TRAFFICKING IN EUROPE: AN ANALYSIS OF THE EFFECTIVENESS OF EUROPEAN LAW

Saadiya Chaudary*

INTRODUCTION

This Essay looks at the manifestation of various forms of human trafficking within Europe and analyzes the effectiveness of current European law provisions in combating trafficking and protecting victims. The Essay will accomplish this by examining recent and current cases before the European Court of Human Rights and the comparative gap between European standards and domestic procedures in the United Kingdom. The United Kingdom is a well-known destination state for trafficking victims1 and consequently is required to meet obligations under international law toward a significant number of individuals who have been forced into exploitation in the United Kingdom.

Part I of this Essay looks generally at the extent of the trafficking problem in Europe and, more particularly, in the United Kingdom. Part II then assesses the status and use of European antitrafficking law. Part III examines the European Union (E.U.) Directive on Combating Trafficking in Europe and how it may change the fight against trafficking in member states adhering to that Directive.

* Saadiya Chaudary is a Lawyer and Legal Project Manager at the AIRE Centre where she runs the center’s project on Trafficking and Domestic Violence. The Author would like to thank Adam Weiss, Assistant Director of the AIRE Centre, for his insight and input into the preparation of this Essay. All opinions and any errors in the Essay however remain the responsibility of the Author.

I. THE INCREASING PROBLEM OF TRAFFICKING IN EUROPE

The trafficking of persons within Europe has significantly increased in the past decade as European borders continue to fade. The particular problem of trafficking for forced labor has grown exponentially since the accession of Eastern European states to the European Union in 2004 and 2007. Labor exploitation includes forced labor in the construction, agriculture, textile, and food processing industries; domestic servitude in private households; and forced begging, petty theft, and pick pocketing. Trafficking for pick pocketing has been a particularly serious issue in the United Kingdom since 2005, when the central London area saw a large increase in the number of incidents of pick pocketing by Romanian children. In response to this, Operation Golf was set up between the United Kingdom’s Metropolitan Police authorities and the Romanian Police force, using special E.U. powers providing for cooperation between member states, to identify the perpetrators and carry out cross border investigations to break up the ring responsible for trafficking these Romanian children. As a result of this operation, in April 2010, eighteen people were arrested in Tandarei, a small town in southeastern Romania, on suspicion of trafficking at least 168 children to the United Kingdom. In total, over a thousand children are thought to have been trafficked from Tandarei to locations across Europe for exploitation in begging, theft, or benefit fraud.


5. For background on Operation Golf, see generally Griffiths, supra note 4.


The increase in trafficking incidents for forced labor is not only seen in Western European states. According to the International Labour Organization (ILO), trafficking for forced labor is the predominant form of trafficking in Russia. In Ukraine, a study carried out over the course of four years also clearly demonstrated the expansion of this form of trafficking: In 2004, the number of trafficking cases for sexual exploitation was "more than double those for labour exploitation." In 2007, however, "the gap between the two categories had almost disappeared and in the first six months of 2008, the number of labour exploitation cases [identified] exceeded those of sexual exploitation." This change may be the result of increased awareness of the phenomenon of trafficking for forced labor, simply a direct illustration of an increase in the number of cases, or perhaps a combination of both. But what is undisputable is that this is now a serious problem in Europe and across the globe. The ILO estimates, based on figures obtained in 2005, that "out of 360,000 forced labour victims in industrialised countries (including Western Europe), 270,000 were trafficked." The Organization for Security and Co-operation in Europe (OSCE) links the increase in labor exploitation incidents in Europe to globalization trends and the economic downturn. In particular, the OSCE found that

"[t]he interdependencies in a globalized world, the push for profits and the economic competition that leads to the need to cut production costs, and the current practices of consumption and production driving the world economy have led to an increased demand for cheap labour, making some economic sectors more prone to the use of trafficking for labour exploitation."

Another possible reason for the increasing number of U.K. forced labor cases may be the expansion of free movement across borders within the

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9. Id.
10. Id.
13. Id.
European Economic Area (EEA).\textsuperscript{14} The right to free movement within the EEA was expanded to Eastern European states including the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, and Slovenia in 2004, and to Bulgaria and Romania in 2007.\textsuperscript{15} Under E.U. free movement law, E.U. citizens can arrive and reside for a period of up to three months in any other member state of the European Union, free from any immigration control or regulation.\textsuperscript{16} There is no requirement to obtain prior authorization from the immigration authorities of the member state or to obtain entry documentation, making entry into a state much easier.\textsuperscript{17}

A report by Anti-Slavery International\textsuperscript{18} illustrates one case of post-expansion human trafficking and the level of sophistication achieved by traffickers. The report brought to light the situation of Polish workers who came to the United Kingdom on a promise of work following Poland’s accession to the European Union in May 2004.\textsuperscript{19} On arrival, they were taken to the city of Exeter and put to work for a subcontracted company packing chicken for a large national supermarket chain.\textsuperscript{20} Their wages were withheld and they were forced to live in degrading circumstances, such as sleeping on the kitchen floor.\textsuperscript{21} The victims received pay slips documenting and presenting their work as legitimate employment.\textsuperscript{22} However they were charged with an excessive amount of rent and large tax deductions.\textsuperscript{23} Often the employers failed to pay the final amount on the pay slips, and some individuals did not get paid at all.\textsuperscript{24} This case demonstrates the level of sophistication adopted by modern day trafficking rings.

