanttogetpaiddamages.html>.

⁴⁰ Human Trafficking For Sexual and other Purposes, Report 17. Police Report 2017.

⁴¹ Interview with Deputy Chief Prosecutor of the International Public Prosecution Office in Gothenburg, Sweden.

Through the European Mutual Legal Assistance, all European legal authorities can cooperate and exchange information and evidence with other states regarding on going cases. Due to the diversity in legal systems across the EU, the aim of the MLA is to provide guidelines on how transnational cooperation within legal matters should be conducted, thereby creating a uniform approach to cases going beyond a state's borders.⁴²

Created by the European Council, Eurojust, which consists of lawyers, prosecutors, judges, police officials etc., serves as an entity focused on strengthening collaboration and cooperation in the fight against transnational crime. In line with partnership agreements and following a request, Eurojust may assist party states in criminal investigations. This assistance can take the form of bringing together the relevant authorities from different states so as to create coordinated efforts in criminal investigations as well as coordinating regional efforts in combatting specific crime areas such as human trafficking.⁴³ Transnational cooperation within the EU is further supplemented by the European Judicial Network which serves the same purpose as Eurojust however, with a particular focus on the judicial cooperation between EU member states.

⁴² European Commission. Internet: http://ec.europa.eu/justice/criminal/judicial-cooperation/legal-assistance/index_en.htm.

⁴³ Eurojust, Implementation of the Eurojust Action Plan against THB 2012-2016 Final Evaluation Report. Internet: <http://www.eurojust.europa.eu/Practitioners/operational/THB/Documents/2017-01-31-THB-FINAL.pdf>.

