



## Human Trafficking and the Importance of Situational Awareness for Human Trafficking Judges

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Ladies and gentlemen,

I have been a judge for the best part of my career and sat on the bench even at the beginning of my Rapporteurship, which is now nearly ten years ago. That might explain why I have always taken an extra interest in the role judges have and take in the fight against trafficking in human beings. You might ask: do they have a role? After all they are not part of the law enforcement chain, consisting of the police and the prosecution service. Judges are independent and not only have the interests of victims at heart. It is also their role to guarantee a fair trial for perpetrators.

What I have studied in the Netherlands – in the rulings in THB cases – is not whether or not there was enough evidence in a particular case. Not having read the files and not being part of the courtroom, I did not have the opportunity to study these cases extensively. But what I have seen are the facts the courts in the Netherlands established and the subsequent application of the national law. I found the knowledge at the district and appeal courts wanting. For me this was the reason for recommending specialized training for the judiciary, as was the case for the police and the prosecution.

Because: yes, judges have a role to play in the fight against trafficking in human beings. And this role can best be described by using the term 'situational awareness'. In my opinion, this situational awareness must be conceived a key quality for all judges dealing with cases of trafficking in human beings. This competence underlines the importance of the interaction of judges with their surroundings. What I will do here today is explore with you the three main components that constitute this situational awareness. Each of these components address an area with which judges have to interact in order to deal with human trafficking cases properly.

The first component focuses on the way in which judges relate to the phenomenon of human trafficking, which is a complex issue, that occurs in highly varied forms, but a phenomenon that is also changing over time and one that requires an equally dynamic response. I am talking here about how important it is for judges to interact with society and the different forms of human trafficking that keep popping up.

Equally important is for judges to interact well with their fellow judges in other legal fields. A just treatment of victims in legal proceedings requires an approach that extends beyond single areas of law, a holistic approach. No silo effect but an all-embracing approach in which the expertise from the various legal domains are studied in conjunction and not separately.

Thirdly, judges with situational awareness take into account their role as being part of the world, part of international law and European law, and the influence of these on the work they do. These judges are conscious of their important role in expanding that law with the experiences they have gained and are gaining at national level.

I am making a distinction therefore between three situational factors that judges in human trafficking cases need to relate to. Allow me to go through these three with you.

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First of all **social reality**. Human trafficking is no static, legal fact but occurs in our social reality in a multiplicity of forms. Constant factors are force and exploitation. Human trafficking aims at financial gain, coerced by violence or much more subtle forms of coercion. Human trafficking seeks to profit at someone else's expense, someone who is often in a highly vulnerable position in relation to the human trafficker. Although everyone has an idea of what the term 'human trafficking' entails, it is the legislator's job to encapsulate the social reality that it represents in abstract terms. Then it is a challenge for judges to reconcile these abstractions with the facts that are manifest in a concrete case. Reality used to be fairly clear-cut. Up until 2005 only sexual exploitation was a criminal offence in many countries and we could well imagine the suffering that lay behind it. When labour exploitation became a crime this was already much more difficult. But recently the courts are finding

themselves increasingly confronted with cases of what we call criminal exploitation: exploitation which involves victims being forced to commit criminal offences: shoplifting, drug smuggling, cannabis harvesting. All services which people can be forced into. But how are we to spot the human trafficking behind a 16-year-old shoplifter? There's nothing about the shoplifting that betrays signs of human trafficking.

In the Netherlands Romanu and Janu, two Romanian boys, were taken by their uncle to Wassenaar, a well-heeled village close to The Hague. It happened more frequently and every time the instruction of the uncle to his nephews was: get everything out of the houses for me. In Wassenaar the uncle and the nephews were caught. The nephews were sentenced to six weeks in jail and sat out their sentence. The uncle was sentenced much later because it was realised that he was not only guilty of theft but also human trafficking. Here we see how criminal exploitation poses challenges to the criminal justice system. The nephews in our case are not just perpetrators but also victims. How do we deal with this duality? What do you do as judge if you are confronted with a victim who is also a perpetrator? One would hope that from the outset in such cases the public prosecutor would decide that prosecution is inappropriate, but otherwise judges have a vital role to play here. Judges need to respond to the new challenges arising from changes in social reality, in our case the new reality of criminal exploitation. The judges' ability to be constantly gauging a changing reality is tested here to the full. It is a crucial skill because human traffickers are cunning and they switch their tactics incessantly, especially now in the face of the influx of refugees. The fate of refugees is worrying not simply from a human perspective, but also from a human trafficking point of view.

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It is crucial for judges to relate to society. But equally so judges must be aware of the situation of their colleagues in **other legal domains**. Human trafficking has too many faces to be tackled in a straightforward way by a repressive approach derived primarily from criminal law. Administrative law, immigration legislation and labour law play a vital role. A view that looks beyond individual legal domains is needed.

