

A Case Law
Compendium
in Trafficking
in Human Beings

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ACRONYM LIST

BiH Bosnia and Herzegovina

BDBiH Brčko District of BiH

CC BiH Criminal Code of Bosnia and Herzegovina

CC BDBiH Criminal Code of Brčko District of BiH

CC FBiH Criminal Code of Federation of Bosnia and Herzegovina

CC RS Criminal Code of Republika Srpska

CoE Council of Europe

EU European Union

FBiH Federation of Bosnia and Herzegovina

ICTY International Criminal Tribunal for the former Yugoslavia

RS Republika Srpska

UN United Nations

Abstract

This case law compendium in trafficking in human beings, developed with the support of the OSCE Mission to Bosnia and Herzegovina, is primarily intended for legal practitioners i.e. judges, prosecutors and lawyers, but also for others dealing with human trafficking issues in the context of their work or scientific or other interests.

The main purpose of this publication is to provide in one place the relevant case law involving all forms of trafficking in human beings. The introduction contains a brief overview of international and national law and explains the need for developing this publication in order to contribute to better understanding and better application of all available legal instruments to combat human trafficking.

The first part of the compendium is focused on the elements of the criminal offence, and includes extensive case law classified according to each element or component of trafficking in human beings. For example, in the part dealing with the acts of perpetration of a criminal offence, apart from a brief theoretical explanation of each form of the act, the reader can also find related case law examples. The examples are primarily from Bosnia and Herzegovina, but also from other countries, i.e. Serbia, Montenegro, Croatia, etc.

As related to the means of perpetration of crime, and in cases where there is no relevant jurisprudence, other criminal offences whose interpretation may lead to the essence of each of the means of perpetration was provided. For example, abduction as a means of perpetration is illustrated with the case law involving the criminal offence of abduction, because it can contribute to proper understanding of this particular means of perpetration of crime.

As related to the forms of exploitation, as the third element of this criminal offence, the majority of examples include sexual exploitation. However, there is also a substantial amount of case law involving labour exploitation, slavery or practices similar to slavery.

The second part of the compendium focuses on minors as victims of crime and shows specific features of this criminal offence, providing also case law examples clearly showing that there has been a lack of understanding of the elements of this criminal offence and of the relevant legal provisions. In addition to negative practice, this part also provides an overview of court verdicts that include deliberation as to whether the accused knew the age of the victim, of importance for establishing criminal liability for this form of an offence.

The third part of the compendium focuses on the confiscation of proceeds of the crime. Apart from relevant international instruments stipulating compulsory confiscation of such

proceeds, the publication includes case law examples which show the method of calculating the approximate value of property acquired by the perpetration of a criminal offence.

The case law compendium in trafficking in human beings should serve as a baseline for judges and prosecutors in interpreting individual elements of the criminal offence of trafficking in human beings. The publication contains a substantial number of verdicts used as good practice examples, as well as several verdicts illustrating the lack of understanding of these issues and misinterpretation of some elements of this criminal offence. Overall, the said verdicts should contribute to the adequate application of legal provisions with the aim to efficiently prevent and suppress these forms of crime.

Introduction

Trafficking in human beings was introduced to the criminal legislation of Bosnia and Herzegovina as a stand-alone criminal offence in 2003 when the Criminal Code of Bosnia and Herzegovina (CC BiH) came into force. By introducing this crime into the group of criminal offences against humanity and against values protected by international law, Bosnia and Herzegovina fulfilled its obligation assumed upon signing and ratification of the United Nations (UN) Convention against Transnational Organized Crime and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.¹ With the exception of the criminal offence of trafficking in human beings for the purpose of prostitution as defined in the Criminal Code of Republika Srpska (CC RS), which was codified before the enactment of the CC BiH and which encompassed only one segment of human trafficking², it can be said that with the adoption of the CC BiH in 2003, BiH for the first time established legal provisions regulating trafficking in human beings in line with the way that this issue is addressed at the international level.³

Subsequent to the adoption of the noted UN Convention and its accompanying Protocols in 2000, new legal instruments were adopted to introduce more efficient

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- 1 Bosnia and Herzegovina (BiH) signed the UN Convention against Transnational Organized Crime and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children on 12 December 2000 in Palermo. The Presidency of BiH ratified these documents by a decision which came into force on 27 March 2002. The Convention and Protocols were published in the Official Gazette of BiH - International Treaties, no. 3/2002.
 - 2 According to the opinion presented in a publication entitled "Trafficking in Human Beings and Responses of the Domestic Criminal Justice System", A Critical Review of Law and Emerging Practice in Bosnia and Herzegovina in Light of Core International Standards, OSCE, June 2009, the criminal offence of trafficking in human beings for the purpose of prostitution does not reflect the definition enshrined in relevant international documents. Nevertheless, the publication reads that this criminalization includes elements of trafficking in human beings (p. 131 of the aforementioned study), which in a way confirms the thesis that the Criminal Code of Republika Srpska (CC RS) criminalized certain forms of trafficking in persons i.e. of trafficking in human beings with the purpose of sexual exploitation as early as 2000. Namely, establishing control over a victim by using force, threats, taking advantage of a difficult financial situation etc. with the purpose of exploitation (sexual exploitation in this case) are also emphasized in this criminalization, and therefore one can reasonably say that the criminal offence of trafficking in human beings for the purpose of prostitution constitutes a criminal offence which criminalizes some, but not all forms of trafficking in persons. Also, one should keep in mind that this criminalization was included in the RS criminal legislation at the time when a universally accepted international definition of trafficking in persons did not exist (this CC RS came into force on 1 October 2000, and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children was open for signing from 12 to 15 December 2000 in Palermo, and at the UN Headquarters until 12 December 2002); subsequently, in 2003, parallel-shared competencies in criminal legislation were introduced in BiH, and criminal offences against the values protected by the international law were transferred to CC BiH. For more information, see I. Marković: Trafficking in Human Beings for the Purpose of Prostitution (Trgovina ljudima radi vršenja prostitucije) Article 198 of the Criminal Code of Republika Srpska, Official Gazette, no. 9/02, p. 54-67.
 - 3 For more information, see: I. Marković: Trafficking in Human Beings in the Criminal Legislation of Bosnia and Herzegovina (Trgovina ljudima u krivičnom zakonodavstvu Bosne i Hercegovine), Collection "Prevention and Suppression of Contemporary Forms of Criminality -11" published by the Academy of Criminalistic and Police Studies, Belgrade, p. 3-6.

measures to prevent and suppress this negative social phenomenon. New criminal justice measures were proposed to address these issues comprehensively, from the criminalization of complicity in trafficking in human beings as a standalone criminal offence, sanctioning users of human trafficking victims' services, providing optimal protection to human trafficking victims, to finding efficient measures to seize items used in this criminal offence and to confiscate the proceeds of this form of crime. Bosnia and Herzegovina ratified the Council of Europe's Convention on Action against Trafficking in Human Beings from 2005 on 1 May 2008.

Such developments had significant impact on the criminal offence of *trafficking in human beings* because as the international law and standards in the field were developed, the criminal justice theory and case law were also developed revealing various oversights and inconsistencies regarding the legal formulation of this crime.

Accordingly, frequent corrections were made and legal descriptions of the criminal offence of trafficking in persons were often changed both at the level of Bosnia and Herzegovina and at the level of the entities. Since it entered into force in 2003, the CC BiH has been amended on several occasions, and the legal description of the criminal offence of trafficking in human beings was specifically amended in 2004, 2005, 2007, 2010 and 2015. The most recent amendment to the Criminal Code⁴ changed the name of the criminal offence to *International Trafficking in Human Beings*, and Article 186 has ten paragraphs implementing the main requirements of the noted Council of Europe Convention. By restricting the criminalization to international trafficking in human beings only, the criteria were set for division of competencies in this field between the State and entity levels, this because CC BiH criminalizes only the international trafficking in human beings, meaning that all cases of human trafficking without the international element fall under the competency of the entities.

In addition, a new Article 186(a) *Organized International Trafficking in Human Beings* was introduced to criminalize the organization and management of a group or other association which perpetrates the criminal offence of trafficking in human beings through joint activities.

In Republika Srpska (RS), amendments to criminal justice legislation regulating human trafficking issues were made with the adoption of the Law on Amendments to the Criminal Code from 2013,⁵ adding the following offences into the group of criminal offences against sexual integrity: *Trafficking in Human Beings* (Article 198 (a)), *Trafficking in Minors* (Article 198 (b)) and *Organizing a Group or a Criminal Association for the Purpose of Criminal*

4 The Law on Changes and Amendments to the Criminal Code of Bosnia and Herzegovina, „Official Gazette of Bosnia and Herzegovina“, 40/15 of 19 May 2015.

5 The Law on Changes and Amendments to the Criminal Code of Republika Srpska, „Official Gazette of Republika Srpska“, 67/13.

Offences of Trafficking in Human Beings and Trafficking in Minors (Article 198 (v)). In the Criminal Code of Brčko District of BiH (CC BDBiH), the criminal offence of trafficking in human beings (Article 207 (a)) and the criminal offence of organized trafficking in human beings (Article 207 (b)) were introduced in the group of criminal offences against sexual freedom and moral in 2013.⁶ Legal formulations of these offences are in line with the relevant international standards. In the Federation of BiH (FBiH), the process of harmonizing criminal justice legislation with international standards is ongoing.

It should be noted that, unlike the solution contained in CC BiH, CC RS defines trafficking in human beings involving a minor victim (i.e. under the age of 18) as a separate criminal offence. Moreover, the basic form of the offence, when perpetrated with the use of force, serious threats or other forms of coercion, misleading, abduction, blackmail, abuse of office, abuse of a relationship of confidence, dependence or helplessness, of difficult circumstances of another, giving money or other benefits, is defined in CC RS as a more serious form of the offence with minimum stipulated imprisonment of eight years. Therefore, the means of perpetration of a crime, which represent the basic element of a crime of trafficking in human beings when committed against a person of age, in this case represents an aggravated circumstance which is justified from the criminal justice policy standpoint. Namely, the criminal offence of trafficking in human beings, when the passive subject is a person up to 18 years of age, exists at the point when any one of the alternative acts of perpetration with the purpose of exploitation is undertaken, regardless the fact that neither means referred to in the description of the underlying form of the criminal offence of trafficking in human beings was used. The use of force, coercion or other alternatives to the means of perpetration increases the gravity of this crime and the level of danger it represents, thus the said solution should also be introduced to the CC BiH and the CC BDBiH. From the criminal justice policy standpoint, it is not the same when the crime is committed against a person younger than 18 years of age with or without the use of the said means of perpetration. In the case of the latter, the intensity of violation of the protected goods is much stronger and the consequences suffered by the passive subject are much more severe, which should have been taken into account by the legislator when formulating this criminal offence. Namely, although the lawmaker foresees imprisonment of at least ten years for the second form of the criminal offence referred to in Paragraph 2 of Article 186 of CC BiH, for the first form of the crime a prison sentence of at least five years is foreseen, but this solution is not based on the means of perpetration of the crime rather on the age and maturity of the passive subject. With this form of crime, the use of force, threat and other forms of means of perpetration referred to in Paragraph 1 of the CC BiH represent an aggravated form of the offence that largely increases the level of the danger posed by the crime and by the perpetrator, and that the lawmaker, *de lege ferenda*, should treat them as such. According to the current solution with this form of crime, these circumstances may only be treated as aggravating circumstances, which is not in line with the European initiatives in preventing and combatting trafficking in human beings.

Amending the laws addressing the crime of trafficking in human beings is not specific only to the national legislation, as many other countries in the region have also often amended the provisions dealing with human trafficking in their respective laws (e.g. Serbia and Croatia). The main reason for such frequent amendments regarding this type of crime is the fact that it is an entirely new form of crime which has not previously existed in many criminal

6 The Law on Changes and Amendments to the Criminal Code of Brčko District of Bosnia and Herzegovina, „Official Gazette of Brčko District of Bosnia and Herzegovina“, 9/13.

legislations, including those in BiH, and there has not been a generally-accepted and empirically-confirmed model in comparative law. Moreover, the reason also lies in the mere nature of this type of crime, which, by its character, usually falls under very complex types of (organized) crime that can manifest itself in many different forms, making it highly challenging to legally regulate, especially with regard to its application. The interpretation of individual elements of this crime sometimes differs to such an extent that, for example, while one court provides a substantiated reasoning for the existence of elements of this crime in a factual description, another court does not find them at all although analysing the same facts (e.g. the cases of B.P., C., C.D.Ć, and N. before the Court of Bosnia and Herzegovina).

Arguably, there remain significant dilemmas and uncertainties in the application of this type of crime stemming from the lack of understanding of the essence and nature of this issue, as well as from underdeveloped and non-harmonized jurisprudence. In order for the case law to be accessible to the professional public, an analysis of all elements of this criminal offence is provided in the body of the Compendium, accompanied by the case law examples and comments. The overview of the case law and the views taken in the national and international case law in interpreting individual elements of the crime of trafficking in human beings should offer a solid basis for correct interpretation and application of this form of crime in the future.

1. ELEMENTS OF CRIME

The crime of trafficking in human beings is characterized by certain elements which affect its application. First and foremost, it is a criminal offence involving multiple acts with alternative forms and acts of perpetration, and may therefore occur in a large number of forms. Diversity in its manifestation and, at times, the indifference or unwillingness of a victim of trafficking in human beings to have the offence revealed (e.g. when a victim consents to exploitation), can complicate recognition and detection of this criminal offence.

According to the legal definition of this crime provided in Article 186, Paragraph 1 of the CC BiH, a criminal offence comprises three main elements with alternative forms of perpetration:

- a) *Acts*: recruitment, transportation, transfer, harbouring or receipt of persons;
- b) *Means*: threat or the use of force or other forms of coercion, abduction, fraud or deception, abuse of power or influence or position of vulnerability or giving and receiving payments or other benefits to achieve the consent of a person having control over another person;
- c) *Purpose*: prostitution of other persons or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or removal of body parts or any other form of exploitation.