The United Kingdom only enacted a law criminalizing trafficking for labor exploitation in July 2004.\textsuperscript{25} It defines various forms of trafficking, go-

\begin{footnotesize}
\begin{enumerate}
\item See id.
\item See id.
\item See id. at 22.
\item Id.
\item Id.
\item Id.
\item See id.
\item Id. at 23.
\end{enumerate}
\end{footnotesize}
ing beyond any of the international instruments prohibiting trafficking for labor exploitation in human beings by, for instance, including trafficking for organ donation and recognizing that trafficking can occur within a family. The offense also explicitly covers trafficking into the United Kingdom, trafficking within the United Kingdom, and the trafficking of an individual out of the United Kingdom for the purposes of exploitation.

The 2004 Act has resulted in some convictions for trafficking Eastern European victims for forced labor in the United Kingdom. For example, in the first conviction under this provision, Romanian defendants were convicted of trafficking a thirteen-year-old child to and within the United Kingdom and forcing her to sell The Big Issue. Elsewhere, Operation Ruby in 2008 led to a number of arrests on a leek farm, where more than sixty Eastern European men and women aged between fifteen and sixty-seven were found to be working in extremely poor conditions.

However, despite these successful convictions, it is the Author’s view that this legal provision is vastly underused. This may be because often, particularly in the case of Eastern European individuals who are entitled to move freely among member states, it is difficult to prove the trafficking element, even with demonstrated exploitation. The 2004 Act does not apply in cases of mere exploitation, leaving the victims at risk of further abuse and with only diminished forms of protection.

The problem of trafficking for sexual exploitation also continues to be a serious concern. The United Kingdom in particular has recently seen a large number of successful convictions for trafficking in sexual exploitation.
number of Eastern European and non-EEA member-state women trafficking victims who have been forced into prostitution. Following ratification of the Council of Europe Convention on Action Against Trafficking in Human Beings (Trafficking Convention) and its entry into force within the United Kingdom in April 2009, the U.K. government set up the U.K. Human Trafficking Centre (UKHTC) and implemented a National Referral Mechanism (NRM) for the identification of victims of trafficking. According to data published by the UKHTC, as of March 2010 there had been a total of 105 referrals by authorized bodies—such as the police, local authorities, healthcare professionals, and a limited number of nongovernmental organizations (NGOs)—of individuals from E.U. countries, including thirty people from Slovakia, twenty-six from Romania, twenty-three from the Czech Republic, and eleven from Poland. Also, by September 2010, these numbers rose to forty-one individuals from Slovakia, thirty-five from Romania, and thirty-three from the Czech Republic. By September 2010, forty-five percent of the 1,048 total individuals referred to the NRM were victims of sexual exploitation. According to statistics released by the United Kingdom’s Operation Pentameter 2, by February 2009, 406 human trafficking suspects had been arrested, and thirty-four percent of those were E.U. nationals.


39. NRM April–March, supra note 3, at 3. This figure excludes the thirty-eight referrals made of British nationals trafficked within the United Kingdom. Id.

40. Id. at 2.

41. NRM April–September, supra note 3, at 2. No statistics from Poland were included in the September 2010 data. Id.

42. See id. at 3–4 (adding the total referrals for adults and minors and dividing that number by the total number of referrals of 1,048). Another forty-five percent were victims of forced labor, encompassing twenty-seven percent who were victims of labor exploitation and eighteen percent who were victims of domestic servitude. Ten percent of referred victims were under the “unknown exploitation” category. Id.

43. UKHTC, United Kingdom Pentameter 2 Statistics of Victims Recovered and Suspects Arrested During the Operational Phase 2 (2009), available at http://www.soca.gov.uk/about-soca/about-the-ukhtc/statistical-data. These figures include all forms of exploitation, not just sexual exploitation. See id.
II. THE EFFECTIVENESS OF EUROPEAN ANTITRAFFICKING LAW

The most comprehensive European antitrafficking instrument is the Council of Europe Trafficking Convention, which contains detailed provisions on the assistance, protection, and support to be provided to trafficking victims. In addition, it details member states’ obligations to carry out effective criminal investigations and to take steps to combat trafficking. Article 4(a) of the Trafficking Convention defines trafficking in the following terms:

“Trafficking in human beings” 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 . . . .

The Trafficking Convention came into force on February 1, 2008. As with all Council of Europe laws, to apply in national courts, each country needs to implement the Trafficking Convention as domestic law. However,
the European Convention on Human Rights (ECHR)\textsuperscript{50} and recent jurisprudence of the European Court of Human Rights (the Court), particularly on ECHR Article 4, provide some flexibility against this general rule.\textsuperscript{51}

ECHR Article 4 provides that “[n]o one shall be held in slavery or servitude” and that “[n]o one shall be required to perform forced or compulsory labour.”\textsuperscript{52} It is established case law of the European Court of Human Rights that the positive obligations of states under ECHR Article 4 are absolute\textsuperscript{53}:

Article 4 enshrines one of the fundamental values of democratic societies. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 4 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 even in the event of a public emergency threatening the life of the nation . . . .

