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Training lawyers, prosecutors, judges to ensure better rights protection for migrants and refugees' victims of human trafficking (TRAIN-PRO-RIGHTS)

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FORMAZIONE INTERNAZIONALE

I diritti dei minori stranieri non accompagnati vittime della tratta di esseri umani

Analysis of cases concerning child victims of human trafficking in the EU
Analisi dei casi riguardanti i minori non accompagnati vittime della tratta di esseri umani nell'Unione Europea

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Objectives for these sessions:

- Increase lawyers, prosecutors, judges' knowledge on EU legislation and jurisprudence concerning victims of human trafficking who are migrants/refugees.
- Contribute to an effective and uniform application of EU laws in cases that involve victims of human trafficking.

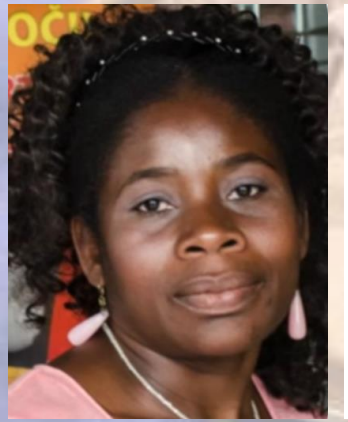
Agenda for this session:

- Discussion of European Court of Human Rights cases: SILIADIN v. FRANCE and S.M. v CROATIA
- Quick recap of *The Story of Liz – A CILD Case Study*
- Ongoing concerns

What will be explored:

This session explores how:

- In practice, legislative provisions designed to assist victim from being transgressed against, can indeed prejudice their ability to obtain justice.
- Underused, little-known legislative provisions can create risks for victims too.
- Individuals at the investigative level can have proceedings levelled against them on a regional front also.



SILIADIN v. FRANCE - European Court of Human Rights

Henriette Akofa Siliadin was 15 years old when she arrived in France from Togo, with a passport and tourist visa – under an agreement whereby she would work at a woman's house until her airfare was "reimbursed" and that the woman would assist in getting her into school and in regularising her immigration status. Instead, Henriette was kept in domestic servitude. For 4 years, she worked 7 days a week from early morning to late night, across childcare, housework and cooking, for no pay and with no days off.

Photo source: www.coe.it

- She had her passport taken and purposely had her immigration status kept illegitimate by those she was kept by.
- Henriette was eventually "given" to a couple with children – with Henriette's father's consent, and she became an unpaid housemaid for the couple.

She slept on a mattress on the floor

Received none of the promised assistance re status

- She eventually managed, with help, to recover her passport, and confided in a neighbour, who alerted the Committee against Modern Slavery, which in turn filed a complaint with the prosecutor's office.
- This case showcases how failures in legislative structures can deny victims true justice, but also how running these cases can assist in filling legislative holes.

The Couple Were Initially Convicted

- The couple were prosecuted on numerous charges (including under Article 225-13 and 14 of France's Criminal Code).
- The initial presiding court found that in relation to Article 225-13 Henriette had not been given adequate pay and her vulnerability and dependence in her relationship with the couple was proved by the fact that Henriette was unlawfully resident in France, feared arrest, that the couple nurtured that fear while promising to secure her leave to remain and that Henriette had no resources, no friends and almost no family to help her.
- The Court however concluded that, regarding Article 225-14, while employment regulations had not been observed in respect of working hours and rest time, this was insufficient to conclude that working conditions were incompatible with human dignity (as a 'furious pace", "frequent insults and harassment" might have). Thus Article 225-14 was not made out.
- Nonetheless, the judges concluded that the offences of which the couple were convicted were serious, particularly as the couple considered that they had treated the applicant quite properly, thus they were sentenced to 12 months imprisonment each, and a fine and damages were awarded.

Picture: Endslaverynow.org

The Paris Court of Appeal then *overturned this judgment*, releasing the couple of both criminal and civil consequences

Despite noting that Henriette was an irregular immigrant and had not received any real remuneration, the Court of Appeal found that because Henriette:

- Could speak French
- Could leave the house for work or commute related travel, like taking the children to school and going shopping for the family
- Could call her uncle by phone sometimes, from a telephone box outside the couple's home
- Received small sums of money for family celebrations
- Was appropriately dressed and in good health
- Didn't actively complain of her situation

The existence of working or living conditions that were incompatible with human dignity had not been established, and Henriette was not in a "state of vulnerability or dependence". The Court of Appeal acquitted the defendants on all the charges against them.