In order to have an act qualified as a crime of trafficking in human beings, all three elements, in any of the established alternative forms, must be cumulatively present. For example, recruiting a person by deception for the purpose of sexual exploitation constitutes the criminal offence mentioned above, except in the case that a victim is under the age of 18, when the existence of only two elements would be sufficient for constituting this criminal offence, i.e. the existence of one of the alternative acts of perpetration for the purpose of exploitation, without applying one of the alternative means (Article 186, Paragraph 2 of the BiHCC).

An important feature of this criminal offence is also reflected in Paragraph 9 of the above-mentioned Article 186, according to which the consent of a victim of trafficking in human beings to exploitation does not preclude the existence of a criminal offence. Therefore, the purpose of such codification is to have all forms of trafficking in human beings unconditionally prohibited, irrespective of the victim's consent. A similar solution is found in CC RS Article 195 regarding sexual violence against a child, which criminalises the act of sexual intercourse or any other sexual activity with a child, notwithstanding the fact whether the child consented to sexual intercourse or any other sexual activity. Such

criminalization reflects the stance of the legislator towards this type of crime, i.e. zero tolerance for this type of crime, and provides the victim with legal protection even if the victim has consented to a sexual activity. This reflects a type of criminal offence which, by its nature, represents a unilateral criminal offence as a form of 'necessary complicity' where only one person i.e. the perpetrator of the criminal offence is sanctioned and the other is provided with protection.

By its nature, the criminal offence of trafficking in human beings falls within the category of continuous crimes, which may be of relevance when establishing a range of legal matters, especially when having in mind frequent amendments to the law regarding this criminal offence in terms of temporal validity of the criminal code.

In that regard, the verdict of the **Court of BiH, No. KŽ-45/06** of 25 October 2006 reads that *"the criminal offence referred to in Article 186 of the BiH CC, by its nature, falls within the category of continuous crimes which are not considered completed as long as the illegal state caused by the act of perpetration lasts, meaning, in this specific case, that the act is not considered completed as long as the victim's state of subordination lasts, and in that sense, as long as the victim's state of subordination lasts and in that sense, as long as the act of sexual exploitation of the victim lasts. Therefore, the moment when such state has ceased to exist, regardless the reason (whether the accused terminated it or it ceased for some other reason), is the time of completion of this act, because that is the relevant moment on the basis of which the time of its completion, which affects a range of criminal and legal matters, especially to the temporal validity and application of relevant provisions set out in Article 4 of the CC BiH. Therefore, even if the acts had been perpetrated before the CC BiH entered into force (completion in formal sense), the offence is not considered completed if the illegal state caused by the offence still lasts. Since this fact has unequivocally been established in the disputed verdict, this panel is of the opinion that the court of first instance correctly found that this criminal act should in its entirety be qualified under the CC BiH, in other words according to provisions from Article 186, Paragraph 2 and in relation to Paragraph 1 and Article 54 of the CC BiH."*

A) ACTS

The acts of this criminal offence are alternatively defined as recruitment, transportation, transfer, harbouring or receipt of persons for the purpose of exploitation, on the condition that at least one of the mentioned forms of perpetration was used.

1. Recruitment

In its broadest sense, recruitment implies activities which lead other persons to make a decision on whether or not to do something. From the aspect of criminal law, it almost entirely corresponds to the definition of enticement that involves all the activities which may motivate another person to commit a criminal offence. In the context of the criminal offence of trafficking in human beings, recruitment may encompass all the activities, i.e. an action or the failure to act, which lead a passive subject to make a decision to consent to

planned exploitation, in other words which affect the willingness of the passive subject to undertake a particular act, i.e. to place oneself into a particular position such as a position similar to slavery. Recruitment may be performed in any way, orally or in writing, via print media or through other means of communication (i.e. internet). In order for recruitment to be qualified as an element of a basic form of a criminal offence, it must be performed in one of the alternative forms of perpetration, for example by the use of force, threat of the use of force, or other forms of coercion.

In case law, recruitment or enticement most frequently appear as an act of perpetration of this criminal offence, with different means of perpetration. In this regard, the verdict of the **Appellate Court in Novi Sad, No. KŽ I 455/11** of 8 March 2012, underlines that *"recruitment, by its nature, represents enticement that may be achieved by any act which may cause a victim (injured party) to make or reinforce a relevant decision. There are a large number of different acts that include performing recruitment, including soliciting, promising material or other kinds of gain, explaining that by taking a certain action a disastrous event may be averted, requesting consent from another person for taking a certain action, etc. Methods of recruitment are multiple, and bearing in mind that the court of first-instance established that the accused individuals had enticed the injured party to return to their house and that she consented to prostitution upon their enticement, meaning that their actions included elements of recruitment on the basis of which the allegations of the defence were deemed unfounded in claiming that the accused had not recruited the injured party and that she voluntarily returned to their house to live with their underage son. Keeping in mind that the act of perpetration of the criminal offence involves enticement and recruitment of the injured party by the accused individuals and bearing in mind that the victim is a minor, this is a criminal offence of trafficking in human beings under Article 388, Paragraph 2 of the Criminal Code..."*

Therefore, in terms of this criminal offence, acts of individuals which may be considered recruitment are very different and sometimes difficult to recognise. In such situations, the relevance of these acts to the decision of the victim to consent to exposing oneself to a certain type of exploitation or to undergo exploitation should be viewed as the main criteria for establishing recruitment as the act of perpetration of this criminal offence. In recognition of the fact that situations in which an individual may become a victim of trafficking in human beings are very diverse and that recruitment may be performed in many different ways, it is necessary to ensure that legal professionals have access to as many court verdicts as possible containing recruitment as the established act of perpetration of the criminal offence of trafficking in human beings. This would enable them to acquire the necessary knowledge on different acts of recruitment and to more easily recognise them in other cases.

In the **Court of BiH verdict No. K-71/05** of 25 April 2006, it was established that the accused had perpetrated a criminal offence of trafficking in human beings (Article 186, Paragraph 2) *"by organising and using prostitution and other forms of sexual exploitation of female persons with the intent to acquire material gain, ...by deception and fraud, threat of the use of force and the use of force and by abusing their difficult economic situation and drug addictions, recruited several female persons, as follows:*

The underage E.Ć., whom he seduced in 2002 and then used her feelings towards him, and threatened her and her family, was enticed by the accused to offer sexual services for money and then to help him recruit other female persons for the purpose of prostitution and also to help him organise and perpetrate prostitution, which E.Ć. consented to due to her immaturity, affection towards him and the fear that he would fulfil his threats against her and her family;

E.Ć., while helping the accused Ć.N. during 2002, promised underage D.I. that the accused would give her a job, and then took her to S., to an apartment used by the accused where the accused held D.I. captive for several days and enticed her, by threatening the infliction of physical injuries and torture, to offer sexual services for money for his gain, which D.I. consented to due to her immaturity and fear that he would fulfil his threats, as well as the fact that she had no job or accommodation in M. and hoped that she would earn her living in that way;

D.P., – a citizen of the State Union of Serbia and Montenegro – whom he met early 2003 through acquaintances, spent some time with her and, on several occasions, supplied her with small amounts of heroine which she, being a drug addict, used. Knowing that D.P., as a victim of trafficking in human beings in BiH, provided sexual services for money on her own and that she had no job, accommodation or legal place of residence in S., he introduced her to E.Ć. and told her that he organised prostitution in the M area. The accused asked her to work for him and E. providing sexual services for money, promising her the best conditions and protection from the person she had testified against as a victim, which D.P. accepted due to her difficult financial situation, drug addiction, the lack of accommodation, job or residence in S., and hoping that she would be able to ensure, in this way, her legal stay and earn a living;

The underage E.A., whom he attempted to recruit March or April 2003. After underage E., in order to help the accused Ć.N., enticed E. by financing the drugs she was addicted to in exchange for providing sexual service for money. In the flat E. and D. were used for prostitution. Ć.N. urged E. to provide sexual services for money for his benefit, together with E. and D. When E. refused, he ordered her to take off her clothes, threatening her with a gun. Fearing for her life, she obeyed and he forced her to have sexual intercourse with the intent to thus force her into providing sexual services for money...”

In its verdict **No. S1 3 K 994249 12 KŽK** of 30 January 2013, the **Court of BiH** found that the accused, B.P., committed a criminal offence of trafficking in human beings pursuant to Article 186, Paragraph 2 because *"In the second half of 2008, after he taking in the underage A.P., due to her difficult economic situation, he convinced her to live with him and her mother he was married to, he forced her to beg, and as previously arranged with A.B and U., he recruited her for a common-law marriage with their son, P. A.P. was forced by the them and B.P. into entering sexual relations with P. within several days of her arrival to their house. She was also subsequently subjected to labour exploitation by the same family having to work at landfill sites. She ran from the said family on several occasions, but B.P, abusing her physically and mentally, would return her back to the family.*

Therefore, by using the difficult family situation and immaturity of the injured party, using force and other forms of coercion, aware of the true significance and illegality of what he was

doing, he acted intentionally and willingly in order to entice her to enter into cohabitation and a sexual relationship with the purpose of her exploitation and abuse."

The verdict's reasoning reads furthermore that *"The accused was enticing and recruiting the victim by placing her in a situation in which she became subject to exploitation in the A.B. family for the purpose of forced labour and sexual exploitation. The accused was involved in forcing her to live with his son and handing her over to the A.B. family and that he was guilty of committing a crime was confirmed by the fact that every time the victim would escape, he would find and return her to A. The A. family to which she was handed over to for the purpose of forcing her into cohabitation and sexual exploitation. These facts were corroborated by testifying witnesses, especially by Š.H., the injured party's aunt, and by the witness A.H., who testified about threats she was exposed to by the accused P. and about the multiple injuries on the body of the injured party inflicted by 'her stepfather' when he would find her and return her after she had fled".*

It needs to be noted that in the first-instance procedure the Court of BiH did not find elements of a criminal offence of trafficking in human beings in the aforementioned acts thus acquitting the defendant of the charges in its verdict No. SI 3 K 004249 11 K of 28 September 2011.

In its verdict **No. KŽK-1/07** of 15 February 2007, the Court of BiH found that the accused N.Z. and N.N. *"in the period between February 2004 and February 2005, as co-perpetrators, aware and willing to act together, abusing the state of vulnerability and helplessness or difficult material and social status, by use of threat and other forms of coercion, recruited and enticed a female Romanian national (A.A.), female BiH nationals (M.A. a.k.a. K., M.B., and S.L.) and other unknown female persons for the purpose of exploiting them for prostitution, organised provision of sexual services to an indefinite number of clients in an apartment owned by the accused N.Z., for the purpose of acquiring material gain. The accused N.Z. would receive at least BAM 10 (ten) per sexual service and the female persons who provided those sexual services received at least BAM 20 (twenty) each. Whenever any of them refused to continue providing sexual services, the accused would exert pressure on them to continue by endless telephone calls, visiting them at their homes and, if that was not enough, the accused would threaten them...*

...thus committing a criminal offence of trafficking in human beings pursuant to Article 186, Paragraph 1, as read with Article 29 of the CC BiH".

In the aforementioned case, the first-instance panel of judges of the Court of BiH did not find elements of a criminal offence and acquitted the defendants N.Z. and N.N. of charges relating to the criminal offence of trafficking in human beings, by its verdict No. K-34/06 of 14 September 2006.

In its verdict **No. S1 3 K 005873 11 KŽK** of 27 October 2011, the **Court of BiH** found that *"by taking advantage of the poor material and social situation of the underage M.I., whom he had received from J.G in October 2003, and her emotional immaturity that prevented her from properly understanding the significance of her actions, in particular the significance of entering into sexual relations with other persons, the accused used sexually in the period from*

October 2003 until the second half of 2007. The accused... taking advantage of the said situation of the underage M.I., used her to recruit her female friends --underage B.D. and underage S.I.-- from September 2006 to the second half of 2007, also by taking advantage of their difficult material and social status and emotional immaturity and mental underdevelopment, which prevented them from understanding the significance of exchanging sexual favours for money. He enticed the underage B.D. and S.I., in order to earn money and to provide sexual services to the accused, which the two mentioned injured parties did hoping to earn some money, where the underage B.D. provided the accused with sexual services on several occasions and also together with the underage M.I. and underage S.I., for which they were paid BAM 50 each. The accused also tried to entice the underage S.I. to "set him up" with her two female friends, promising that he would award her for it and she would not have to be with him any longer. Finally, by continuing to abuse the same difficult social situation of the underage M.I. and S.I. and their previously established dependent relation on the accused and on the income they earned by working for him, he enticed the underage M.I. and S.I. to provide sexual services to his friends, acquaintances and guests who visited his Pub, the place where the accused most frequently negotiated the provision of sexual services by the injured parties, which took place in cars, motels and his Pub, for which the users of sexual services paid between BAM 30 and BAM 50 to the injured parties per service...

Thus committing the criminal offence of trafficking in human beings pursuant of Article 186, Paragraph 2 of the CC BiH."

In its verdict, the **Appellate Panel of the Court of BiH** explained in detail what constitutes the act of recruitment in this specific case, correctly noting that *"by soliciting or connecting the victims with other men, most frequently negotiating provision of sexual services to his friends and guests at the Pub, the accused C. placed the above underage victims in situations in which they were subject to exploitation or sexual exploitation.*

The said acts mentioned are qualified as acts of recruitment in this specific case, especially being that an act of recruitment involves activities of acquiring persons to be subjects of exploitation. By enticing underage persons to engage in prostitution and by negotiating provision of sexual services of those persons to other men, the accused C. carried out the activity of procuring underage persons to his friends and guests at his Pub for the purpose of sexual exploitation. The fact that the accused C. procured underage persons for prostitution is, also, confirmed by his first abuse of the underage M.I. and, then, the underage S.I. to find and bring other underage girls to him, whom he also exploited sexually, taking advantage of their emotional immaturity, naivety and need of money."