In those circumstances, the Court considers that, in accordance with contemporary norms and trends in this field, the member States’ positive obligations under Article 4 of the Convention must be seen as requiring the penalisation and effective prosecution of any act aimed at maintaining a person in . . . a situation [prohibited by Article 4].\textsuperscript{54}

In effect, this acknowledgment of the fundamental status of Article 4 is evidence that it is to be considered on par with the most central human rights, including the right to life and the prohibition on torture and inhuman and degrading treatment.\textsuperscript{55} Bringing trafficking within the ambit of ECHR Article 4 will therefore also provide victims with its absolute protection in a number of crucial ways, including, for example, preventing deportation to a

\textsuperscript{50} European Convention on the Protection of Human Rights and Fundamental Freedoms [ECHR], \textit{opened for signature} Nov. 4, 1950, C.E.T.S. No. 005 (entered into force Sept. 3, 1953; amended June 1, 2010) [hereinafter ECHR]. Note that although the ECHR of 1950 is also a Council of Europe instrument, it has been implemented into the domestic legislation by all of its signatory states. The older Council of Europe member states have implemented the ECHR over time, and the new member states have been required to do so as part of their admission to the Council.


\textsuperscript{52} ECHR, \textit{supra} note 50, art. 4(1)–(2). ECHR Article 4(3) excludes from the ambit of the prohibition on forced or compulsory labor situations where the labor is carried out in the course of a prison sentence or conditional release, military service, any service “exacted in case of an emergency or calamity threatening the life or well-being of the community,” or “any work or service which forms part of normal civic obligations.” \textit{Id.} art 4(3).


\textsuperscript{55} ECHR, \textit{supra} note 50, arts. 2–3.
country where they may face a risk of reprisals from their traffickers or re-trafficking.56

A. The State of European Trafficking Law
Before the Trafficking Convention

Through its jurisprudence, the Court has adopted a practice of interpreting ECHR Article 4 in light of other international and European law provisions, including the ILO Convention No. 29,57 the Slavery Convention of 1926,58 and the Trafficking Convention.59 Neither the ECHR itself nor the travaux préparatoires define the prohibited acts in ECHR Article 4.

Van der Mussele was the first case to consider ECHR Article 4 substantively and to analyze in particular the prohibition on forced or compulsory labor.60 Because of the ECHR’s silence regarding the scope of the article’s prohibited acts, the Court in this case explicitly relied on the provisions contained in two ILO conventions to interpret the article.61 The Court stated that “it is evident that the authors of the European Convention . . . based themselves, to a large extent, on an earlier treaty of the International Labour Organisation, namely Convention No. 29 concerning Forced or Compulsory Labour.”62 The Court considered the definition of the term “forced or compulsory labour” contained in Article 2(1) of the ILO Convention No. 29, which states that “the term ‘forced or compulsory labour’ shall mean ‘all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily,”63 and

62. Id.
63. Id. (emphasis added). The Court expanded on this definition in Siliadin, finding that the definition contained in Article 2(1) ILO Convention No. 29 brought to mind “the idea of physical or mental constraint.” Siliadin, 2005-VII Eur. Ct. H.R. ¶ 117.
found that this definition could “provide a starting-point for interpretation of Article 4 . . . of the European Convention.”64

Similarly, in *Siliadin*, the Court relied on provisions of the Slavery Convention to interpret the ECHR Article 4 prohibition on slavery and servitude. The applicant was a fifteen-year-old girl, brought from Togo to France by deceit for labor exploitation.66 “The Court looked exclusively at France’s failure to put in place adequate criminal-law provisions to prevent and effectively punish the perpetrators of those acts.”67 The judgment did not address any protection measures, which should have been taken toward the victim. The judgment addressing ECHR Article 4, however, fell short of addressing states’ positive obligations in relation to the protection of trafficking victims. In assessing whether France had violated the article, the Court made fine distinctions between “slavery,” “servitude,” and “forced or compulsory labor,” and held that an assessment needed to be made to ascertain whether this situation fell into one or more of these three distinct prohibitions.68 The Court turned to Article 1(1) of the Slavery Convention, which provides that “[s]lavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.”69 The Court noted that the definition “corresponds to the ‘classic’ meaning of slavery as it was practiced for centuries,” including a right of ownership over another person, which is retained in the ECHR Article 4 concept of “slavery.”70 The Court stated that servitude

64. *Van der Mussele*, 70 Eur. Ct. H.R. ¶ 32. However, the Court qualified its use of this definition by noting that “sight should not be lost of that Convention’s special features or of the fact that it is a living instrument to be read in the light of the notions currently prevailing in democratic States.” *Id.* (internal quotation marks omitted).


67. *Id.*; see *Siliadin*, 2005-VII Eur. Ct. H.R. ¶¶ 130–49. The Court also used other international legislative instruments in assessing whether these obligations had been met. For example, the Court found:

> [U]nder the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, each of the States Parties to the convention must take all practicable and necessary legislative and other measures to bring about the complete abolition or abandonment of the following institutions and practices:

> “(d) Any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.”

*Id.* ¶ 125 (quoting the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery art. 1(d), *opened for signature* Sept. 7, 1956, 266 U.N.T.S. 3 [hereinafter Supplementary Convention on Slavery]).


