


Zăicescu and Fălticineanu v. Romania: Forsaking Non-Retroactivity – a Positive Shift in Judicial Activism Recognising Secondary Victimisation

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by Zoë Grossi and Pauline Charlotte Janssens

Introduction

On 23 April 2024, the European Court of Human Rights delivered a judgment in the case of Zăicescu and Fălticineanu v. Romania. The Court unanimously held that Romania violated Article 8 *juncto* Article 14 of the Convention by acquitting two high-ranking military officials previously convicted of war crimes and crimes against humanity connected with the Holocaust. The acquittal followed from extraordinary appeal proceedings that were not disclosed to Holocaust victims, nor to the public.

In our opinion, the Court seems to have taken its judicial activism too far in this case by disregarding the general principle of non-retroactivity of international obligations. On a positive note, the Court's judgment appropriately recognises the psychological harm suffered by the victims, by (implicitly) acknowledging the secondary victimisation caused by the national proceedings.

Facts

In 1940, the Romanian Government enacted anti-Semitic legislation, leading to the deportation of Jews and the pogrom at Iași which resulted in thousands of deaths. At the end of the 1940s and early 1950s, a set of trials against alleged war criminals took place. On 15 August 1953, R.D. and G.P. – both lieutenant-colonels in the Romanian Army – were convicted of war crimes and crimes against humanity for the ill-treatment of prisoners, cooperation with the Special Intelligence Service in the enactment of the Iași pogrom, and the direct participation in the organisation and execution of deportations of Jews. The judgment became final on 26 May 1954. In 1955, the law governing their prosecution was repealed by a parliamentary decree, pursuant to which the remaining unserved sentences of R.D. and G.P. were pardoned. A few years later, in 1957, the judgment in relation to R.D. was quashed and the acts committed were reclassified to 'engaging in intense activity against the working class and the revolutionary movement'.

After the fall of the Communist regime, the Prosecutor-General secretly lodged extraordinary appeals to seek the acquittal of R.D. and G.P. After this, the Supreme Court of Justice ('SCJ') quashed the judgments of 1953, 1954 and 1957, reopened the proceedings, and acquitted R.D. and G.P. The SCJ held that they had merely complied

with orders concerning the deportation of Romanian Jews and were not involved in the massacres of the Jews, which, as deemed by the Court, had been carried out by German troops only.

For several years, the case files were stored in the archives of the secret services and, subsequently, in the archives of the National Council for the Study of the Archives of the *Securitate* (CNSAS). On 26 January 2016, the applicants attended a public conference organized by the 'Elie Wiesel' National Institute for the Study of the Holocaust in Romania (INSHR-EW) in their capacity as Holocaust survivors. At this conference, they first found out about the acquittal proceedings. Hereafter, the applicants lodged several unsuccessful requests, first with the CNSAS and afterwards with several courts, to be granted access to the case files and copies thereof. They finally obtained copies in May 2016 through the efforts of INSHR-EW.

Judgment

The Court assessed the alleged violation of Article 3 (prohibition of inhumane or degrading treatment or punishment) and Article 8 (respect for private life), both *juncto* Article 14 (prohibition of discrimination).

Concerning the alleged violation of Article 3 *juncto* Article 14

As some of the events took place before the adoption of the Convention and its ratification by Romania, the Court addressed first its competence *ratione temporis*. The Court reiterated that, for it to have competence *ratione temporis*, there must be a genuine connection between the event giving rise to the procedural obligation under Article 3 and the entry into force of the Convention in respect of the respondent State. More specifically, there must be a connection between the obligation to conduct an effective investigation and the date when the Convention entered into force.

For this genuine connection to exist, two cumulative criteria must be fulfilled: (1) a reasonably short period of time between the triggering event and the entry into force of the Convention for the Member State, and (2) the most important procedural steps must occur after the entry into force of the Convention for the Member State (§ 82). In exceptional cases, the real and effective protection of the values underlying the Convention would suffice to establish the genuine connection, i.e. the 'Convention values'-clause (Janowiec and Others v. Russia, § 145-148 and 149-151). This would apply to international crimes, such as war crimes and crimes against humanity (§ 83).