The Court of BiH first-instance panel did not find elements of the criminal offence of trafficking in human beings in the fact pattern above and acquitted the defendant from the charges by its verdict No. K-54/08 of 26 May 2010. Interpreting correctly international and local legislation and standards applicable on the subject matter, the Appellate Panel found that there were elements of the criminal offence of trafficking in human beings in the described activities.

The verdict of the **Appellate Panel of the Court of BiH No. KŽ-61/09**, of 9 March

2010 which confirmed the verdict of the **Court of BiH No. KŽ-76/o8** of 11 September 2009 rendered in the first instance underlines the following: *"The first instance court correctly found the acts perpetrated by the accused constitute all the elements of trafficking in human beings pursuant to Article 186, Paragraph 2 as read with Paragraph 1 of CC BiH and that the described acts of recruitment were carried out exclusively for the purpose of sexual exploitation of the victim.*

Contrary to what is stated in the appeal, the accused committed acts of recruitment by bringing the injured party to his art studio under the pretence that he would teach her how to paint, also giving her false promises that he would help her enroll in the art academy, convincing her that she would be unable to enrol without his influence and recommendation. Therefore, the means of perpetration, in this specific case, included deception, fraud and abuse of pedagogical influence that the accused exerted upon the underage female student in her first grade of secondary school, where he had worked as a fine arts teacher. Regardless his claims that he did not consider himself an academically trained painter, there is no question that the accused, as a fine arts teacher, had a certain authority and standing in the community they both lived in. It is completely irrelevant whether it was the standing of an academically trained painter or a graphic designer, as insisted upon by the accused, since it had been established that the victim had visited his art studio with the intention to acquire painting skills and knowledge that would help her enrol in the fine arts academy. Therefore, by abusing the authority and the status of a secondary school teacher, which, as correctly found in the disputed verdict, demanded from the accused, to develop a special relationship with his students, the accused committed the act of recruitment for the purpose of sexual exploitation of the injured party A.K. to satisfy his own sexual urges and depraved sexual needs, to which the victim rationally and convincingly testified before the court."

The dispositive part of the judgment of the **Higher Court in Kraljevo, No. 4K. 63/11** of 17 August 2011 states that the criminal offence of trafficking in human beings pursuant to Article 388, Paragraph 1 of the Criminal Code was committed as follows: *"the accused convicted person A. B. started a romantic relationship with the injured party S.S., a citizen of Montenegro, who was staying in K., and brought her to his house where he and the convicted D. K. at first claimed to be brother and sister, despite the fact that they lived in a common law marriage and had children. They promised the injured party a better life, good earnings and protection. However, they kept her locked in a separate room and was not allowed to move freely. The convicted D.K. withheld her ID card and other personal documents. They threatened to assault the injured party and when she refused to act upon their orders, they battered her with their hands, inflicting bodily injuries. They also threatened that they would break her bones and kill her if she tried to escape. When the victim managed to escape their house one day in April 2011, they found her in a cafe, beat her up, put her in the car and brought her back to their house. From then on, in the mornings they would take S.S. to a landfill site to collect secondary raw materials which the A.B. would sell without paying her. In the afternoons and evening, they would take her to village A and force her to prostitution. S.S. charged 1,000 or 2,000 dinars for her services and all the money she would earn, they would keep for themselves. They knew how much she earned because they made her keep a mobile telephone line open while negotiating the price with the client. Thus they collected and kept for themselves all the money obtained by exploiting S.S. for labour and sexually, illegally acquiring material gain."*

In its verdict **No. KŽ-31/10** (in connection with the first instance verdict No. KŽ-54/08) of 3 March 2011, the **Court of BiH** found as follows: *"The accused recruited both victims by giving them money and promises to help them with school, with the aim of creating a relationship of dependence and a situation in which the injured parties, as underage girls who could not sufficiently understand the gravity of their situation and consequences of their decisions, would become subject to sexual exploitation. Both victims confirmed that the accused told them that they must pay back their debt by providing sexual services to friends and business partners without telling that they were providing sexual services for money. Both injured parties unequivocally confirmed that they had sexual intercourse with the accused on multiple occasions."*

In its verdict **No. K.756/2005** of 16 December 2005, the **Municipal Court of Pančevo**, Republic of Serbia, found that the accused P.Ž. committed a criminal offence of trafficking in human beings as follows: *"between May 2003 and 3 November 2004 he **recruited, transported and transferred** the victim by the use of force and threat of the use of force, abuse of the relationship of dependence and difficult situation of the injured party with the aim of acquiring material gain through prostitution by lending money to the victim to buy heroine, which she was addicted to. Thus he made her dependent and recruited her, and persuaded her to prostitute in Italy to pay him back..."*

2. Transportation

Transportation, as a form of an act of perpetration, involves physical movement of victims from one place to another, that is, transportation from one in-country locality to another or from one country to another. Under the noted Council of Europe's Convention, to establish a criminal offence of trafficking in human beings it is irrelevant if the victim of trafficking enters the country legally or illegally (in the case of transnational trafficking). The key factor in the establishment of a criminal offence of trafficking in human beings, as it relates to transportation of persons, is that subjects are being transported for the purpose of their exploitation, with the application of one of the alternative means of perpetration, for example by fraud or deception where victims would believe that they would be given jobs in a private company with adequate monetary compensation.

The verdict of the **Supreme Court of Serbia No. Kz. 483/04** of 25 May 2004 and verdict of the **District Court in Belgrade No. K. 1038/03** of 24 December 2003 read as follows: *"The accused committed a criminal offence of trafficking in human beings in the manner in which they illegally transported foreign citizens abroad due to the fact that those citizens were unemployed in their countries of origin and were forced, as unqualified labourers, to accept any job in Western countries, whereas **the accused, by abusing their difficult material situation for the purpose of exploitation of their labour abroad, participated in their transportation to Western countries and received certain amounts of monetary compensation for this act.***

All three accused persons were found guilty on account of abusing the dependence and difficult material situation of 34 Turkish citizens of Kurdish origin and of participating in their illegal transportation from Turkey via Montenegro and from Serbia to Belgrade. They transported them for the purpose of transferring them to other persons, thus they mediated the

mediated the transfer for the purpose of exploiting their work abroad with the aim of acquiring monetary gain by charging them for the transportation to the Italian border, ranging from EUR 2,500 to EUR 4,000 per each citizen. For these reasons, the perpetrators needed to contact Turkish citizens that would take the injured persons from Turkey and transport them to Belgrade and Pančevo, where they would then wait for further transportation from Belgrade.

All these facts point out to the correct conclusion that the activities of the accused involve elements of a criminal offence of trafficking in human beings under Article 111b, Paragraph 2 in connection to Paragraph 1 of the Criminal Code, because the offence was committed against multiple persons.”

The verdict of the **Higher Court in Podgorica No. K 197/08**, found that “the accused A. D., K. M. and A. A., in the period from an unestablished day in September through November 2007 in Prizren, Kosovo⁷ and Ulcinj, Montenegro in an organised manner and by the use of force and deception, transported and held the underage G. A. for the purpose of bringing her into a position of servitude. The accused did this in the manner in which they came from Ulcinj to Prizren on an unestablished day in September 2007 in order to bring the underage G. A. to Ulcinj by deception to then exploit her for forced labour. The accused K. M. deceived her into coming from her Pećani Village to Prizren to the apartment owned by the accused A. D. and A. A. There she was told that they would go to Ulcinj for one day. When the injured party did not accept, she was subsequently beaten up by the accused K. M., and confined to the apartment until the accused K.M. transported her the next day in a vehicle driven by A. D. over the Kula border crossing into Montenegro. This was carried out after they acquired an ID card in the name of the adult person K.L for her. On this occasion, the accused A.D. ordered her to pretend that she was sleeping while he showed the officers at the border crossing the ID card with the name of the adult person K.L., falsely presenting it as the ID card of the injured party. Upon arrival in Ulcinj, the accused A. D. accommodated her in the shared apartment without registering her stay with the relevant authority and employed her as a waitress in the 'K' restaurant where the injured party earned income in the amount of EUR 10 per day, all of which was immediately taken from her while providing her only with an accommodation and some food:

on the basis of which they committed a criminal offence of trafficking in human beings in terms of Article 444, Paragraph 6 in connection to Paragraphs 1 and 3 of the Criminal Code.”

An interesting case of trafficking in human beings committed by transportation of the injured parties who were previously deceived about certain circumstances for the purpose of their exploitation is found in the verdict of the **Higher Court of Bijelo Polje (Montenegro) No. Ks. 12/12**. The reasoning of the judgement reads that “in repeated proceedings the accused Đ. fully admitted that he had committed the criminal offence for which he was charged and pleaded guilty. He stated that it was true that he had sent the convicted B.B. to R. to take over four persons sent to him by a man from K. whom he had met when he was transporting construction material by truck to Kosovo. That man had sent those four persons through K.E. who were taken over by B.B. in R. who was supposed to transport them to C. They had arranged all that via telephone conversation. They had all earned money from that job, and, although, the accused stated that he did not know specifically how much was earned,

7 All references to Kosovo in this text, whether to the territory, institutions or population, should be understood in full compliance with United Nations Security Council Resolution 1244.

he believed it was a large amount of money. The transportation of those persons was agreed upon by an Albanian from Kosovo, however the accused stated that he did not know his name. He claimed that he did not know what the Albanian had agreed upon with them, and that he only sent those persons to him and that the Albanian transported them across the border to Bosnia and Herzegovina. They had co-operated in that manner on two or three more occasions. He would receive a call from the Albanian, then he would call B. while K. would hand those persons over to B.B. who would then transport those persons in his van on several occasions. The transit route would lead to C. which is covered by the basic station LJ. He did not know where those persons went after C. nor was he familiar with the motive for their transportation from Kosovo to Bosnia and Herzegovina. He did not previously see the four persons brought in when B. was arrested, however he did see the other persons, who were black men and did not speak the same language."

The reasoning of the verdict further reads that *"the injured parties M.K., M.M.R., S. and R.M., while testifying as witnesses during the investigation and upon facing the accused B.B, all confirmed that they were citizens of Bangladesh and during May and June they travelled to Pristina, then they stayed in the area of Kosovo until their freedom was taken when they were transported in the van to Montenegro. They all testified that they came from Bangladesh after receiving recommendations and guarantees from alleged relatives and their friends. They had arrived and stayed in Kosovo earlier with the intention to get involved with trade and to earn profit. To that end, as enticed by the aforementioned accused persons, they all brought money with them: the injured parties M.M.R. and S. brought approximately EUR 2,000 each, the injured party M.K. brought USD 2,000 and the injured party R.M. brought around EUR 3,000. They all left those amounts of money, as well as everything they earned, allegedly, in the meantime with the persons who took them in and held them in the area of Kosovo. The same day, thinking that they could move around freely, they went to B. to 'examine the market' with the aim of earning more than in the area of Kosovo. They all consistently testified to the course of this trip describing that they arrived by taxi from P. to the place where the taxi vehicle 'broke down', and they had to continue on foot. This is when they were picked up by the van in which they were intercepted and apprehended by the police.*

However, all of them stressed that they knew they had neither residence visa nor travel visa for the countries of Europe, with the hope that the visa they had covered 'Yugoslavia as well' they had the intention to return to Kosovo in two or three days. They strongly testified that they had no intention to travel beyond Berane. The injured party M. clearly stated that he knew that Berane was in Montenegro and that one could get there by taxi from Kosovo, but claimed that he had never heard of the town of Pljevlje before. He and other injured parties, as it was the case also during the previous procedure, stated that they did not speak the language of the mentioned area, except M.M.R., who spoke a little bit of the language.

*The injured parties all stated clearly that they had no feeling that they were in a subordinate situation, subject to manipulation or trade or forceful labour against their will. In short, they all stated that they **did not feel like victims**, including in terms of the relation of the accused with them, especially because they did not know the accused."*

On the basis of the analysis of all facts and circumstances, the court concluded that *"only*

upon a careful and comprehensive analysis of all statements of the injured parties and upon connecting the statements with the entire evidence and a part of defence, could a realistic conclusion be drawn.

The injured parties, in this specific case, consistently stated that they had been received and held by, so far, unknown persons residing in the area of Kosovo and that they were deceived into thinking that their stay was officially allowed, so that they could develop their trade with textile, earn a good living and move around freely.

Those circumstances obviously constitute deception against the injured parties, in terms of the law, bearing in mind that their passports contained only stamps confirming entry into the airport in Pristina by the UNMIK police and that they did not have residence and work permits, not even temporary ones. This was confirmed by E.E., a person who has knowledge about the meaning of passport data.

That indicated that the injured parties were deceived in terms of the facts regarding a possibility of a legal stay and business development. Also, in contravention of the statement of the injured parties, it means that, under the circumstances as described by the injured parties, their trust toward persons who received them and held them in the area of Kosovo was abused in the manner in which they were requested to leave their money with the accused persons in the amounts stated above, allegedly for the purpose of starting a business, they were referred to the area of Montenegro to allegedly 'examine the market', and their lack of knowledge of local regulation, language, people and places they visited was abused.