69. *Id.* ¶ 51 (quoting Slavery Convention, *supra* note 58, art. 1(1)).

70. *Id.* ¶ 122.
prohibited a particularly serious form of denial of freedom... It includes, in addition to the obligation to provide certain services for others... the obligation for the “serf” to live on another person’s property and the impossibility of altering his condition... It follows in the light of the case-law on this issue that for Convention purposes “servitude” means an obligation to provide one’s services that is imposed by the use of coercion, and is to be linked with the concept of “slavery” described above.71

B. The Rantsev Case and European Trafficking Law After the Trafficking Convention72

At the time of the Siliadin judgment the Trafficking Convention had not yet entered into force. However, given the Court’s demonstrable practice of interpreting ECHR Article 4 in light of the two other conventions mentioned above, it was unsurprising that the next trafficking case to come before the Court would trigger a much-needed detailed and comprehensive assessment of a state’s ECHR Article 4 obligations toward trafficking victims viewed in light of the Trafficking Convention. This assessment came in the landmark case of Rantsev v. Cyprus.73 Mr. Rantsev brought this case on behalf of his daughter, Ms. Rantseva, a Russian national who entered Cyprus on an artiste visa obtained on her behalf by the owner of a cabaret.74 Ms. Rantseva escaped from the club where she was working, but her “employers” found her and brought her to a police station to be deported for violating the terms of her visa. She spent several hours at the police station; the police, not intending to deport her, contacted the alleged traffickers to come and pick her up, which they then did. Several hours later, Ms. Rantseva was found dead on the pavement outside one of the alleged trafficker’s apartment buildings.75 Ms. Rantseva’s father complained to the Court principally about Cyprus’s failure to investigate the allegations of human trafficking and the circumstances of his daughter’s death, as well as about the Cypriot authorities’ failure to protect his daughter.76

In its judgment, the Court made substantive findings on the relationship between trafficking and ECHR Article 4, relying heavily on the provisions of the Protocol to Prevent, Suppress and Punish Trafficking in Persons,

71. Id. ¶ 123–24 (internal quotation marks and citations omitted). The Court also had regard in this case to the provisions contained in the Supplementary Convention on Slavery. Id.

72. See generally The AIRE Centre, supra note 2.


74. Id. ¶ 15, 291–93 (noting that artiste visas were widely used by human traffickers to bring women into the country for purposes of prostitution in nightclubs).

75. Id. ¶¶ 17–25.

76. Id. ¶ 1–3.
Especially Women and Children (the Palermo Protocol)\textsuperscript{77} and the Trafficking Convention, both to define trafficking and to bring it within the realm of Article 4.\textsuperscript{78} The court initially commented that the increasingly high standards required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably require greater firmness in assessing breaches of the fundamental values of democratic societies . . . . The conclusion of the Palermo Protocol in 2000 and the Anti-Trafficking Convention in 2005 demonstrate the increasing recognition at international level of the prevalence of trafficking and the need for measures to combat it.\textsuperscript{79}

The Court then reconsidered and expanded the Article 4 definition of slavery following the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the case \textit{Prosecutor v. Kunarac, Vukovic and Kovac},\textsuperscript{80} in which the Tribunal discussed the definition of enslavement as a crime against humanity:

> The Court observes that the [ICTY] concluded that the traditional concept of “slavery” has evolved to encompass various contemporary forms of slavery based on the exercise of any or all of the powers attaching to the right of ownership. In assessing whether a situation amounts to a contemporary form of slavery, the Tribunal held that the relevant factors included whether there was control of a person’s movement or physical environment, whether there was an element of psychological control, whether measures were taken to prevent or deter escape and whether there was control of sexuality and forced labour.\textsuperscript{81}

The Court then applied this assessment to the trafficking situation, essentially finding it to be a form of slavery and therefore prohibited under ECHR Article 4:

> [T]rafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership. It treats human beings as commodities to be bought and sold and put to forced labour, often for little or no payment, usually


\textsuperscript{78.} \textit{Rantsev}, 51 Eur. H.R. Rep. \textsuperscript{¶} 286–87 (citing Palermo Protocol art. 3(a); Trafficking Convention art. 4(a)).

\textsuperscript{79.} \textit{Id.} \textsuperscript{¶} 277–78.


\textsuperscript{81.} \textit{Rantsev}, 51 Eur. H.R. Rep. \textsuperscript{¶} 280 (citations omitted).
in the sex industry but also elsewhere. It implies close surveillance of the activities of victims, whose movements are often circumscribed. It involves the use of violence and threats against victims, who live and work under poor conditions. . . . [Therefore] trafficking itself, within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention, falls within the scope of Article 4 of the Convention.82

The Court found numerous violations of the ECHR in this case, against both Cyprus and Russia,83 including a violation by Cyprus of Article 2 (the right to life) for its failure to fulfill its procedural obligation to carry out an effective investigation into Ms. Rantseva’s death.84 The Court also found a violation of Article 5 (the right to liberty) arising out of Ms. Rantseva’s detention in the police station and her subsequent imprisonment in the apartment before her death.85 In addition, the Court found that Cyprus violated Article 4 in three respects: it violated the procedural obligation under Article 4 through the failure to put in place an appropriate legislative and administrative framework aimed at preventing trafficking,86 it failed to take protective measures toward Ms. Rantseva as a trafficking victim, and both Cyprus and Russia violated their cross border procedural obligations to investigate human trafficking.87