Henriette wanted the Public Prosecutor's Office to appeal.

They refused.

Why was the appeal successful? Untargeted legislation.

- Article 225-13 of the Criminal Code, which made it an offence to obtain another person's labour by taking advantage of him or her, assesses whether “the victim was vulnerable or in a state of dependence” leading the courts to look for certain signs of constraint or control of the individual as prerequisites for a finding of exploitation.
- Article 225-14 also required an infringement of “human dignity” for the offence to be established. This was a vague concept, and one subject to random interpretation. It was for this reason that neither her working nor living conditions had been found by the court to be incompatible with human dignity.

Legislation with more bark than bite, as regards for child victims of trafficking

The French National Assembly's joint taskforce on the various forms of modern slavery noted that:

1. Regarding Articles 225-13 and 225-14 “these are not always used in full and are proving an insufficient deterrent when put to the test…”
2. “The concept, of the abuse of an individual's vulnerability or state of dependence contains ambiguities that could be prejudicial to their application.”
3. “In the absence of legal criteria enabling the courts to determine whether there has been abuse of [an individual's] vulnerability or state of dependence, the provisions are open to interpretation in different ways, some more restrictive than others…”
4. “Whether with regard to actual or potential sentences, the shortcomings of the provisions are clearly visible, in view of the seriousness of the factual elements characteristic of modern slavery.”
5. “Bearing in mind … the seriousness of the offences in such cases, the inconsequential nature of the penalties faced by those guilty of them is surprising and raises questions about the priorities of the French criminal justice system.”

But this case wasn’t done yet:

On appeal by Henriette alone, the Court of Cassation quashed the judgment of the Paris Court of Appeal but **only in respect of the provisions dismissing the civil party's requests for compensation in respect of the offences provided for in Articles 225-13 and 225-14 of the Criminal Code**. That meant that the criminal sanctions were out of the question, but the civil part of the fight was revived.

The Versailles Court of Appeal, to which the case was subsequently referred, upheld this decision, **but again only on a civil front**. In awarding Henriette 15,245 euros in compensation, as was assessed by the court of first instance, this Court noted that “far from showing that [Henriette] was happy to return to the couple’s home, the conditions in which she did so after an absence of several months are, on the contrary, indicative of the pressure she had been subjected to by her family and of her state of resignation and emotional disarray”

The Paris industrial tribunal would also later deliver judgment following an application submitted by the applicant, awarding her 33,049 euros for arrears of salary, her notice period and holiday leave (but nothing punitive).

From a ***Civil*** perspective, arguably, she received justice. From a ***CRIMINAL*** perspective however – she received no justice. On that basis this case arrived at the European Court of Human Rights as *Siliadin v France*.

A civil remedy alone is not enough. The criminal “machinery” must be well-oiled.

Henriette and her team claimed that France had failed to comply with its positive obligations inherent in Articles 1 and 4 of the ECHR, to secure tangible and effective protection against, and punishment for, the practices to which she had been subjected to, via adequate criminal-law provisions.

She alleged that Articles 225-13 and 225-14 of France’s Criminal Code, were worded too openly and elusively, and diverged so much from the European and international criteria for defining servitude and forced or compulsory labour that she had not been able to secure effective and sufficient protection against, for justice for, the practices she had been subjected to.

A civil remedy alone is not enough. The criminal “machinery” must be well-oiled.

Henriette’s team further asserted that:

1. As the public prosecutor's office had not considered it necessary to appeal on points of law on the grounds of public interest, the acquittal of the couple on criminal grounds had become final. Consequently, subsequent courts could not return a guilty verdict nor impose a sentence but could only decide whether to award civil damages.
2. The imposition of a fine and damages could not be regarded as an acknowledgment, whether express or in substance, of a breach of Article 4 of the ECHR.

The French Government's response?

- They asserted that the proceedings before the criminal courts which led to the payment of damages were sufficient under Article 4 in order to comply with any positive obligation arising from the ECHR, citing case law regarding Article 3.
- In the alternative, the Government considered that French criminal law fulfilled any obligations arising under Article 4 and that the "wording of Articles 225-13 and 225-14 of the Criminal Code made it possible to fight against all forms of exploitation through labour for the purposes of Article 4".
- They stressed that these criminal-law provisions had, at the time of the events complained of by the applicant, already resulted in several criminal-court rulings, thus establishing a case-law, and that, since then, they had given rise to various other decisions to the same effect".