Specifically, the injured parties, were encouraged by, so far, unknown persons from the area of Kosovo, who previously transported and held them in the area of Kosovo before departing for Montenegro, creating a false hope that the injured parties could develop their textile business there and earn income. The injured parties accepted those suggestions because of their vulnerability to the accused's' deception, at the same time leaving them money that they had. These injured parties were taken over by the accused persons, who were all connected within a chain of taking over and further transportation of injured persons, within the border crossing zone between the territory of Kosovo, controlled by the UNMIK police and the territory of Montenegro. After which, they were transported to Bosnia and Herzegovina in the van owned by B.B. on which occasion the accused were detected by the police. The accused also acted in that manner on earlier occasions with groups of 19 foreign citizens in total, bearing in mind that the accused Đ.R. and now convicted B.B. and K.E. and the mentioned persons from Kosovo and BiH planned and carried out the mentioned activities for a longer period of time."

Deliberating on the elements of this criminal offence, this Court in this specific case concluded that "under Article 444 of the Criminal Code, in terms of a criminal offence of trafficking in human beings, three elements are characteristic, as follows:

acts, means and purpose of exploitation. The acts are alternatively prescribed and they include, inter alia, recruitment, transportation, transfer, harbouring or receipt of other persons, while the means of perpetration includes, inter alia, fraud, deception, abuse of trust or difficult situation of other persons. In line with this legal description, for the

*existence of a criminal offence, the mentioned **acts** and **means** have to be in function of the achievement of a **purpose**, such as forced labour, slavery, criminal activities, prostitution, pornography, removal of body parts and armed conflicts. This stems from the legal definition that an offence is completed when one of the above acts is committed by one of the above means with the intent of achieving one of the above purposes, meaning that a purpose does not necessarily have to be achieved for the existence of a criminal offence.*

In this specific case, having in mind the above said, the court considered the fact that a purpose does not necessarily have to be achieved for a criminal offence to exist, for it is quite certain that the intent of the accused included not only the act and manner of perpetration but also the purpose desired – bringing the injured parties into a situation in which they might be enslaved under certain circumstances and exploited in the country of destination. In terms of their lives, such an interpretation of a legal norm is justified, because waiting for the purpose to be achieved in order to collect material evidence might inflict permanent damage on the interests of the injured parties.”

3. Transfer

Transfer, as one of the alternative forms of perpetration in the context of this criminal offence, includes an act by which a victim of trafficking in human beings is made available to another person, for example to a user of services of the victims of trafficking or to another person who is also a perpetrator of the criminal offence of trafficking in human beings. For instance, a person using force or threatening the victim with the use of force transfers an already exploited victim to another person who will continue the exploitation, also transferring in that manner the control over the victim to another person.

Explaining this act of perpetration, the verdict of the **District Court in Doboj No. 13 O K 003360 15 K**⁸ of 18 June 2015 states that: “...*the accused transferred the injured party to other persons for the purpose of prostitution, which is concluded by the panel of judges on the basis of the testimony of the injured party and witnesses who were consumers of sexual services provided by the injured party and who paid for the sexual intercourse with the injured party, and the accused M.D. connected the injured party with the consumers most frequently via telephone and to whom the injured party handed the entirety of the money earned. On one occasion, as the injured party stated herself, she handed the amount (BAM 40) to the accused O.M. The accused persons drove the injured party M. to the place of meeting with “clients,” after having previously called her on her mobile telephone to tell her to get ready and wait, which was testified by Đ.D., C.A. and others. They usually waited for her close by and drove her back home....”*

Having regard to the above case, it is important to note that the Doboj District Prosecutor's Office **stated** in the indictment No. T15 o KT 0018385 15 of 17 March 2015 that the accused M.D. and O.M. “during the month of January 2015 in the area of Teslić and Tešanj, for the purpose of prostitution, on several occasions, by using force or threat of the use of force and other forms of coercion, threatened the injured party C.A. that they would expose her to the cruellest methods of torture and abuse, in addition to taking her underage 17-month-old child away from her.

⁸ At the time of the drafting this publication, this judgement had not yet become final.

In using these means, they forced her to provide sexual services in the manner in which they **transferred her to clients in the area of Teslić and Texan municipalities, including to H. H., K. P., B. R. and to other persons for certain amounts of money, which they took directly from the clients or from the injured party C.A...."** However, the Prosecutor's Office omitted to accuse the users of sexual services of committing a criminal offence of trafficking in human beings in terms of Article 198a, Paragraph 4 of the CC RS, which prescribes a prison sentence ranging from six months up to five years for anyone **who uses** or enables the use of sexual services or other forms of exploitation, being well aware that a victim of trafficking in human beings is involved.

It stems from the very text of the indictment that the Prosecutor's Office was familiar with the fact that the mentioned persons had used the services of the injured party knowing that she was a victim of trafficking in human beings, for those same 'clients' had given money for using the services of the injured party C.A. (which was corroborated by their statements presented in the reasoning of the judgement). By acting in this manner, the Prosecutor's Office unjustifiably abolished guilt of the persons who enabled through their behaviour the perpetration of this kind of crime, because trafficking in human being was in this case ultimately organized to satisfy the interests of users of sexual services provided by victims of trafficking in human beings. This is precisely why the noted CoE Convention, CC RS, CC BiH and other relevant documents prescribe sanctioning the users of sexual services in order to efficiently fight against and prevent trafficking in human beings. In that way, the demand for persons to be exploited can be reduced along with the scope of this kind of criminal activity.

The verdict of the **Higher Court in Podgorica No. K. 6/13** established that *"the accused J. V., in the period between 17 July 2011 and 15 July 2012 in the area of the H.N. municipality, was involved with trafficking in human beings, abuse and the exploitation of a difficult situation for the purpose of prostitution as well as the **transfer of a larger number of female persons** to other persons. Amongst these females, two of them were underage girls, of which the accused was aware. The accused committed the offence in the manner in which he abused the injured parties S.S. and A.M., who came from the same place in R. M.. He took advantage of their difficult material situation, unemployment and the illness of their family members. For instance by promising to help the injured party A.M. provide medical treatment for her father and acquisition necessary injections, while promising the injured party S.S. that he would give her money for medical examinations for her ill mother, in exchange for the money the injured parties made working on a ship, as he had promised them before. Although he knew that they had no money, he demanded that they return it. He explained that they could earn that money by providing sexual services. Concerning the injured party V.D. and her underage daughter S.M., whom he knew was underage by the fact that he asked her to hide her age while meeting men, he abused and exploited their difficult material situation because they had told him before they did not have money for food, nor to pay their utility bills, and that they could barely make ends meet. In the case of the injured party R.A., whom he had promised to help manage her difficult financial situation after she had confided in him, the accused lent her money for her rent, then he forced her to pay the money back by providing sexual services. In the case of the injured party A.D., who was forced to come to H.N. in C.G. due to her difficult, isolated*

*situation where she did not know anybody besides the accused, he abused her difficult material situation by enticing her to provide sexual services to earn the financial means that would improve her family's material situation. Similarly, in the case of the underage P.D., whom he knew was underage, he met her while she was attending school and, motivated by gaining profit, **abused her difficult situation and transferred her to various men for the purpose of prostitution,***

on the basis of which he committed a criminal offence of trafficking in human beings in terms of Article 444, Paragraph 6 in connection to Paragraphs 3 and 1 of the Criminal Code of Montenegro."

4. Harboring

Harboring as a form of an act of perpetration of this criminal offence should be understood to imply that the victim of trafficking in human beings is kept hidden from public, that is, from other persons who may potentially be in position to help the victim, at a specific location that is accessible only to the users of services or specifically chosen persons, but also at locations accessible to other persons in a manner which ensures that the presence of the victim at that location is kept hidden from other persons. Harboring should therefore be understood as an act of prolonging the victimised state of a passive subject, notwithstanding the location or means of perpetration.

5. Receipt

Receipt is an act of perpetration by which a victim of trafficking in human beings is taken over from another person, in other words, the control over a victim of trafficking in human beings is taken over from another person, for the purpose of exploitation.

A criminal offence of trafficking in human beings is frequently committed by carrying out several forms of perpetration alternatively set in the subject-matter of the criminal offence. For example, the verdict of the **Appellate Panel of the Court of BiH No. X-KŽ-06/181** of 21 April 2009 reads as follows:

"...committing the acts given in the factual description of the indictment under Item 1, the accused K. and P. organised a group of people and managed that organised group in order to recruit, transfer and accommodate female persons for the purpose of exploitation by prostitution and other forms of sexual exploitation and organised recruitment, transfer and accommodation for multiple female persons, who did not have a BiH citizenship and registered place of residence on the territory of BiH, for the purpose of exploitation by prostitution and other forms of sexual exploitation in order to illegally obtain material gain."

B) MEANS

A constituent element of a criminal offence of trafficking in human beings, along with alternative acts of perpetration, is a means of perpetration of a criminal offence. Under the

noted Council of Europe's Convention and Article 186, Paragraph 1 of the CC BiH, a means of perpetration involves the use of force, threat of the use of force or other forms of coercion, abduction, fraud or deception, abuse of power, influence or position of vulnerability, or giving and receiving payments or other benefits to achieve the consent of a person having control over another person. In terms of this criminal offence, it is therefore necessary to establish the existence of one of the mentioned means of perpetration which can on occasions become difficult with perfidiously committed criminal offences. However, if the passive subject is a child i.e. a person under the age of 18, the criminal offence exists even if none of the alternatively set means of perpetration are used.

1. Use of force or threat of the use of force or other forms of coercion

The most frequent means of perpetration of a criminal offence of trafficking in human beings is the use of force or threat of the use of force or other forms of coercion. Coercion involves use of physical or mechanical force against a person in order to achieve a desired behaviour from that person. Under Article 1, Paragraph 28 of the CC BiH, force includes the use of hypnosis or opiate drugs against a person in order to bring that person against his or her will into a state of unconsciousness or incapability to resist. Force is also considered "used" in situations when there is no direct physical action against the person, but the actions taken against the person influence him or her equally as the use of physical force would. Threat or moral force includes presenting someone with the harm that may happen to them unless they behave as the perpetrator desires. The threat must also be serious, and it becomes serious when, on the basis of its nature and given circumstances, it is objectively convenient for encouraging a certain decision or a type of behaviour from a concerned person. It is irrelevant whether a perpetrator is ready to fulfil the threat or if the threat is objectively feasible. It is important that the threatened person takes the threat seriously, meaning that it is the subjective effect of the threat that is of relevance.

Threat may be exerted by e.g. murder, attack on bodily integrity, attack on honour or reputation, etc. Threat is most frequently exerted verbally, but can also be exerted by suggesting and/or showing what may happen to persons who refuse to act upon an order or a request of a perpetrator of a criminal offence, this in a manner in which a passive subject is told how the use of force is applied to another person, for example by 'physical punishment' of disobedient girls who lie about the amount of money earned, mistreat clients, or exhibit similar kinds of disobedience.

As illustrated, the legislator provided for other forms of coercion in addition to the use of force and threat of the use of force. These other forms of coercion, in the context of this criminal offence, should include all acts which exclude freedom to decide, meaning all acts which influence a passive subject to behave in accordance with requests and desires of a perpetrator of this criminal offence. This would for example include the taking away identification documents, threatening to cause physical harm to passive subjects' closest family members, or threatening to reveal the passive subjects' activities. The acts which may be considered to constitute this means of perpetration are very diverse, stemming from existing case law.

Force or threat of the use of force or other forms of coercion may be used as methods of keeping a victim in a state of dependence during the perpetration of a criminal offence, that is, during the recruitment or transportation of the victim or during the perpetration of a form of exploitation. The reasons provided in the verdict of the **Appellate Court in Novi Sad No. Kž. 14897/10** of 7 December 2010 for overruling the verdict of the Higher Court in Novi Sad No. K. 532/10 of 9 June 2010, reading: *"Furthermore, the court of first instance established hereby that the accused used force against the injured parties, but that force had not preceded the perpetration of the criminal offence, as stemming from the dispositive part and factual description, which was corroborated by the injured parties themselves. The injured parties did not engage in prostitution as a result of the use of force or threat of the use of force, but the accused exerted force after they had already engaged in prostitution because he was unsatisfied with their behaviour or amounts of money earned", are not satisfactory.*

When interpreting this means of perpetration of a criminal offence, that is, the relevance of the used force or threat of the use of force, all circumstances surrounding the case must be taken into account because something that represents a serious threat or force for one person leading that person to obedience may have no relevance at all for another person. Therefore, when assessing circumstances, one must take into account the age and mental state of a passive subject, his or her emotional maturity, social and intellectual status, the 'criminal reputation' of the perpetrator, the place of the use of threat or force, the means of the use of threat or force, etc.

In that regard, the verdict of the **Court of BiH No. KžK-1/07** of 15 February 2007 in its reasoning explained in detail all circumstances relevant for the assessment of this element of a criminal offence as follows: *"The witness/victim A. A., an injured party that refused to provide sexual services, when asked by the court at the main hearing on 4 July 2006 if she had been threatened by someone, after attempting not to reply to the question on two occasions and after stating: 'so, this means that I have to answer', said that she had been threatened by the second accused N. N. during their encounter when she was walking with her son on the way to the grocery store where she was approached by the accused who told her to listen to what Z. tells her to do, telling her that she should not forget that she has a son and to think what may happen if she disobeys Z. According to A. A. that took place after Z. had visited O.G., where A. A. was living, bringing three clients along and exerting pressure on A. A. to change her mind. When she still refused to provide sexual services, the accused Z. continued to threaten her via mobile telephone telling her to 'listen to her son or otherwise she will end up in hospital'. A. A. changed her mobile telephone number after that, but the accused continued to call her on the landline telephone belonging to O.G., repeatedly threatening her and telling her that she 'cannot calm Z's son down and that she should listen to him'.*

*A. A. finally admitted, quite anxiously, after the court had asked the question several times if she had been threatened, she had taken all the words of the accused as a **threat**, particularly emphasizing that she was in a difficult situation in a foreign country with a small child and that she foresaw a serious threat for her child and herself, which is why she continued engaging in prostitution for three more months under constant threats exerted by Z. and her son, after which she finally went to a safe house and remained there."*

The verdict of the **Court of BiH No. K-71/05** of 25 April 2006 in its reasoning explained in detail all circumstances relevant for the assessment of this element of a criminal offence as follows: *"Witness D.I. explained, quite convincingly in the court's opinion, what had happened in the apartment. The witness stated that E. said in her presence to the accused that they would work together, and when she was told that prostitution was involved, D.I. categorically refused by saying 'that is out of question'. The witness stressed, furthermore, that the accused started threatening her seriously by saying 'you do not know how I can torture' telling her that he would press her face against the heated stove and that he would batter her. It is obvious that D.I. fearing for her physical integrity, being underage and unemployed and without any source of income, and having run away from home consented to take 'the job' to which she was literally forced, due to the threats imposed on her that she understood to be serious and believed would be enforced, given her age and experience...."*

The use of force and threat of the use of force was also corroborated by other witnesses according to whom, "D. I. was constantly in great fear of the accused while working for him, which was caused by his threats and use of blackmail, since the accused had previously recorded naked photographs and videos of E. and by a camera he video recorded D. I. and himself having a sexual intercourse. E. stated that the accused threatened that he would send those shots to her parents and shamed her by saying 'what would they think of this'...."