The finding of a violation on the basis of lack of investigation is particularly important as trafficking often occurs within and between two (or more) states. Through this finding, the Court has thus recognized a cross border element to the obligations under ECHR Article 4:

[T]rafficking is a problem which is often not confined to the domestic arena. When a person is trafficked from one State to another, trafficking offences may occur in the State of origin, any State of transit and the State of destination. Relevant evidence and witnesses may be located in all States. . . . In addition to the obligation to conduct a domestic investigation into events occurring on their own territories, member States are also subject to a duty in cross-border trafficking cases to cooperate effectively with the relevant authorities of other States concerned in the investigation of events which occurred outside their territories.88

In Rantsev, the Court also found, crucially, that “[s]tates were not permitted to leave [a victim of an Article 4 violation] unprotected or to return

82. Id. ¶¶ 281–82 (citations omitted).
83. See id. ¶¶ 212–334.
84. Id. ¶¶ 232–42.
85. Id. ¶¶ 314–25.
86. The Cypriot Government’s violation of this stemmed from its artiste visa regime, which essentially legitimized human trafficking. Id. ¶¶ 290–93.
87. Id. ¶¶ 299–300, 307–49.
88. Id. ¶ 289.
her to a situation of trafficking and exploitation.”89 In those cases where a country expels a victim, there are multiple provisions in the Trafficking Convention that helpfully elucidate ECHR Article 4’s prohibition. Article 12(2), for example, states that “[c]h [e]ach Party shall take due account of the victim’s safety and protection needs.”90 Article 16 provides that any return of the trafficking victim “shall be with due regard for the rights, safety and dignity of that person and for the status of any legal proceedings related to the fact that the person is a victim.”91 It is essential to consider these two articles in all cases because they serve as a counterforce to the European Union’s free movement law92 that often prevents trafficking victims who are E.U. nationals and unable to support themselves in the member state into which they have been trafficked to remain in that state. Consequently, these victims face removal to their country of origin. This is even more common for non-E.U. citizen victims, whose fate is often left at the complete discretion of immigration authorities, as is the case in the United Kingdom.93

In two recent cases before the Court against the United Kingdom, the applicants were recognized trafficking victims who faced a real risk of harm on return to their origin countries.94 In the case M. v. United Kingdom, the Ugandan applicant had been trafficked to the United Kingdom for forced prostitution.95 The applicant claimed that if forced to return to Uganda, she would be at a real risk of being retrafficked or forced into sexual labor in contravention of Articles 3 and 4 of the ECHR and argued further that this risk would cause anxiety, stress, and a severe deterioration of her mental health, in contravention of Article 8.96 The government of the United Kingdom proposed a friendly settlement of the case. Following negotiation between the parties to the case, the applicant was eventually granted three-years leave to remain in the United Kingdom.97

89. Id. ¶ 271.
90. Trafficking Convention, supra note 36, art. 12(2).
91. Id. art. 16(2) (emphasis added).
93. Cases of victims of trafficking from non-E.U. countries would be considered by the U.K. Border Agency’s asylum casework teams in conjunction with the U.K. Human Trafficking Centre. For more information, see generally Catherine Briddick, Trafficking and the National Referral Mechanism, Women’s Asylum News, October 2010, at 1-4, http://www.asylumaid.org.uk/data/files/publications/143/WAN_October.pdf (discussing the National Referral Mechanism “put in place in the UK to identify and protect victims of trafficking”).
96. For a statement of facts, see id.
97. For the Court’s decision, see id.
In the second case of *L.R. v. United Kingdom*, the Albanian applicant was trafficked to the United Kingdom and forced into sexual labor at a nightclub in Leeds. The applicant escaped and fled to London where she reported her situation to the police. She continued to cooperate fully throughout the subsequent investigation, providing statements against her trafficker and identifying him in an identity parade. She then claimed asylum in the United Kingdom on the basis of the risk of reprisals and retrafficking that she faced if deported. The Crown Prosecution Service (the prosecuting authority in the United Kingdom) subsequently decided not to prosecute the trafficker because the case against him did not meet the very high standard necessary under criminal law to show that he had committed the trafficking offense. As a result, the United Kingdom refused the applicant’s asylum application despite the even greater risk of harm she faced from her trafficker and his associates due to their awareness of her cooperation with the police. The case was communicated to the United Kingdom government on April 1, 2010, following which friendly settlement negotiations were initiated through which the applicant was granted refugee status in the United Kingdom.

Although the obligations under the ECHR run against the state, the Court has established that meeting these obligations often requires protecting an individual from another private individual. The Court clearly stated this principle in *X and Y v. Netherlands* when considering the state’s duties under Article 8 of the ECHR, finding that although the object of Article 8... is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.