To illustrate my point let me tell you the tale of Santosh, a thirteen-year-old Indian girl who came to the Netherlands in 1999 to work in the household of a well-to-do Indian family. For seven years Santosh had to work excessively long hours and had to be available at any given moment. She was exploited for years as a domestic slave, but besides her exploiters Santosh was also convicted. What was the story? During the time of her own exploitation Santosh was instructed by her exploiters to maltreat the baby of two other housekeepers who, according to the exploiters, was bewitched by evil spirits. After a gruesome scene the baby died and Santosh – despite the fact that everything had happened in a situation of human trafficking – was sentenced to five years in prison.

The conviction of Santosh had major repercussions because, as the first domino to fall, it proved to have an immense impact on the outcome of other proceedings in other legal domains. Thus the conviction was the immediate ground for Santosh being declared an undesirable alien. The conviction served to ensure that Santosh was not granted the protection which all human trafficking victims are entitled to by virtue of immigration legislation. She had thus no right to temporary residence and protection. We see here how much influence a decision taken in one legal domain has on the substance of a decision in another legal domain. The decision took no account of the lamentable circumstances that Santosh found herself in as the victim of human trafficking.

And then I've not even mentioned the discrepancy between criminal law and labour law. Exploitation is defined in the Netherlands by Dutch standards but the labour judge decided in the case of Santosh that the work had been performed in an entirely Indian context and that therefore Indian labour law was applicable. The calculation was easily made. For working an 80-hour week unpaid for a period of two years Santosh was entitled to 2020 euro.

What the case of Santosh demonstrates is that the protection of victims is a challenge thwarted by the subdivision into legal domains that we ourselves have created. The case is an argument like no other for judges to look beyond their own legal field. Interaction between criminal, administrative, immigration and labour law is indispensable for the protection of human trafficking victims.

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That brings me to the third and last situational factor shaped by the **international dimension**. I mean by this not just the impact of international and European law, but also the importance of the knowledge of and interaction with fellow judges in other countries.

The *internationalisation* and *Europeanisation* of law is accelerating fast. In cases of human trafficking international and European law is leading. The definition of human trafficking in the United Nations Palermo

Protocol dates from 2000 and provided an international definition for the first time. Much national legislation has been geared to this international definition right up to the present day.

The definition was adopted virtually intact in the Council of Europe Convention on Action against Trafficking in Human Beings, while the European Court of Human Rights in its judgements has included far-reaching positive obligations for states with regard to tackling human rights and protecting victims. Judges are expected to operate within this international judicial reality and to adjudicate in the spirit of the documents I've mentioned.

The relationship of judges to international law is absolutely one of interaction. International and European law only take shape through their transposition into law by the national courts. Despite the creation of a uniform, worldwide definition, the human trafficking provisions are interpreted in diverse ways in different states. My view is that this is *inter alia* attributable to the open formulation of the definition; the different parts still allow a lot of scope for interpretation by the courts. The international definition for instance sees the abuse of someone's vulnerable position as being a form of coercion. But what is a vulnerable position? And when does someone abuse it? National courts are the key in answering these questions and this is why it is absolutely crucial for the judges from the different states to keep in touch with each other.

I remember from my time as a juvenile court judge and secretary-general of the International Association of Youth and Family Judges and Magistrates that such contacts were by no means self-evident. It was through this association that I met Luigi Fadiga, president of the family court here in Rome, who came in very handy in a case of child abduction involving an Italian father and a Dutch mother. My court couldn't imagine why I would want to email my Italian counterpart to ask about the application of family law in Italy. What he sent me though was a detailed overview of the most recent case law, exactly what I needed to handle the matter properly. This was fifteen years ago, I was somewhat ridiculed about my *cher Luigi* email. Now there is a working connection by family judges on cases concerning child abduction as stated in the The Hague Convention. This is an example of current interaction between national judges on international legal concepts and their implications for justice seekers in the domain of family law. But why should this interaction be limited to family law judges? In my view a closer connection between domestic judges is necessary in criminal law as well.

I made a strong case for this in an article I published this month in *Anti-Trafficking Review*. I'm glad that the United Nations is currently working on a database of translated human trafficking cases and happy with the recent development of a European case law database by the European Commission. Things do change, as they must.

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Ladies and gentlemen, I've said most of what I want to say. I've demonstrated how vital it is for judges to interact with their surroundings given the complexity of the issues confronting judges in human trafficking cases.

Judges dealing with human trafficking need skills that can be collected under the umbrella term 'situational awareness'. I have borrowed this terminology from the aviation sector not without reason. I think the interaction between pilots and their surroundings is a very similar quality than the interaction needed for human trafficking judges. Judges, like pilots, have to have command of the priority information they need to take the right decision in a demanding situation. In interaction with society, other legal domains and international counterparts. In an endeavour to fly towards freedom, the freedom that is still not a reality for the millions of human trafficking victims but must remain in our sights on the horizon.

Many thanks for listening.