The case law of the Court of BiH contains the case of B.P. in which the panel of judges adjudicating in first-instance has not found elements of the criminal offence of trafficking in human beings, such as recruitment, use of force or threat of the use of force or other forms of coercion, thus noting in the verdict **No. S1 3 K 004249 11 KŽK** of 28 September 2011 the following:

"On the basis of the evidence presented by both the prosecution and defence, the court finds that the prosecution could not prove that the accused P.B. had committed the criminal activities described in the modified dispositive part of the indictment, which are qualified under the law as constituting a criminal offence of trafficking in human beings in terms of Article 186, Paragraph 2 of the CC BiH."

However, the **Appellate Panel** of this court, in the same factual description of the offence and on the basis of the same facts and evidence, stated in its judgement **No. S13K 004249 12 KŽK** of 30 January 2013 the following:

"The evidence presented during the course of the trial hearing and the hearing before the Appellate Panel prove beyond doubt that the accused, P.B., as described in the judgement, committed the criminal offence of trafficking in human beings, as enumerated under the provisions of Article 186, Paragraph 1, with reference to Paragraph 2 of CC BiH. The accused took advantage of the difficult economic situation affecting the family as well as the immaturity of the injured party, A.P., and resorted to the use of force and other forms of coercion, in addition to employing other means to force the injured party to beg and work, along with inciting her to enter sexual relations and start an extramarital relationship. All of the mentioned acts were conducted for the purpose of exploiting and taking advantage of the injured party."

In the reasoning part of the judgement, witness statements were cited, including the following statement:

"Witness A.H., from B., confirmed the claims of the injured party in terms of providing the circumstances relating to their relationship, as well as the circumstances in which she became a member of A's family, adding a description of her living condition under the subject family. In her statement made during the trial hearing, the witness, A.H., described the multiple instances of forceful transfer of the injured party from her family by the accused P.B and B.A., adding that P.B. threatened the witness and her family, urging them to leave A. alone because she was married to P. It was also added that the accused made threats, while holding a wooden baseball bat he kept hidden under the seat of the van.

In addition, the accused informed A. and her husband, both indirectly and directly, that they had to financially compensate him for A., adding that A. was sold to E. and U., and that they had no right to accept her into their household. In the statement made during the trial hearing, the witness explained that on one occasion the injured party had gone to get some water and went missing thereafter. When returning a while later, the injured party stated that the accused, P., had found her at the location she had gotten water, dragged her into his car and physically abused her on their way to his home, where he then tied her and beat her with a cable. This is why she returned to B. with multiple injuries on her body. In reference to this event, the accused, according to the statement of this witness, expressed threats to B., as well as the witness, mandating that the witness not say anything that would disadvantage him, adding that he would be released from prison eventually, but she would never return from her grave."

Based on the evidentiary hearing, the court appropriately concluded as follows:

"The statement of the injured party, A.P., statements of witnesses A.H., S.H., E.P., and the statement of witness, E.H., suggest beyond doubt that upon each attempted escape of the injured party, A., from family A., the accused, P.B., pursued, threatened, found and returned her on several occasions to family A. Either accompanied by members of family A., on his own, or accompanied by the mother of the injured party, the accused abused the juvenile injured party both physically and psychologically, causing her, as corroborated by the statements of the interviewed and listed witnesses, to become completely intimidated and psychologically unstable, due to the treatment she withstood from the accused and her mother."

The reasoning section of the judgement **No. 13 O K 003360 15 K** of 18 June 2015 issued by the **Dobož District Court**⁹ listed multiple acts qualified by the court as the use of force, threat and other forms of coercion, citing, among other things the following:

"They were telling her (the injured party) that it would not bode well for her if the clients were not satisfied, adding that anything might happen, threatening to physically abuse her and to report her to the social welfare centre as a means to take her child away from her, since the proceedings were ongoing before the Teslić Municipal Court resulted in handing the custody of her child to her mother while she was detained. He reminded her that she had a criminal record. Both of the accused frequently physically abused her. When she resisted, they would take her to the woods on the way towards...,

⁹ At the time of the drafting of this publication, the judgement had not yet become final and binding.

where they would beat and harass her. D. used to tell M. that she would beat and torture her; she used to pull her nipples telling M. that nipples were the most sensitive part of the female body. Once D. had even pulled her nipples with her teeth when she began refusing to spend time with the clients... When she realised that she had become disgusted with it and that she could not put up with it any longer, she told them that she did not want to do it anymore; they consequently beat, threatened and humiliated her. On another occasion, they took her to, together with her little daughter and her 11-year-old brother. While the children stayed in the car, they brought her out in the snow and they both proceeded to punch and kick her, focusing their blows on the ribcage area, which resulted in multiple injuries and bruising. She later showed this to her mother who proceeded to call the police. In another instance, D. and M. took all her clothes off and threw them in the snow, forcing her to return home naked. After Crni Vrh, M. took her to his home in J. As she was wet, he gave her his shirt. The witness claimed that she would never be able to forget that night. D. and M. took her to the basement and told her as follows: "Can you see this room? We will stage torture in here!" While they were driving her in the car, M. was telling her: "Do you know what I do to my people who do not obey me?" He proceeded describing four different forms of punishment for disobedience, specifically, closing people in the chicken coop with chickens and snakes, cutting one of their fingers off or electrocuting them. He then found two wires, checked the voltage in the outlet and then gave her the wires to feel the electricity. D. suggested to put the wires on her nipples first and then in her vagina and he told her to come closer to the outlet, so she could feel the electricity. They later closed her in the chicken coop where she was cold. They took her cell phone away and blocked the door with a piece of wood and she could hear the dog barking. They told her later that she had a client, that a person named N. would come. They took her to the café "E," parked the car far away from the police station lest being recognised by the police. She then had sex with that man in the car. They had followed them in another car. When the man gave her BAM 40 she was forced to give it to M. From there, M. took her to the basement again and tortured her using the same electric shocks and he then took her back home, threatening to shock her again."

The use of force and the threat of the use of force was identified by the **Municipal Court in Pančevo** (judgement **No. K.756/2005**) in the actions of the accused, who, knowing that the injured party was a drug addict who owed money to drug dealers, lent money to her on multiple occasions and relocated her to Italy where she engaged in prostitution to repay her debt to him. The Judgement further specifies that the injured party returned from Italy to Serbia and Montenegro and that the accused, P.Ž., repeatedly, and with the assistance of other persons, transferred her back to Italy where she engaged in prostitution for the benefit of the accused who forced her to make EUR 500 per day payments to repay the debt. When the injured party threatened to report him to the Italian authorities, the accused, P.Ž., threatened her mother and said that he would kill the injured party and remove her kidneys. In mid-June of 2004, the injured party went to the Embassy of Serbia and Montenegro in Rome, where she was issued a passport, subsequent to which she returned to Serbia and Montenegro. In reaction, the accused came to her apartment, assaulted her and her mother, and requested the injured party to engage in prostitution and repay the debt, after which the injured party engaged in prostitution in Serbia and Montenegro for the benefit of the accused. On 3 November 2004, the accused assaulted the injured party and punched her in the head with an opened fist. The facts listed here represent the elements of the criminal offence of trafficking in human beings.

When it comes to interpreting the element referred to as “**other forms of coercion**”, rather extensive interpretation is used in practice, including the modes of behaviour of the perpetrator of the criminal offence, which on its own, represent individual criminal offences different in nature from the criminal offence of trafficking in human beings. Accordingly, for instance, the **Court of BiH**, in the judgement **No. K- 71/05** of 25 April of 2006, states that the accused: *“tried to recruit the juvenile injured party by... instructing the juvenile injured party to remove her clothes, threatening her with a handgun, causing the injured party to comply out of fear for her life. He then forced the injured party to have sex with him against her will, with the intent to force her to provide sexual services in exchange for money...”*

The actions described above were considered by the court to constitute a means of perpetration of the criminal offence of trafficking in human beings, or in other words “other forms of coercion”, which is not justified from the criminal justice policy standpoint because the described behaviour is criminalised as an independent criminal offence, categorised within the group of criminal offences against sexual integrity, as mandated under the entity law, as opposed to the criminal offence of trafficking in human beings which is categorised under the category of criminal offences against humanity and values protected under international law. In interpreting the term “other forms of coercion” in this manner, the court pardons the perpetrators of serious criminal offences. Because the mode of behaviour represents an independent criminal offence, it is different from trafficking in human beings in its nature. However, in terms of the form of the offence, it is treated as the criminal offence of trafficking in human beings. This course of action by the court relieved the perpetrator of criminal responsibility for his acts.¹⁰

However, the case law of neighbouring countries suggests a **different stance** for this matter. For instance, the **Higher Court in Podgorica**, in its judgement **No. K 198/08**, found that the accused, A.D., committed the criminal offence of trafficking in human beings and the criminal offence of rape over a prolonged period of time. The court found that A.D., during a period of time that the injured party spent in his apartment, where she had been taken for the purpose of work exploitation, *“used force and threats to force the juvenile G.A. to have sex with him on three occasions. The first time it happened, he threatened to physically abuse the victim if she did not agree to have sex with him, forcing her to agree out of fear. The second time, when the injured party refused sex, he pulled her hair and threw her down on the concrete floor, used an iron bar to beat her, and once she ceased to resist, had sex with her. Finally, the third time, he threatened to beat her again, which made the injured party fearful and unable to resist, enabling him to have sex with her. These acts were qualified by the court as the criminal offence of rape over prolonged period of time.”*

There is no doubt that the accused, A.D., used rape in this specific case as one of the mechanisms of exerting control over the victim. The court has appropriately decided not to treat the acts undertaken by the accused as “other forms of coercion” nor as the means of perpetration of the criminal offence of trafficking in human beings, but has instead qualified it as an independent criminal offence, i.e. as rape.

The same treatment of the issue was noted in the judgement of the **Higher Court in Novi Pazar**, **No. K 11/10** of 21 May 2010, in which the accused, O.M., was found guilty for *“knowingly and with premeditation, having fully understood that his actions were against*

¹⁰ For more details see the paper by, I. Marković, under the title: “Trafficking in Human Beings in Criminal Codes of Bosnia and Herzegovina, Collected Papers, p. 3-6

the law, used force and threats to attack the life and body of the minor person, forcing her to have sex with him in addition to using threats to force the minor person into prostitution. He knew that the injured party was underage and unable to make a living in N.P. so he hired her to work in his café as a waitress in mid-August of 2009. The evening the injured party was hired, he threatened her and said that she had to comply without question, adding that failure to comply could result in a multitude of negative consequences for the injured party. He made threats against the victim's life and body in order to force her to have sex with him. He repeated these same actions seven to eight times over a period of several days, continuing with the use of threats and psychological pressure, assuring the injured party that anything might happen to her, adding that he served a 15-year prison sentence in Sweden as a means to affirm that she did not know anything about what he was capable of, using force, pulling her hair and slapping her repeatedly. One day, he threatened to dismember her and added that her body parts would be looked for all over Serbia if she refused to provide sexual services to a guest. He then forced the injured party to provide sexual services to patrons of his café in exchange for a EUR 20 charge, which she was required to hand over to him. During the period since mid-October of 2009, the injured party had sex in hotels, houses and cars with a large number of unknown male individuals, who paid the accused the fee specified above in exchange for one hour of sexual services. Once the sexual exploitation and prostitution of the injured party resulted in pregnancy, he allowed the juvenile injured party to leave his café and N.P.

These actions constitute the criminal offence of rape over a prolonged period of time, as mandated under the provisions of Article 178, Paragraph 3 and the criminal offence of trafficking in human beings, as mandated under the Paragraph 388 of the Criminal Code. “

The use of force and the threat of the use of force and other forms of coercion are often part of different actions which aim at the submission of the victim. However, other means of perpetration are often used as well. The judgements of the **Appellate Court in Belgrade No. KŽI 6471/11** dated 9 February 2011 and the **Higher Court in Belgrade, No. K. 378/10** dated 6 September 2011, note as follows: *“The court of first instance found correctly that the accused kept the identification documents of the injured party with the intent of detaining her and exerting pressure on her to force her to engage in begging, having known that the injured party was a foreign citizen and that she was unable to leave the territory of the Republic of Serbia without her identification documents, regardless of the fact that she could speak and understand the Serbian language. These claims were corroborated by the statement of the injured party, which suggested that the accused, in addition to withholding personal identification documents of the injured party, undertook other acts of perpetration of criminal offences, and used force and threats in addition to taking advantage of the relationship of dependence and the poor material situation of the injured party, to exploit her for the purpose of begging. The statement of the injured party clearly suggested that two months after she had entered the territory of the Republic of Serbia, the accused started forcing her to beg in order to make a living, because their material situation was difficult. He threatened her and physically abused her on a daily basis, using among other things, a copper wire, an aluminium pipe and an electric cord. He took her in front of the building where she was asked to beg and waited for her across the street to receive the money. The appeals of the accused stating that there was no correlation between physical abuse of the victim and the forcing of the victim to beg were found not to be justified.”*

2. Abduction

The legislator defined abduction as a special means of perpetration of the criminal offence of trafficking in human beings. Having in mind the fact that abduction was criminalised as an independent criminal offence (i.e. under the provisions of Article 165 of CC RS), this means of perpetration of the criminal offence should be interpreted in accordance with the provision. Accordingly, abduction exists when a person is taken away or detained by the use of force, threat or deception, or another method, with the intent to extort money or a different material benefit from that person or from another person, or to force that person or another person to do something, to refrain from doing something, or to suffer something.