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99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. For the Court’s decision, see *id.*
106. *See ECHR, supra* note 50, art. 8 (“Everyone has the right to respect for his private and family life, his home and his correspondence.”).
The Court’s findings in the *Rantsev* case regarding the ECHR Article 2 violation and the ECHR Article 4 procedural violation are not surprising in the light of the authorities’ failure to carry out an adequate investigation.\(^\text{108}\) This is consistent with the Court’s jurisprudence in cases such as *Osman v. United Kingdom*, which established that a violation of Article 2 occurs where “the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge.”\(^\text{109}\)

The Court has extended this principle to child abuse and neglect under ECHR Article 3. In such cases, there is not merely a duty to investigate; if the authorities are aware of an existing victim, they have a duty to protect him or her from further acts of abuse.\(^\text{110}\) The Court has also recently confirmed the police and judicial duty to take active steps, under ECHR Article 8, to protect known domestic violence victims.\(^\text{111}\) Therefore the ruling in *Rantsev* appears to logically extend this principle to trafficking victims under Article 4 who are, in most cases, unable to present themselves to authorities as victims, but who often can be identified by appropriately trained officers, in accordance with Article 10 of the Trafficking Convention, by their demeanor and circumstances.\(^\text{112}\) The Court held that in practice,

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\text{[i]}\text{n order for a positive obligation to take operational measures to arise in the circumstances of a particular case, it must be demonstrated that the State authorities were aware, or ought to have been aware, of circumstances giving rise to a credible suspicion that an identified individual had been, or was at real and immediate risk of being, trafficked or exploited. . . . In the case of an answer in the affirmative, there will be a violation of Article 4 of the Convention where the authorities fail to take appropriate measures within the}
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\(^{112}\) See *Rantsev*, 51 Eur. H.R. Rep. ¶ 296. This was also an observation made by the Court in *Rantsev* when considering Cyprus’ violation under Article 5(1) ECHR following Ms. Rantseva’s detention at the police station. The Court noted that “victims of trafficking often suffer severe physical and psychological consequences which render them too traumatized to present themselves as victims” and therefore the police ought to have known that Ms. Rantseva was or was at real risk of being a victim of trafficking. Id. ¶ 320. The same obligation to identify victims of trafficking is explicitly contained in Article 10 of the Trafficking Convention. *Trafficking Convention*, supra note 36, art. 10.
scope of their powers to remove the individual from that situation or risk.113

Most significantly, the Court’s findings in Rantsev under Article 5 and, particularly, under the nonprocedural aspects of Article 4 opened a route to enforcing the Trafficking Convention provisions in national courts. The Court explicitly stated its view that in order to meet the positive obligations under ECHR Article 4, it was necessary for member states to put in place effective provisions for protecting trafficking victims, including immigration provisions:

The Court considers that the spectrum of safeguards set out in national legislation must be adequate to ensure the practical and effective protection of the rights of victims or potential victims of trafficking. Accordingly, in addition to criminal law measures to punish traffickers, Article 4 requires member States to put in place adequate measures regulating businesses often used as a cover for human trafficking. Furthermore, a State’s immigration rules must address relevant concerns relating to encouragement, facilitation or tolerance of trafficking.114

For guidance on the types of protection provisions required under ECHR Article 4, the Court referred member states to the provisions of the Trafficking Convention, observing that “the Palermo Protocol and the [Trafficking] Convention refer to the need for a comprehensive approach to combat trafficking . . . . The extent of the positive obligations arising under Article 4 must be considered within this broader context.”115

This Rantsev judgment is expected to have a significant impact on trafficking cases in the United Kingdom, as the country has yet to incorporate into domestic law some of the key protection provisions contained in Articles 10 to 17 of the Trafficking Convention.116 Yet, there has now been some movement within U.K. courts toward recognizing the applicability of provisions contained in the Trafficking Convention. In a recent case decided by the England and Wales Court of Appeal, which concerned the prosecution of trafficking victims for offences related to prostitution or the use of false documentation, Lord Justice Hughes held that

114. Id. ¶ 284.
115. Id. ¶ 285.
116. These provisions include the duty to provide assistance to victims (Article 12), to protect their private life (Article 11), and to provide compensation and legal redress (Article 15). See Trafficking Convention, supra note 36, arts. 10–17. An evaluation by the European Commission shows that some assistance to victims is provided primarily through non-governmental organizations [NGOs]. See Eur. Comm’n, Fight Against Trafficking in Human Beings: United Kingdom, EUROPA.EU, http://ec.europa.eu/anti-trafficking/showNIPsection.action?country=United%20Kingdom (last updated July 12, 2011) (providing a forum for the NGO sector to comment on the United Kingdom’s implementation of the Trafficking Convention).
Rantsev v Cyprus and Russia . . . demonstrates that trafficking may fall within the scope of the prohibition on servitude contained in Article 4 of the ECHR. But the principal current international instrument, which contains specific and positive obligations upon States, is the 2005 Council of Europe Treaty. Its provisions, agreed between States, cover (1) steps to prevent and combat trafficking, (2) measures to protect the rights of victims and assist them and (3) the promotion of international co-operation. The United Kingdom is bound by this treaty. At the time of [an earlier case], it had signed but not ratified the treaty and was thus subject to the attenuated obligation under Article 18 of the Vienna Convention on the Law of Treaties to refrain from acts which would defeat its object and purpose. Now, however, this country has ratified the Convention (on 17 December 2008) and it is fully bound by it.\(^\text{117}\)