In this case, the Court held that the period of time between the triggering events, i.e. the ill-treatment in the context of the 1941 Romanian Holocaust, and the entry into force of the Convention for Romania on 20 June 1994 was too long to speak of a genuine connection. Moreover, the defendants had been convicted and had served their sentences before the pardon of 1955. Therefore, the obligation to conduct an effective investigation had been fulfilled prior to the entry into force of the Convention for Romania (§ 90). Furthermore, despite the triggering events being international crimes, they predate

the adoption of the Convention and, the 'Convention values'-clause can thus not be applied in this case (§ 92). It would be hard to have recourse to the values underlying the Convention prior to the existence of it. Therefore, the complaint was incompatible *ratione temporis* (§ 93).

As the first criterion of a 'reasonably short time period' is not fulfilled, the Court does not further assess whether the reinterpretation of existing evidence as a result of the reopening of the case, would concern a significant procedural step (§ 91).

Concerning the alleged violation of Article 8 *juncto* Article 14

Regarding the second alleged violation, the Court first assesses the admissibility of the claim, in particular, the applicants' victim status. The Court ruled that since the crimes are by their nature directed against a group, there must be no direct link between the acts committed and the applicants, who are Holocaust survivors, for the latter to be considered as victims (§ 102). Since the acquittal proceedings and the moment that the applicants became aware of these proceedings took place after the entry into force of the Convention for Romania, there exist no concerns as to the Court's jurisdiction *ratione temporis* (§ 105). On the question of the applicability of Article 8, the Court determined that the acquittals and the authorities' actions surrounding them, coupled with the general anti-semitic context in Romania, have caused the applicants emotional distress that reaches the threshold of severity required under Article 8 (§ 118-119).

On the merits, the Court found that the findings of the SCJ contradicted the written evidence and the historical background regarding the organization of the deportation of Jews (§ 149). By disguising these facts and blurring the responsibility of Romania, the SCJ's decision constitutes Holocaust denial and distortion under the internationally accepted definition of the International Holocaust Remembrance Alliance (§ 150). Moreover, as these retrials concerned a matter of public interest, both the victims and the general public should have been informed of them. The applicants' eventual access to these files does not remedy the fact that the files were first kept by the secret service and were only accessible later under restrictive conditions and after multiple unsuccessful attempts (§ 153-154).

Taken together, the SCJ's substantive reasoning and findings leading to the acquittals, the authorities' lack of transparency, and the applicants' lack of access to relevant files could have legitimately led to feelings of humiliation and vulnerability causing the applicants' psychological trauma (§ 154). The authorities' actions were excessive and could not be justified as 'necessary in a democratic society' (§ 155). Hence, violating Article 8 *juncto* Article 14.

Analysis

Apart from the sensitivity of retrials and pardons for collaborators of the Holocaust, the case at hand also gives rise to numerous legal reflections. We will focus on the inconsistent application of the non-retroactivity principle and the acknowledgment of

psychological harm resulting from secondary victimisation.

The discrepancy in the application of non-retroactivity

Questions arise about the application of the principle of non-retroactivity in the imposition of international obligations upon Romania. Non-retroactivity as a general principle of international law means that a State's actions must be assessed against the background of the State's international obligations at the time of the actions concerned. As explained by *inter alia* Moelker and Chua and Hardcastle, the application of this principle goes well beyond criminal prosecution of individuals. This is also reflected in Article 28 of the Vienna Convention on the Law of Treaties. Hence, unless treaties contain a provision to the contrary, the non-retroactivity of treaty obligations must be presumed. The ECHR does not contain any provisions that establish the Convention's retroactive application to events prior to its adoption.

The Court rightly distinguishes between the retroactive application of the ECHR to events predating the ECHR's entry into force and events predating the Convention's adoption (§ 82-83). However, in this case, arguably multiple relevant actions have taken place both before and after the treaty's entry into force for Romania, highlighting the complexity of non-retroactivity when accepting a court's jurisdiction to hear disputes involving treaty obligations.

However, in our opinion, the Court seems to have chosen the incorrect triggering event. In its decision, the Court concluded that it lacked competence over the alleged violation of Article 3 as the 1941 ill-treatment predated the adoption of the Convention with nearly a decade (§ 84-94). However, in their dissenting opinion, Judges Rădulețu, Guerra Martins and Vehabović disagree with the date of the triggering event chosen. They are of the opinion that the triggering event is not the 1941 ill-treatment, but rather the reopening of the trials and the subsequent acquittals, which took place in 1998 and 1999, several years after the Convention entered into force in respect of Romania (20 June 1994). Hence, they posit that the Court would have been competent *ratione temporis*. In our opinion, they are right; the ill-treatment the applicants complain about is rather the psychological harm caused by the 1998 and 1999 acquittals and their surrounding circumstances, not the events of 1941 (§ 71 and 77).