According to the judgement of the **District Court in Belgrade No. Kž. 312/03** dated 10 April 2003, and the judgement of the **Second Municipal Court in Belgrade No. K. 1295/01** dated 5 July 2002, the criminal offence of abduction was found to have been committed in the case where *"twelve Chinese citizens were deceived by seven accused persons, six among whom were Chinese citizens, and detained for seven days with the intent to keep them in detention for as long as it took to extort money from persons close to them"*.

The reasoning part of the judgement specifies as follows: *"the principally accused, a citizen from our country, who claims to be an interpreter, deceived the Chinese citizens who were denied the request to stay on the territory of the FRY and took their passports, asserting it would help them. In collusion with other accused persons, he transported the injured parties in four taxi vehicles in previously prepared premises. Once he took them to the leased apartment, the injured parties were denied freedom of movement and the accused persons took turns guarding them. The injured parties were threatened to be executed unless they provided telephone numbers of their relatives in China. The accused persons intimidated the injured parties claiming that to kill a Chinese person in Belgrade no longer meant anything, adding that it was considered to be no more serious than killing a chicken. The accused persons contacted the relatives of the injured persons in China, while physically abusing the injured persons so that the relatives could hear over the telephone the punches and the moans of the injured persons. The accused persons took the money that the injured persons had in their possession. The injured persons were kept in confinement until the police intervened on the seventh day of their detention. At that instance, three different handguns with silencers and ammunition were taken away from the accused persons. These acts were found to constitute the criminal offence of abduction, as mandated under the provisions of Article 64, Paragraph 2, with reference to Paragraph 1 of the Criminal Code, because the injured parties were threatened to be executed, with the purpose of accomplishing a planned goal."*

The judgement of the **Supreme Court of Serbia, No Kž. 633/05**, dated 1 November 2005, and the judgement of the **District Court in Belgrade, No. K. 1134/03** dated 22 June 2005, found that the criminal offence of abduction was committed in the case where *"the accused used force and threats to take away and detain the injured party at Zemun cemetery, with the intention of releasing him when they forced him to agree to sell heroin for them. They punched and kicked him and beat him using an iron bar, threatening to kill him and continued doing so for as long as it took for the injured party to agree to sell heroin for them."*

The reasoning part of the judgement specifies as follows: "*These actions of the accused are found to constitute the criminal offence of abduction, since force and threats were used to force the injured party to sell heroin*".

According to the judgement of the **Supreme Court of Serbia No. Kž.Ok.1/05** dated 29 September 2005 and the judgement of the **District Court in Belgrade – Special Division, No. K. P. 8/03** dated 12 June 2004, the criminal offence of abduction (qualified form of the offence) was found to have existed in the case in which "*force and threats were used to take away and detain the injured party by the accused persons for more than 10 days, with the intent to extort money from his brother. The injured party was found in the underground garage in S., where he was tied and put into a car and taken to Serbia on foot across the border and taken to L. and V.B. During that time, his brother was contacted and asked to pay one million euros and threatened that the hand, the foot or the head of the injured party would be sent to him if he failed to comply. After the threats were made, the brother of the injured party presented the accused persons with EUR 590,000 before the accused persons released the injured party from their custody.*"

If the perpetrator of the criminal offence of trafficking in human beings undertakes an act of perpetration by acting in the above described manner and with the purpose of exploitation which represents an element of the criminal offence of trafficking in human beings, then this represents such a means of perpetration.

3. Fraud or Deception

Fraud or Deception, as means of perpetration of the criminal offence, imply acts which result in another person having wrong ideas about something, with the purpose of accomplishing the desired purpose. Acts or actions which cause a person to be deceived may vary and their impact in the context of this criminal offence has to be viewed in the context of the specific victim rather than in the context of a random average person capable of realistically assessing the chances of fulfilling the promises made. In other words, the personality and subjective features of the victim must be considered in addition to the victim's wishes and expectations, age, living conditions, intellectual capacity, education, etc.

These means of perpetration of the criminal offence may be found in the judgement **No. Kž-76/08, Court of BiH** dated 11 September 2009, which finds that the accused used **fraud and deception**, using the authority he had as an arts teacher of a secondary school attended by the injured party. The accused expressed interest in providing painting classes to the injured party free of charge, in addition to giving her references that would serve as a basis for her enrolment into an art academy. The accused undertook necessary action to make sure that the injured party would come to his studio and then proceeded to create special conditions by making signals and taking actions to suggest emotional affection for the injured party, hoping to persuade the injured party into a sexual encounter (according to the statement of the injured party: ...the accused would touch her neck and breasts, asking her to take off her clothes so he could take photos of her naked body; he would also appear before her with no clothes on...).

Explaining its views, the court of first instance stated as follows: *"It has to be considered as completely realistic that the injured party, A.K., expected to develop her skills as a painter in her teacher's studio which would help in her enrolment in the art academy. The injured party considered the accused to be a renowned artist, a person with connections in artistic circles, a person of authority who could help her..."*

The judgement of the **Appellate Panel of the Court of BiH, No. X-KŽ-06/181** dated 21 April 2009, noted as follows: *"For the purpose of recruitment of female persons, with the intent of exploiting such persons through prostitution and other forms of sexual exploitation, the accused T.K. and M.P. agreed with other persons known to them that those persons would help them with recruitment of women and arrangement for the legitimate stay of those women on the territory of Bosnia and Herzegovina. As a result, with the assistance of other persons, the accused provided shelter to women who did not have permanent residence in the territory of Bosnia and Herzegovina nor the citizenship of BiH, who visited restaurants in the territory of BiH and provided sexual services in exchange for money, as victims of trafficking in human beings. The accused persons used **fraud and deception, promising employment to lure women from their permanent places of residence in their home countries in pursuit of employment in other countries in which they do not have permanent residence. The victims were recruited to provide sexual services in exchange for money..."***

Case law often contains cases in which several means of perpetration of this criminal offence were used, such as fraud, deception, the use of force, etc. Such a case is illustrated in the judgement of the **Higher Court in Kraljevo No. 4K. 63/11** dated 17 August 2011, which cites that the criminal offence of trafficking in human beings was committed in the following manner: *"the accused A.A. initiated a romantic affair with the injured party S.S., a citizen of Montenegro, who was staying in K. Several days later, he took her to his home, where, during the first several days of her stay, the accused A.A. and the convicted D.K. falsely identified themselves as siblings, although they actually lived in an extramarital relationship and had children together. They promised the injured party a better life, decent earnings and protection; yet they later kept her in a separate room, locked her in and prevented her from moving freely. The convicted person, D.K. kept the victim's identification card in her possession in addition to the victim's other personal documents. They threatened to physically abuse the injured party S.S. and when she refused to comply with their demands, they assaulted her using their hands, inflicting bodily injuries and threatening to crush or kill her if she escaped. When S.S. escaped from the house on an undetermined date in April of 2011, they found her in a bar "K," physically abused her, pushed her in a "Mercedes" vehicle and returned her to their home..."*

4. Abuse of power, influence or position of vulnerability

Abuse of power, influence or position of vulnerability, as a means of perpetration of this criminal offence, may take different forms, including the abuse of a subordinate position of the victim, the abuse of the victim's difficult material or family situation, or abuse of the victim's poor health. These actions aim at abusing the "vulnerability" of the victim and their feeling of helplessness that result from objective circumstances, or include acts which take advantage of any situation in which a specific person has no other real or acceptable alternative other than giving in to being taken advantage of. When this means of perpetration is identified, the ways in which the victim got into such a situation or whether

the perpetrator of the criminal offence of trafficking in human beings caused such a situation or not becomes irrelevant. It is sufficient for the perpetrator to have known that the victim was in such a situation and for them to have decided to take advantage of it. Case law often points to this mean of perpetration of the subject of criminal offence.

For instance, the judgement of the **Appellate Panel of the Court of BiH No. X-KŽ-06/181** dated 21 April 2009 states the following: *"for the purpose of providing sexual services in exchange for money, the accused T.K and M.P. used fraud and deception – promising the provision of a work permit and employment in motels "M" and "N.C.A" and promising the arrangement of asylum and a permanent legitimate stay in BiH, they abused **the position they held as employers, and in addition to taking advantage of the subordinate position of their employees, their difficult material position in BiH and their substance abuse problems**, they recruited several female persons to provide sexual services in exchange for money in their dining establishment "M".* (In this specific case, the injured persons were foreign citizens, without permanent residence in BiH, tricked into coming to BiH).

The judgement of the **Court of BiH No. S1 3 K 005873 11 KŽK** dated 27 October 2011, states that the accused *"took advantage of the difficult material and social situation of juvenile M.I. and her inadequate mental development to be capable of understanding the importance of her actions, especially the meaning of her decision to enter into sexual relations with other persons. In October of 2003, juvenile M.I. was kept by J.G., who took advantage of her sexually from October of 2003 until mid-2007, paying her BAM 50 for each sexual encounter. The accused C. took advantage of the situation of the juvenile M.I. and used her to identify and recruit her friends, juvenile B.D. and S.I. ..."*

However, the judgement does not specify what the difficult material and social situation consisted of, other than stating in one part of the judgement the following: *"the kind of relationship the accused C. had with the injured parties in this case is clearly demonstrated in the testimony of the injured S.I. who was introduced to the accused through M.I., when the accused, D.C. led the injured party M.I. to introduce him to her friends, promising to reward her for it. The accused always used the same method to entice individuals into prostitution; in other words, he took advantage of the same circumstances and the same needs as those M.I. had, specifically her need for money and her gullibility that resulted from the age of all the injured parties and their incautious attitude towards entering into sexual relations for money."*

In this context, it is worth noting the **Decision of the Appellate Court in Novi Sad No. Kž. 14897/10**, dated 7 December 2010, which annulled the judgement of the *Higher Court in Novi Sad, No. posl. br. K. 532/10*, dated 9 June 2010 which notes the following:

"For the abuse of difficult circumstances to exist, it is not sufficient that the injured parties are children without parental care. Instead, it would require a higher degree of adverse living and material conditions that the accused would take advantage of in addition to persuading and recruiting them for the provision of sexual services".

From the reasoning part of the judgement:

"The factual description provided by the court of first-instance did not indicate what

constituted "difficult circumstances of the injured persons" that the accused could take advantage of to make the injured persons dependent on him, except for the invitation to work for him at "K.P.". It is also worth noting that the injured party S.N. had a house and a mother she would go to, to pick up her clothes, as she testified herself. For the abuse of difficult circumstances to exist, it is not sufficient that the injured parties were children without parental care (at one point, the social welfare centre sent the injured person to an orphanage and she decided to return from there on her own). Instead, it requires a higher degree of difficult living and material circumstances which the accused would take advantage of to persuade and recruit them for the purpose of providing sexual services. The existence of these conditions was not identified precisely by the court, nor were these circumstances specified in the contested judgement. The only thing the court specified was that the injured persons were children without parental care. Therefore, the precise explanation of how the accused took advantage of the difficult material and family situation of the injured persons was not provided, nor was it explained what the relationship of dependence consisted of, because one of the injured parties testified that the accused gave her part of the money, and that from June to December 2009 she kept the money and stopped giving it to the accused, adding that she continued with prostitution even during the time the accused spent in detention.

A specific explanation of this element of the criminal offence may be found in the judgement of the **Appellate Panel of the Court of BiH, No. KŽK-1/07** dated 15 February 2007 (Case N. in which the first-instance panel of the same court acquitted the accused), which stated as follows:

*"For this criminal offence to exist, it is crucial to establish whether the actions of the accused contain any of several different alternative forms of this criminal offence and whether the intent of sexual exploitation of the specific female persons existed on the part of the accused. Both components of this criminal offence have been established by the court beyond doubt, because **the court found that the accused were aware of the difficult situation in which the subject female persons lived, that some of them had young children, in some cases, seriously ill children, and were unable to support and treat those children on their own, which the accused knowingly took advantage of and abused their situation** to recruit them for the purpose of prostitution, with the purpose of earning material gain for themselves."*

"Therefore, for this criminal offence to exist in the form of abuse of the position of vulnerability or helplessness of some person for the purpose of recruitment of such person for prostitution, it is not necessary for the use of force or threat of the use of force to exist. It is sufficient that the accused abused the difficult situation of the female persons referred to above for the purpose of sexual exploitation of those persons, which was found beyond doubt. That means that the accused committed the offence of trafficking in human beings for the purpose of prostitution, which was also highlighted justifiably in the appeal of the BiH Prosecutor's Office. Even the fact identified by the court of first instance, which states that by making repetitive telephone calls and visiting G.O. at home, the accused N.Z., in a way, forced A.A. to reengage in the same business, which was described by the court as "simple persuasion or luring into reengagement in providing sexual services in exchange for money," in the view of the Appellate Panel, represents recruitment as one of the acts of this criminal offence. This conclusion stems from the legal description of this criminal offence (Paragraph 1), which clearly indicates that the use of force or threat of the use of force were not the only means of perpetration of this criminal

offence, since other forms of coercion are also listed. In addition, as stated previously, this criminal offence may also be committed by abusing the position of vulnerability or helplessness of those persons without the use of force or threat of the use of force, if such actions were committed for the purpose of accomplishing a specific goal– all of which was found based on the evidence presented by both the court of first instance and this court.”