However, following the Rantsev case, it is now possible to argue that many, if not all, of the Trafficking Convention’s victim-protection provisions come within the realm of a state’s positive obligations under ECHR Article 4. States will need to ensure that they make available and accessible to trafficking victims the protection mandated by these provisions to avoid falling short of their Article 4 duty. Access to the means of protection provided for by the Trafficking Convention will constitute an effective domestic remedy for trafficking victims and, if implemented, should negate any potential violations of Article 4. However, this implemented domestic remedy must be “‘effective’ in practice as well as in law, particularly in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State.”\(^\text{118}\)

The Court in Aksoy v. Turkey considered in detail the necessary components of an effective remedy for ECHR Article 3 violations.\(^\text{119}\) Following the Court’s reasoning in Siliadin v. France, in which the Court stated that “together with Articles 2 and 3, Article 4 of the Convention enshrines one of the basic values of the democratic societies making up the Council of Europe,”\(^\text{120}\) it is the Author’s view that this same standard should apply to trafficking victims under ECHR Article 4. This assertion is complemented by the long-established principle that the “Court must be mindful of the Convention’s special character as a human rights treaty, and it must also take the relevant rules of international law into account. The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part.”\(^\text{121}\) It also accords with the express legal provision contained in Article 53 that the Convention cannot be “construed as


\(^{119}\) See id. ¶¶ 95–98 (citing ECHR, supra note 50, arts. 3, 13).


\(^{121}\) Al-Adsani v. United Kingdom, 2001-XI Eur. Ct. H.R. 81, ¶ 55 (citation omitted).
limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party.”

In Aksoy, the Court considered what constituted an effective remedy for a torture victim, holding that “the notion of an ‘effective remedy’ entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible.” It was also irrelevant that the ECHR did not expressly contain the remedies set out in “Article 12 of the 1984 [U.N.] Convention against Torture . . . which imposes a duty to proceed to a ‘prompt and impartial’ investigation whenever there is a reasonable ground to believe that an act of torture has been committed” as the Court found that “such a requirement [was] implicit in the notion of an ‘effective remedy’ under Article 13.” Applied to trafficking victims who have suffered violations of Article 4, the enforcement of provisions contained in the Trafficking Convention will likely inform the effectiveness of the remedies available to victims at the domestic level.

The European Court of Human Rights is clear in its view that the Trafficking Convention does not replace existing human rights protections but rather works together with the provisions of the ECHR, particularly Article 4, and other international legal instruments. The Trafficking Convention drafters recognized this harmonization between international legal instruments and explicitly described it in the Explanatory Report to the Convention.

This multi-instrument approach is also necessary for the practical application of provisions of the Trafficking Convention. For example, Article 16 provides that “[w]hen a Party returns a victim to another state, such return shall be with due regard for the rights, safety and dignity of that person,” without elaborating on the concept of “rights.” The Explanatory Report makes clear, however, that this provision refers to the Court’s jurisprudence on expulsion of aliens: “Such rights include, in particular, the right not to be subjected to inhuman or degrading treatment, the right to the protection of private and family life and the protection of his/her identity . . . . The drafters considered that in this respect it was important to

122.  See ECHR, supra note 50, art. 53. In addition to the above clear routes to enforcement of the Trafficking Convention through application of the ECHR, the United Kingdom also has a general obligation to perform the Trafficking Convention in good faith because it ratified that treaty, and the Trafficking Convention has already entered into force. See Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331.
124.  Id.
126.  Trafficking Convention, supra note 36, art. 16(2).
have in mind the jurisprudence of the European Court of Human Rights regarding article 3.127 The drafters also deferred to the Court’s jurisprudence on the relations between private individuals, on discrimination, and on witness protection measures.128

III. European Union Antitrafficking Law

Until recently, E.U. law on trafficking issues was based in three separate instruments (discussed below), each of which considers a specific aspect of either prevention or protection. However, as with most international antitrafficking legislation (with the exception of the Trafficking Convention), E.U. instruments are also predicated on states’ obligations to put into place criminal provisions to punish perpetrators and to prevent future acts of trafficking.

The first instrument, Council Directive 2004/81/EC (the 2004 Directive),129 requires E.U. member states130 to provide residence permits to third-country (non-E.U.) national human trafficking victims based on “the opportunity presented by prolonging [their] stay on its territory for the investigations or the judicial proceedings,”131 as well as on the victims’ willingness to cooperate with the authorities,132 and if they have severed relations with the traffickers.133

The 2004 Directive provides, in addition, some other protective measures for individuals until the residence permit decision is made. During that time, individuals are entitled to information about the 2004 Directive’s provisions134 and to a “recovery period” during which they may “escape the influence of the perpetrators of the offences so that they can take an informed decision as to whether to cooperate with the competent authorities.”135 Victims are also entitled to access “standards of living capable of ensuring their subsistence and . . . emergency medical treatment” (including during the recovery period) while the state decides whether the

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127.  EXPLANATORY REPORT, supra note 125, ¶ 202–03.
130.  With the exceptions of Denmark, the Republic of Ireland, and the United Kingdom. See id. at 19–20.
131.  Id. art. 8(1)(a).
132.  Id. art. 8(1)(b).
133.  Id. art. 8(1)(c).
134.  Id. art. 5.
135.  Id. art. 6(1). The length of the recovery period is determined by national law and therefore can be quite short. See id. art. 6.
individual is eligible for a residence permit. The rights in the 2004 Directive are nonetheless focused around cooperation with the authorities, which is required of victims in order to gain access to a residence permit. Any other rights expire either on the authorities’ decision to deny a permit or at the end of the recovery period. The 2004 Directive is silent on other protection measures, such as requirements for victim identification or on human rights and other principles that may prevent expulsion from the member state in cases where a victim is not eligible for a residence permit.