With regard to the alleged violation of Article 8, the Court seems to disregard the importance of non-retroactivity. This time, however, the actions under consideration are the 1998 and 1999 acquittals and the subsequent lack of access to the court files. This can make one wonder about the internal consistency of this judgment. Interestingly, the Court came to the conclusion that these actions constituted Holocaust denial under the definition of the International Holocaust Remembrance Alliance. However, this definition was only adopted in 2013, more than a decade after the acquittals. In addition, the case law cited, i.e. Perinçek v. Switzerland, suffers from the same issue. In the *Perinçek*-case, the Court established that States affected by the Holocaust have a special moral responsibility to distance themselves from Nazi atrocities (§ 242-243). However, case law from 2015 cannot be accepted as the source of State obligations for events from the

1990s. Hence, the Court's findings under Article 8 seem to be irreconcilable with the principle of non-retroactivity. It is, however, possible that the denial of the Holocaust had become prohibited under customary international law, though this is debatable. Yet, in that case, the Court should have referred to the customary prohibition rather than the 2013 definition. Such an approach was implied by the International Court of Justice in the Bosnian Genocide-case (§ 34 *juncto* § 31) when the Court assessed the relevant facts since the beginning of the armed conflict, including those prior the adoption of the Genocide Convention.

The victims' psychological harm: an implicit acknowledgment of secondary victimisation?

A second interesting aspect of the judgment concerns the Court's analysis of the psychological harm inflicted on the applicants. In its analysis on the applicability of Article 8, the Court rightfully concludes that the proceedings and the authorities' behaviour in respect of these proceedings, particularly the failure to inform the applicants and the lack of access to the case files, caused the applicants severe emotional suffering, as it made them reexperience the trauma of the Holocaust (§ 118-119). The Court thus – albeit in an inexplicit manner – appears to take into account that the victims would suffer secondary victimisation.

Secondary victimisation is victimisation that arises not as a direct result of the crime, but from the response of public and/or private institutions to the victim. It involves a lack of understanding of the victims' suffering, which intensifies their trauma and may result in psychological harm, such as post-traumatic stress disorder (PTSD). Such victimisation occurs not only through active behaviour, such as victim blaming, but also through inaction by the authorities – for instance, when victims are denied access to information concerning their case. Based on the foregoing, the Court convincingly rules that Article 8 is applicable, as the lack of information about the proceedings caused the applicants severe emotional suffering.

The Court reinforces this conclusion in its analysis on the violation of Article 8, in which it references the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, although disregarding the non-binding character of these principles. As the Court correctly notes, these principles stipulate that victims of crimes must be informed about the initiation and progress of proceedings, as well as have access to justice and proper assistance (§ 153). Consequently, the Romanian authorities' failure to inform the applicants about the extraordinary appeals might have led to feelings of humiliation and vulnerability, causing them psychological trauma.

A similar reasoning appears in the Court's analysis of the applicants' victim status. The Court decided that the applicants, as Holocaust survivors, could claim to have suffered from emotional distress upon learning of the reopening of the criminal proceedings and the acquittals (§ 101). As Montada rightly points out, the recognition of victim status, and

related to this, the punishment of the perpetrator, are important aspects for victims to find justice. Disregard for the need of recognition is 'likely to be perceived as a particularly severe form of secondary victimisation.'

Conclusion

All in all, the Court's ruling can serve as an important precedent for better accommodating secondary victimisation. Although this may be seen as a positive development, it is somewhat regrettable that the Court does not address this issue in its analysis under Article 3. By determining that it was the ill-treatment during the Holocaust that constituted the triggering events, rather than the psychological harm caused by the 1998 and 1999 acquittals, the Court falls short in adequately recognising the applicants' victim status. On the more procedural level, with regard to the application of the non-retroactivity principle, the present decision shows a clear lack of rigor. First, the Court chose different triggering events: the incorrect one under its analysis of Article 3 and the correct one under Article 8. Secondly, the Court disregarded the principle of non-retroactivity of treaty obligations in classifying the events as Holocaust denial under an *ex post* definition, despite stressing the importance of non-retroactivity earlier in assessing its competence *ratione temporis*.