5. Giving or receiving of payments or benefits to achieve the consent of a person having control over another person

One of the means of perpetration of this criminal offence is manifested in giving or receiving payments or other benefits to achieve the consent of a person having control over another person. This means of perpetration is most frequently employed in criminal offences involving juvenile victims, by giving payments or other benefits to their parents or guardians. Such a case was identified in the judgement of the **Court of BiH No. KŽK-03/10** dated 22 November 2010, in which the accused, C.M. and K. E., were found guilty of the following: *“during the period between unidentified date in 2002 until unidentified date in 2006, acting through their acquaintances, using ads and undertaking other actions, the accused identified female juvenile persons and young adults from extremely socially vulnerable families within the entire territory of Bosnia and Herzegovina and took them to the village of K. in the municipality of J., to take advantage of their extreme helplessness and the fact that they came from extremely socially and materially vulnerable families. **The accused gave monetary compensation to persons who had control over the victims – their family members**, recruited such persons using deception and promise of regular employment in the form of standard serving or cleaning services, with the purpose of exploiting them and engaging them in forced labour. This gave those injured persons the false impression that their work was useful and would lead them to working as waiters and bartenders to numerous patrons, mostly during the night. The night shift typically extended between 8 p.m. and 4 a.m. and would sometimes carry out even longer. The injured parties were not assigned specific hours, given days off, made to sign employee agreement forms, nor were they registered with relevant institutions...”*

The reasoning part of the judgement further notes: *“... **the accused paid a minimum monetary compensation of between BAM 50 and BAM 100 to the families or parents of victims who had control over their children, to attain their consent**, intentionally taking advantage of their grave circumstances, deceiving them into believing that once the girls were taken to the agreed facility, they would be engaged in doing house work or providing standard serving services, such as waitressing, and that they would be compensated for their work”.*

It is important to note that the judgement of the **Court of BiH** (the first instance panel) **No. K- 49/08** dated 14 December 2009, resulted in the acquittal of the accused, C.M. and K.E., for the actions described in the previously-cited judgement, which did represent the criminal offence of trafficking in human beings, as mandated under the provisions of Article 186, Paragraphs 1 and 2 of CC BiH.

This means of perpetration of the criminal offence may occur by giving money to a person who already has control over a victim and who is already exploiting the victim with the purpose of exploiting and taking control of the victim.

Similarly, the judgement of the **Court of BiH, No. K-71/05** dated 25 April 2006, finds that, in addition to other alternative actions and means of perpetration, this means of perpetration also exists, which consists of giving and receiving payments or other benefits to achieve the consent of the person who has control over another person. This conclusion stems from the factual description of the events according to which: *"in early July of 2003, the accused made an agreement with L.A from M. in the Republic of Croatia, that he would, in exchange for an unidentified amount of money, procure female persons for L.A. in Bosnia and Herzegovina, for the purpose of sexually exploiting those persons through prostitution in the Republic of Croatia. The accused then agreed with D.Ž., the owner of a night club "E", in K, to give him two female persons in exchange for an unidentified amount of money. Those female persons were providing sexual services in exchange for money in Ž, in a bar. Subsequently, on 17 July 2003, the accused exchanged the citizen of Ukraine, B.M. and the citizen of Moldova, C.I., with Ž. for a payment of an unidentified amount of money. He then transported M. and L. to Mostar and handed them over along with C.E., whom he had been exploiting for prostitution, to C.B., whom was instructed by L.A. to take the agreed persons from the accused.*

After that, B. attempted to transfer them to Croatia; however he was caught trying to illegally enter Croatia from Bosnia and Herzegovina."

The means of perpetration of the criminal offence cited above may be found in the judgement of the **Supreme Court of Serbia, No. Kž I 664/05** dated 22 March 2006, which confirms that: *"the court of first instance appropriately found that the accused A.A., along with her now deceased husband, B.B., gave the mother BGN 100 (i.e. Bulgarian lev) as a payment for the victim and as compensation for the expenses of issuance of the passport and other necessary documentation for the juvenile injured party to arrange for the transfer of the minor to P, where they promoted him to beg. Under these circumstances, the now deceased, B.B. made serious threats to the juvenile injured party; namely that he would cut off his ear if he refused to go to Italy to beg. The location and acts described in the text of the judgement and the appropriate sections of the reasoning of the contested judgement indicate the exploitation of the difficult material condition of the mother of the injured party.*

The court of first instance has appropriately confirmed the acts based on the testimony of the injured party, juvenile M.M.. M.M described, credibly and in detail, the manner and circumstances under which the accused and her now deceased husband took him from Bulgaria to P. He added details pertaining to the issuance of his passport and other documentation required for him to cross the state border, the reasons behind why the accused gave his mother money, a description of his stay in P. in the house of the accused, the threats made by the accused as well as the manner in which he left the house of the accused and reasons for his departure."

C) FORMS OF EXPLOITATION OF THE VICTIM

For the criminal offence of trafficking in human beings to exist, it must be proven that the perpetrator undertook one of the alternative acts of perpetration, in one of the alternative means of perpetration, for the purpose of exploiting a passive subject. Therefore, for the criminal offence to exist, it is sufficient to prove the existence of the intent of perpetration of one of the listed forms of exploitation.

To that end, the **Court of BiH** in the judgement **No. KŽ-125/05** dated 16 December 2005 cites the following: *"It should be noted that the criminal offence of trafficking in human beings is considered completed upon occurrence of one of the acts of perpetration for the purpose of exploitation of the person who is the subject of such act, the reasons thereof were presented in the first instance judgement. It is not necessary that the purpose be accomplished for the completed criminal offence of trafficking in human beings to exist"*.

The judgement of the **Supreme Court of Serbia No. KŽ-I-1863/06** dated 23 October 2006 and the judgement of the **District Court in Kragujevac No. K-19/06** dated 31 March 2006, highlight the following: *"the basic form of the criminal offence of trafficking in human beings consists of several alternative acts of perpetration and for this criminal offence to exist, it is necessary that the acts, listed in the law as the elements of this criminal offence are related with the accomplishment of a certain purpose which pertains to the person who is a victim of trafficking. In other words, it is necessary to establish the existence of a cause and effect relationship between those acts and the accomplishment of a certain purpose pertaining to the injured party, who is the subject of trafficking, meanings that the act of perpetration is done for the purpose of labour exploitation. In the specific case, the injured party, upon the invitation of the accused, goes to their home for coffee, voluntarily. The act of perpetration takes place only after the injured party attempts to leave their home when the accused keeps her in his home by the use of force and threats, locking the door and preventing the injured party from leaving. The intent of detention for the purpose of prostitution was proved to exist beyond doubt. Such intent was realised during the period referred. Due to his mobility problems, the accused received help from his female partner who escorted the injured party to a section of the highway by the Zastava repair shop, preventing her from escaping, warning her that the threats were serious. In addition, in the evening of 7 January 2006, the female accused brought in with her four persons whom the juvenile injured party had sex with while the accused was standing in the immediate vicinity. The female accused handed over the money resulting from the sexual services to her male partner. The same situation occurred again on 9 January 2006, when the female accused took the money a person had paid to have sexual intercourse with the injured party and handed it to her male partner"*.

Exploitation, under the provisions of Article 186 Paragraph 7 of the CC BiH includes prostitution of another person or other forms of sexual exploitation, forced labour or services, slavery or a situation similar to slavery, servitude, removal of body parts or another form of exploitation.

1. Prostitution of others and other forms of sexual exploitation

In practice, the most common form of exploitation is exploitation of the prostitution of others or other forms of sexual exploitation. These may manifest themselves as forceful or voluntary prostitution,¹¹ the recording of child pornography or the penetration of a child, and as forced, arranged and temporary marriages in exchange for monetary or other material compensation.

According to the views expressed in the judgement of the **Court of BiH, No. K-76/08** dated 11 September 2009 (first instance judgement in the case of J.J.), "sexual exploitation should be interpreted as a form of exploitation which, in addition to sexual exploitation of another person, also implies other forms of exploitation of another person for pornographic shows or production of pornographic material...".

In the same case, the **Court of BiH** in its second instance judgement **No. Kž-61/09** dated 9 March 2010 highlighted the following: *"In this specific case, the purpose of exploitation, as the third element of the criminal offence, was accomplished in the form of sexual exploitation and abuse of a juvenile person. The testimony of the injured party, further corroborated by the testimony of the expert witness R.K. and material evidence, suggests that the accused J. sexually exploited the juvenile person A.K., by physically and sexually abusing and punishing her, using a self-made improvised sexual device - a styrofoam penis, which was not consistent with the kind of sexual devices used by consenting partners in sexual relationships. During the periods of victim's distress, he used different medication to keep the juvenile A.K. submissive and ensure she would continue to tolerate his sexual exploitation. He also gave her a substance to drink, which he later on claimed was semen. He used a video camera to record their sexual intercourse and played pornographic films during their sexual intercourse. All of the listed acts undertaken by the accused, contrary to claims made by the defence in the appeal, have the character of sexual exploitation of a juvenile person, for the purpose of satisfying the sexual urges of the accused and committing perverse sexual acts."*

According to the stance expressed above, **sexual exploitation exists even when the perpetrator exploits the victim for the purpose of satisfying his own sexual desires**. It must however be noted that case law of the countries of the region points to a **different** stance. Specifically, the decision of the **Appellate Court in Kragujevac, No. Kž.1-243/11** dated 27 February 2012, notes the following: *"The Appellate court judges considered the claims listed in the appeal of the public prosecutor, which stated that the criminal actions of the accused were undertaken for the purpose of accomplishing the goal – **sexual exploitation of the juvenile injured party, for the purpose of satisfying the needs of the accused**. The judges pointed to the fact that the purpose of the criminal offence of trafficking in human beings is exploitation, noting that under the provisions of Article 3, item a. of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Human Beings, Especially Women and Children, the exploitation entails, as a minimum, exploitation of prostitution, of*

¹¹ Voluntary prostitution, as a form of sexual exploitation in the context of the criminal offence of trafficking in human beings, exists in all cases in which the victims agreed to engage in prostitution, but did not agree to restriction of the freedom of movement or prevention from keeping their full earnings to themselves. In addition, voluntary prostitution as a form of sexual exploitation exists in the situation when the victim agreed to all requirements of the perpetrator and co-operated with the perpetrator by giving him or her half of the earnings, arranging encounters with clients, etc., because the consent of a victim to intentional exploitation is irrelevant for confirming the existence of this criminal offence (Article 186, Paragraph 9, CC BiH).

other persons or other forms of sexual exploitation, forced labour, or service, slavery or practices similar to slavery, servitude or removal of organs. Therefore, in the opinion of the Appellate Court, the motive of sexual exploitation, in the context of criminal offence of trafficking in human beings, is the profit, in other words, the exploitation of prostitution, rather than satisfying the needs of the perpetrator of the criminal offence, as noted in the appeal of the public prosecutor”.

The opinion detailed in the decision of the **Appellate Court in Kragujevac** is not satisfactory because: *“exploitation implies taking advantage of people under the circumstances and conditions contrary to the principle of respect for human dignity, physical or psychological integrity and health, which greatly conflicts the circumstances and conditions under which regular persons perform the same or similar activities or services”.* The quoted explanation of exploitation was presented in the decision of the **Appellate Court in Novi Sad, No. KŽ. 1 2386/12** dated 29 January 2014.

The interpretation of **child, forced, arranged or temporary marriages**, with or without compensation, as a form of sexual exploitation, may be found in the judgement of the **Court of BiH No. S1 3 K 994249 12 KŽK**, dated 30 January 2013. The reasoning part of the judgement states the following: *“The acts of enticement and recruitment were committed by the accused who put the injured party in a situation in which she fell victim of exploitation in the custody of family A., for the purpose of **forced labour and sexual exploitation**. The accused's involvement in the marriage between the injured party and P., in other words, in the transfer of the injured party to the family A., as well as his responsibility for the criminal acts he undertook, stem without doubt from the fact that after the injured party made numerous attempts to escape from the specified family, he pursued her, physically abused her and returned her back to family A. where **the injured party was initially transferred for the purpose of sexual exploitation and for the purpose of establishing an extramarital relationship**. These claims were corroborated by witnesses' testimonies, especially the testimony of S.H., the aunt of the injured party, as well as witness A.H. who testified against the threats the accused, P., directed towards the injured party. The multiple injuries on the body of the injured party, inflicted by “her stepfather” when he found and retrieved her, also served as evidence”.*

Case law recognises prostitution, either voluntary or forced, as the most common form of sexual exploitation. For instance, the judgement of the **Court of BiH, No. K-71/05** of 25 April 2006, among other things notes the following in the reasoning part in a case of sexual exploitation of a victim: *“Both witnesses confirmed that they had the numbers of their clients stored in their cell phones, which they had received from the accused C. They were required to contact the clients, and according to their claims, the clients also contacted them. So, the accused, C.N. let the girls take care of the business on their own. However, both fear and the subordinate relationship they had with him made them do their job regularly, as a means to earn the amount they were required to bring in. Both witnesses pointed out that their daily “profit” was required to range between BAM 300 and BAM 400, which was later reduced. The rate for the service provided to a single client was set at BAM 100. The accused, as confirmed by the witnesses' testimonies, was not actively involved in finding the clients, since he delegated that role to the injured parties. However, he was confident the girls would act as instructed,*

because he was aware of his position of superiority and the fact that they were afraid of him. Both witnesses noted that they were required to hand over the money to the accused on a regular basis, either in person, by leaving it for him in bar "D," or by dispatching it by bus to S., when the accused was in S.