The European Court of Human Rights found that:

1. Henriette was held in servitude within the meaning of Article 4 of the ECHR.
2. As to whether she performed this work of her own free will, it is clear from the facts of the case that it cannot seriously be maintained that she did.
3. Even though the French Government had pointed to Articles 225-13 and 225-14 of the Criminal Code as protection for what happened to Henriette, they did not deal specifically with the rights guaranteed under Article 4 of the ECHR, but rather exploitation through labour and subjecting people to working and living conditions that are incompatible with human dignity.
4. Children and other vulnerable individuals are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity and further:
5. The protection afforded by the civil law in the case of wrongdoing was insufficient as this was a case where fundamental values and essential aspects of private life were at stake.
6. Effective deterrence is indispensable in this area and it could be achieved only by criminal-law provisions" (see prior judgment to this effect in *X and Y v. the Netherlands*).

The European Court of Human Rights further found that:

1. Henriette, who was subjected to treatment contrary to Article 4 and held in servitude, was not able to see those responsible for the wrongdoing convicted under the criminal law
2. In those circumstances, the criminal-law legislation in force at the material time did not afford the applicant, a minor, practical and effective protection against the actions of which she was a victim.
3. In the present case there has been a violation of the respondent State's positive obligations under Article 4 of the ECHR.

What this case shows:

1. Provisions which claim to incidentally “cover” child trafficking may in fact not do so properly in practice.
2. Civil damages cannot be thought of as “sufficient” from a victim’s rights/welfare perspective and nor from a European law perspective, where such egregious action against a child has been taken.
3. There is an increasingly high standard being required in the area of the protection of human rights and fundamental liberties.
4. Provisions that can be widely interpreted can be useful at times but where the initial instrument is already not geared towards punishment or deterrence against child trafficking to begin with, wide provisions can be prejudicial and act against victims.

S.M. v Croatia and further developments in European Court of Human Rights case law since Henriette's case:

1. The definitional scope of Article 4 of the ECHR was (more clearly) widened with the *S.M. v Croatia* decision, in June 2020, to definitively include trafficking.
2. The case concerned S.M., who had lived with a foster family and a public home for children and had, in September 2012 (at 12) presented to a Croatian police station and filed a criminal complaint against T.M (a former policeman) alleging that he'd physically and psychologically forced her into prostitution.
3. A police investigation followed, including questioning S.M., T.M. and a friend of S.M., and a search of T.M.'s premises and car, where condoms, rifles, ammunitions and mobile phones were discovered.
4. Relevantly, T.M. also already had a criminal record, being previously convicted of procuring prostitution using coercion and of rape.
5. T.M. denied all accusations. He was eventually acquitted by the domestic courts of the charge of procuring prostitution through coercion.
6. The domestic courts concluded that force could not be proven.

S.M. v Croatia:

In this case the Court found that:

- Relevant authorities had not fulfilled their procedural obligations of effective investigation under Article 4 of the ECHR.
- S.M's personal situation undoubtedly suggested that she had belonged to a vulnerable group, while T.M.'s position and background suggested that he had been capable of assuming a dominant position over her and abusing her vulnerability.
- While the prosecuting authorities had reacted promptly to S.M.'s allegations, they had failed to follow some obvious lines of inquiry causing an overreliance on S.M.'s testimony.
- The criminal investigation by the domestic authorities and the subsequent criminal proceedings had 'significant flaws', thus violating the procedural obligation under Article 4 of the ECHR.
- Croatia should pay S.M. damages.

The *"Liz"* case study*:* Where law exists, unused

A separate issue arises where law exists and is little known and thus not used to give victims remedies sought by them, which they are entitled to – this has got to be the greatest tragedy of all.

As regarded Liz's case, Italian immigration legislation offers victims a high standard of protection:

- Trafficked persons can be admitted into a comprehensive protection program and obtain a residence permit, if necessary, which allows them to avoid further violence and exploitation.
- The provision on the protection of trafficking victims is also one of the oldest in Europe! The relevant 1998 law had already included this rule (Article 18).
- The 2003 law, which amended the criminal code by modifying the crimes of enslavement and trafficking, includes another provision on the protection of trafficking victims, open to citizens of any nationality.
- Article 18 was adopted because of the unsuccessful application of previous laws, which only granted a residence permit to those victims who were in danger due to their statements at trial.
- However even once the protection of there – Liz was nearing expulsion and required the active intervention of CSOs to ensure the protection she was entitled to was obtained.
- This shows an intense need for legal, law enforcement and immigration industries within nations to share information and upkeep knowledge of protections at their disposal.