The second main legislative instrument is Council Framework Decision 2001/220/JHA of 15 March 2001 on the Standing of Victims in Criminal Proceedings (the 2001 Framework Decision). This Framework Decision does not explicitly refer to trafficking victims, but instead addresses victims of any crimes covered by the national law of member states. The 2001

136. See id. art. 7(1).

137. The Directive applies to “third-country nationals who are, or have been victims of offences related to the trafficking in human beings.” Id. art. 3(1). The scope is limited to adults, but may be applied “to minors under the conditions laid down in . . . national law,” id. art. 3(3), with certain requirements applying if the member states choose to do so. See id. art. 10. There are no provisions for how to identify victims; rather, the provisions apply once a third-country national has already been identified as a victim. For example, the right to information about the Directive’s provisions becomes applicable “[w]hen the competent authorities of the Member States take the view that a third-country national may fall into the scope of this Directive.” Id. art. 5. Likewise, the right to a reflection period is guaranteed to “the third-country nationals concerned.” Id. art. 6(1).


139. Council Framework Decision 2001/220/JHA, supra note 138, art. 1(a) (“[V]ictim” shall mean a natural person who has suffered harm, including physical or mental injury,
Framework Decision sets out the assistance and protection to be provided to victims of crime, including the procedure during hearings and the provision of evidence;\(^{140}\) however, many of its provisions have been incorporated into the new E.U. trafficking directive discussed further below.\(^{141}\)

The third main legislative instrument was Council Framework Decision 2002/629/JHA of 19 July 2002\(^ {142}\) on Combating Trafficking in Human Beings (the 2002 Framework Decision). This focused almost exclusively on the need for a criminal law framework and for the investigation and prosecution of those responsible for trafficking individuals. Article 7 of this Framework Decision alone addressed “protection of and assistance to victims” with three provisions that concerned the treatment of human trafficking victims.\(^ {143}\) However, as with the 2004 Directive above, these remained solely in the context of criminal proceedings.\(^ {144}\) On April 15, 2011, with the entry into force of Directive 2011/36/EU (the 2011 Directive),\(^ {145}\) the 2002 Framework Decision has been repealed and replaced by that Directive.

The 2011 Directive moves away from the previous E.U. law approach, demonstrated by the 2004 Directive and the Framework Decisions, of subordinating protection measures to investigating and prosecuting human traffickers for acts they have already committed. The 2011 Directive has been drafted in a similar spirit to the Trafficking Convention and makes specific note of that instrument.\(^ {146}\) The forms of exploitation to which the 2011 Directive is applicable has also been expanded from the definition contained in the 2002 Framework Decision to include begging, exploitation for criminal activities such as drug trafficking or shoplifting, and removal of organs.\(^ {147}\)

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\(^{140}\) See id. art. 3.


\(^{143}\) Id. art. 7.

\(^{144}\) For example, a victim’s report or accusation cannot be a prerequisite for an investigation or prosecution, and state authorities must treat children who are victims of trafficking as “particularly vulnerable victims,” id. art. 7(2), entitling them to protection “from the effects of giving evidence in open court” and to information about the progress of an investigation or prosecution. Council Framework Decision 2001/220/JHA, supra note 138, arts. 4, 8(4).


\(^{146}\) See id. pmbl. ¶ 9.

\(^{147}\) Id. pmbl. ¶ 11.
The 2011 Directive came “into force on the date of its publication in the Official Journal of the European Union”148 (on April 15, 2011), and member states have until April 6, 2013 to incorporate the provisions of the 2011 Directive into national law.149 During this transposition period, states must ensure that until the 2011 Directive is adopted into their respective national law, or until the two year transition period has passed, no measures should be adopted that “seriously compromise the attainment of the result prescribed by the directive.”150 After April 6, 2013, those provisions of the 2011 Directive that are clear, precise, and unconditional may have direct effect,151 and consequently the rights contained in those specific provisions could be asserted before national courts. Furthermore, failure to properly implement a directive’s provisions can also give rise to enforcement action by the European Commission, as was recently initiated against Luxembourg for failure to properly implement the provisions of the 2004 Directive.152

The European Union’s firmer stance on combating trafficking through more effective legislation, combined with European Court of Human Rights judgments in recent trafficking cases, demonstrates that European law is productively responding to the trafficking problem through legislation, and to some extent enforcement. However, as the number of European member states continues to increase, so too does the need for effective implementation of international and European law since often only states themselves can effectively combat trafficking and provide victims with support and assistance. Achieving this objective is unfortunately much further away. Nevertheless, European law has thus far developed a solid legal basis from which to successfully advance a trafficking case.

148.  Id. art. 24.
149.  Id. art. 22(1).
151.  See Case 41/74, Van Duyn v. Home Office, 1974 E.C.R. 1337, ¶ 2. It is currently difficult to say in practice which provisions will have direct effect as the Directive has not yet been transposed into any state’s domestic legislation.