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Overview – A child in impossible circumstances

South American youth Liz (pseudonym) arrived in Italy in 2013 as a child and upon her arrival at an Italian airport, she was immediately arrested for international drug dealing, having arrived carrying drugs. During the trial it emerged that **she had been coerced into committing the crime** by her family, as often occurs in international drug-dealing incidents involving minors. Liz's eventual deportation from Italy was considered inevitable, considering that in Italy, foreigners who have served a sentence are usually expelled following release from prison. Liz's history of hardship and efforts to integrate, however, meant that CILD and our industry partners were moved to help her; to stop her returning to the circumstances which precipitated her earlier desperate actions.

After her arrest, Liz's dream of parental reunification quickly turned into a nightmare

In her home country Liz had lived with her grandparents, as her father was deceased and her mother had moved to Italy when she was a few months old. **Liz dreamt of reuniting** with her mother and so was convinced to carry drugs in order to be able to pay for the trip to reunite with her.

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Punishment and desperation

After 6 months of pre-trial detention at the juvenile detention centre, Liz was convicted and handed a suspended sentence, including probation for a year and 8 months. Liz worked hard, following an integration program ordered by the judges and learning Italian. She still desperately wanted to reunite with her mother however and thus, on a whim, escaped from the community where she was hosted. Liz ended up arrested once again near her mother's home, her probation was revoked and **the sentence of imprisonment initially suspended** became a cruel reality for the desperate teen.

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The turning point

While inside juvenile detention, Liz attended training courses and worked in the centre, even though she knew that once her sentence was concluded she'd be deported. Indeed, authorities had endorsed a forced escort of Liz to the border to take place after her release.

Then, on 19 October 2018, Judge Giuliano Amato visited the juvenile detention centre and met Liz. Liz asked him: "It does not seem right to me that a foreigner, who has gone through prison and wants to integrate into society, is expelled. What do you think?"

Picture: Constitutional Court Judge Giuliano Amato speaking from the juvenile detention centre.

CILD's swift coordination of advocacy on behalf of Liz

Liz's meeting with Judge Amato set off a chain of events which led to CILD coordinating a combined advocacy and legal effort on her behalf, seeking that she be allowed to stay.

After social cooperative Dedalus obtained a proposal for permission for Liz to stay, CILD swiftly advocated on behalf of Liz for authorities to apply the often-overlooked Article 18 (paragraph 6) of the Consolidated Law on Immigration - an article which allows foreign minors who complete a custodial sentence to be granted a residence permit if they are enrolled in a social integration program. Despite this law being relatively unknown, CILD's expertise ensured that this legal basis for Liz to stay was put forward to authorities. Representatives appointed by CILD immediately called for the revocation of the planned expulsion and the issuance of a residence permit to Liz, arguing that her social integration program was underway.

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CILD's application of Article 18 on behalf of Liz has led to further good

After Liz's case, Article 18 has been invoked at least two more times in Naples, in cases similar to that of Liz and indeed two conferences have been organised, in Naples and in Venice, on this topic; training lawyers and legal professionals on this route available for vulnerable foreign youth.

Liz is now free and thriving

Today Liz has a job and hopes that her former cell mates might have the same help and luck that she had, which was possible thanks to an incredible collaborative effort involving many parties, and coordinated by CILD.

Upcoming and remaining challenges re law and child trafficking

1. Identifying victims, making services available to them, and supporting them
2. Acknowledging and updating law to be robust noting changing elements of trafficking – for example during COVID-19 routes to reintegration and escape from exploitation have narrowed due to enormous job losses in hospitality fields (“low-skilled work” which victims could access to make a living) – are our national immigration laws set up to assist those in this situation who have lost work? Will they be sent back to situations of danger due to visa breaches, if they are known victims of trafficking?
3. Movement of offending online – how might this affect situations like in *Siliadin v France* where legislation required “vulnerability” or “dependance”? Will this render offending outside of the scope for punishment in your home state?