Sexual exploitation in case N. (judgement of the **Court of BiH, No. KŽK-1/07** of 15 February 2007), was described by one of the injured parties as follows:

"The witness also noted that she would have between one and five clients per day, that payments were made to Z., who she never saw, and that her share of the money was given to her in a corridor, upon her completion of the job. In some cases, a client would not make the payment with the excuse that he had no money, though the money had been actually paid to Z. The witness also noted that she did not know how much Z. charged for the services she provided, but noted that some clients told her that they paid between BAM 40 and BAM 50. One claimed to have paid BAM 100, and consequently demanded the victim to stay in his room for three to four hours, which was why the victim had started screaming. As a result, Z. had to intervene, and once his discussion with the client was over, another girl, named M. was brought in. In addition, the witness claimed that there was a record in which Z. registered all clients and all service providers. She further noted that there had been other girls providing sexual services during the time she spent working for Z. (three months)".

The judgement of the **Higher Court in Podgorica, No. K. 6/13**, noted that the accused sexually exploited the victims by: **"bringing the injured parties to his apartments in H.N. near H.P. and in B, in building No. ..., during a designated period of time. He would contact the injured parties by telephone beforehand to arrange a location, time and price, in addition to giving them a description of the client's sexual needs.** Afterwards, he gave specific instructions to the injured parties, V.D., R., A., A.M., S.S., A.D. and juveniles S.M., and P.D. in person or over the telephone. The instructions contained the time to be spent with male persons, the compensation and the manner in which the sexual needs of individual male persons were to be met. The injured parties acted as instructed, while the accused monitored the activity from the nearby bar across the street from the apartments he used to make sure that the injured parties complied with his instructions and to verify the amount of time they spent with the clients. This was done in order to fully assert control over the behaviour of the injured parties and the provision of sexual services. The rates for the sexual services were arranged individually and ranged between EUR 50 and EUR 100. Part of the money was kept by the accused, while the injured parties were entitled to their share. In situations where the injured parties collected the agreed fees themselves, knowing that the accused arranged the rate directly with the clients, they handed over his share of the money to him..."

The judgement of the **Court of BiH, No. Sl 3 K 005873 11 KŽK** of 27 October 2011 (the case of C.D.), specifies in detail the manner of sexual exploitation of the victims. The reasoning part of the judgement, among other things, noted the following: "The testimony of the injured party S.I., specified the manner in which the accused C. deceived the injured parties S.I. and M.I. to engage in prostitution by transferring them to other people for the purpose of their sexual exploitation. The testimony specified that the accused C., on one occasion, called M.I. and asked her to spend some time with persons from Croatia, noting it was D. and his friends--three individuals in total, who were returning from a funeral and needed cheering up.

*On that occasion, the injured parties M.I and S.I. provided sexual services to those people and were paid for it. Further testimony of the injured party S.I. described the situation which showed beyond doubt that the actions of the accused C. resulted in the criminal offence he is being tried for. The accused called the injured party S.I. and told her about a man coming from abroad, who was a citizen of their country interested in picking her up and taking her to his location. Once the injured party agreed to spend time with the man, accused C., came to pick her up and brought her to a house somewhere in D., where the injured party had sexual intercourse with an older man that paid her BAM 50. On that occasion, the injured party B.D. was accompanied by the accused C. She waited together with the accused in another room. Once the sexual intercourse finished, they took the injured party S.I. back home. The situation described clarifies with great detail the manner in which the accused undertook actions to entice prostitution. In the specific case described here, he made arrangements to provide sexual services to a man who had come from abroad, and had also transported the juvenile persons to the location where the injured party was sexually exploited. **It is obvious that the accused could not be treated solely as a user of sexual services, as wrongfully concluded by the court of first instance;** this claim was wrongfully highlighted by the defence of the accused throughout the initial proceedings. This conclusion was corroborated by the fact that the accused established connection between the injured party S.I. and a man aged between 30 and 35, whom he had met with in café "D," located in the immediate vicinity of the secondary school attended by the injured party. Furthermore, the accused pointed the man to juvenile S.I. and arranged for the sexual encounter between them. He then called S.I. and told her that the man he was with wanted to be with her. After the call, the man came to pick her up, took her to an isolated location close to D. When she was with him, the man stated that he was sent by D. who had told him that she was willing to have sex with men in exchange for money".*

One of the **contentious issues** that emerges in case law with regard to the interpretation of the criminal offence of trafficking in human beings for the purpose of sexual exploitation is **the issue of differentiating between this criminal offence and other criminal offences which also result in the sexual exploitation of the victim**, especially the criminal offence of enticement to prostitution. Case law points to certain views taken in addressing these issues.

The judgement of the **Appellate Panel of the Court of BiH No. X-KŽ-06/181** of 21 April 2009 focuses on the correlation between this criminal offence, the criminal offence of international recruitment for prostitution, and the criminal offence of enticement to prostitution. Accordingly, the reasoning part of the judgement states as follows: "*Based on the evidence presented, the Court found that the actions of the accused K.T. and P.M., in addition to constituting the criminal offence of trafficking in human beings, described in Article 186 and the criminal offence of organised crime, described in Article 250 of CC BiH, also contain all legally defined attributes of the criminal offences of international recruitment for prostitution, described in Article 187 of CC BiH and the enticement to prostitution, described in Article 210, Paragraph 1 of the Criminal Code of the Federation of BiH (CC FBiH). Thus, meaning that several criminal offences have been committed. However, since these criminal offences all relate to the protection of the same legal attribute, they are so mutually correlated that the acts described in Article 187 of CC BiH and Article 210, Paragraph 1 of CC FBiH,*

in the context of the criminal offence described in Article 186 and Article 250 of CC BiH, appear only as prior, initial phases or stages of those primary criminal offences, and consequently, apply only if the main or the primary criminal offence has not been committed.

Therefore, these two offences, which criminalise only less serious, preceding phases in the commission of the criminal offences specified above, represent subsidiary or reserve criminal offences in their nature and their existence is conditional, meaning that they only apply under the condition that the criminal activity has not evolved into a higher stage of perpetration; or in other terms, under the condition that in the specific case, the criminal offence of trafficking in human beings for the purpose of sexual exploitation has not been committed, which is, in essence, the final purpose of perpetrating these criminal offences. The relationship between these criminal offences suggests that these acts are included in the causal progression of perpetrating the main criminal offence, as its preceding phase, and are therefore, encompassed within it. Once the main criminal offence is committed, these criminal offences lose their autonomy, which means that they are included in the primary criminal offence, on the basis of subsidiarity.

Therefore, in evaluating the subject criminal event, the court concluded that it represented a criminal situation where in the criminal, legal and logical sense qualified as a single event. The criminal weight of such an event may therefore only be evaluated in the context of one, main or primary criminal offence; in this specific case, the criminal offence of trafficking in human beings, described in Article 186, perpetrated in the form of the offence described in Article 250 (organised crime) of CC BiH. For that reason, only the provisions of Article 250, Paragraph 3 of CC BiH needed to be applied in this case. In other words, the accused K.T. and P.M. were to be held accountable only for the criminal offence of trafficking in human beings, committed in the form of organised crime, described in Article 250, Paragraph 3 of CC BiH.

In the opinion of the Appellate Court in Novi Sad, expressed in the **Decision No. Kž. 1 2386/12** of 29 January 2014, which annulled the judgement of the **Higher Court in Novi Sad, No. K. 207/11** of 9 April 2012, the essential difference between these two criminal offences is reflected in the existence of exploitation. Explaining this view, the Court noted the following: *"under the provisions of Article 184, Paragraph 1 of the Criminal Code, the criminal offence of mediation in prostitution is committed by the person who induces or entices somebody else to prostitution or participates in the transfer of another person to somebody else for the purpose of prostitution, or the person who uses media or other similar means of communication to promote or advertise prostitution. However, if inducing or enticing to prostitution was done in one of the ways described in Article 388 of the Criminal Code, then such acts would be treated as the criminal offence of trafficking in human beings, rather than mediation in prostitution. The criminal offence of mediation in prostitution applies in situations that imply mediation between the client and the person who provides sexual services, without compensation, or with compensation determined freely and predominantly by the person who provides sexual services, who, in the event prior agreement was made, reserves the right to choose or refuse the client and define the manner, type and conditions of prostitution, in addition to deciding on the termination of their prostitution. To that end, it is the existence of exploitation that makes a crucial difference between the criminal offences described in Articles 184 and 388 of the Criminal Code.*

Exploitation implies taking advantage of people under the circumstances and conditions contrary to the principle of respect of human dignity, physical or psychological integrity and health, which are in great disproportion with the circumstances and conditions under which other persons perform the same or similar activities. "

In the opinion of the **Higher Court in Novi Sad**, presented in judgement **No. K.193/11** of 18 November 2011, which was confirmed by the judgement of the **Appellate Court in Novi Sad No. KŽ. I 247/12** of 14 March 2012, for the existence of the criminal offence of trafficking in human beings it is necessary that the evidence presented serves as a basis to conclude that two important elements exist which indicate trafficking in human beings beyond doubt; these two elements being the control and exploitation of victims. The reasoning part of the same judgement further notes: *"Under the judgement of the court of first instance, the accused A.A. was found guilty of the criminal offence of enticement to prostitution, and not guilty of the criminal offence of trafficking in human beings, because the testimonies of the injured parties clearly suggested that the accused did not restrict their freedom of movement, since the locations the criminal offences were committed were in luxury hotels where the injured parties had freely gone in and out of, having enjoyed full freedom of movement. In addition, some of the injured parties, as one of them indicated, were clearly instructed by the accused not to tolerate violence or similar treatment, adding that they were instructed to call the accused if the client refused to pay or started abusing them physically. Based on those testimonies, the Court concluded that the accused provided protection to the injured parties, which is a typical situation in prostitution. In the opinion of the Court, **the accused organised prostitution for the injured parties, in the most comfortable manner, providing protection for the injured parties.** The accused was employed at the hotel as a security guard, which was why he was able to provide protection to the injured parties, which is the essential element of prostitution. **The actions of the accused lack the element of exploitation. Bearing in mind the fact that the accused and the injured parties shared the earnings of prostitution equally, whereby the injured parties would charge the clients the fee of EUR 120, keeping EUR 50 for themselves and giving the remaining EUR 70 to the accused, who also kept EUR 50 while handing over the remaining EUR 20 to an unknown person from the hotel, who would notify him of the potential clients, as indicated in the testimonies of the injured parties.**"*

The judgement of the **Appellate Court in Novi Sad No. KŽ I 4358/11** of 4 April 2012, which confirmed the judgement of the **Higher Court in Novi Sad No. K.165/11** of 14 October 2011, noted the following: *"Under the judgement of the court of first instance, the accused was found guilty of the criminal offence of trafficking in human beings, described in Article 388, Paragraph 2 of the Criminal Code. The accused took advantage of the difficult material situation of the victim and the fact that she had no accommodation or means to sustain herself and withheld personal documents in addition to recruiting and transferring the juvenile injured party for the purpose of prostitution. Judges of the Appellate Court confirmed the views of the court of first instance, according to which the actions of the accused contained all important attributes of the criminal offence of trafficking in human beings, as described in Article 388, Paragraph 2 of the Criminal Code. The Court therefore decided that the claims of the defence attorney, specified in the appeal, according to which the accused committed the criminal offence of mediation in prostitution described in Article 184 of the Criminal Code were not*

justified, noting that the criminal offence of trafficking in human beings, described in Article 388, Paragraph 2 of the Criminal Code always exists when the injured party is a juvenile person, even if the act of inducement or enticement to prostitution was not committed in one of the ways listed under the provisions of Article 388 of the Criminal Code. ”

With regard to the correlation between the criminal offence of trafficking in human beings and the criminal offence of sexual intercourse by abuse of office, the stance of the Court of BiH, expressed in the case of J.J. in which the accused sexually exploited his female pupil, in the Trial Judgement, No K-76/08, dated 11 September 2009, was that *“the criminal offence of sexual intercourse by abuse of office, in this specific case, was subsumed by the acts of the criminal offence of trafficking in human beings (a more severe criminal offence), and thus, in this case, there was **no concurrence of criminal offences, but instead it was a \ classic correlation of subsumption.**”*

Perpetrators of the criminal offence of trafficking in human beings often use the same victims for various forms of exploitation. For example, in the wording of the judgement of the **Higher Court in Kraljevo, No. 4K 63/11**, dated 17 August 2011, it was stated, among other things, that the accused *“took S.S. to a landfill in the morning in order to collect scrap items, which the accused A.B. subsequently sold. The injured party was not paid compensation for this work. Instead, they kept the money, which had been the result of her work, to themselves. In the afternoons and evenings, they drove S.S. in a “Mercedes” vehicle to a location in the vicinity of a parking lot in village A, which belonged to the “Autotransport” company. There they demanded that she engage in prostitution. She charged RSD 1,000 and RSD 2,000 for her services and they used to take all of her earnings into their possession that same evening. They controlled the amount of money she received through prostitution by forcing S.S. to keep a mobile phone line open during sexual intercourse price negotiations with a customer. In this manner, and during the above-mentioned period of time, they kept all the money earned through the labour exploitation of S.S., the injured party, which was made to work in a landfill and to prostitute herself. Thus the accused gained money through a criminal offence”. Hence, the victim was used both for sexual and labour exploitation.*

2. Forced Labour or Services

Forced labour and services, *i.e.* labour exploitation, is most often conducted through forced begging, or through work conducted either with no compensation at all or with the provision of extremely low compensation, and in inappropriate working conditions. Pursuant to Article 2 of the 1930 International Labour Organization Convention concerning Forced or Compulsory Labour (No. 29), 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.¹² Directive 2011/36/EU, of 5 April 2011, includes forced begging as a form of forced labour. The validity of any possible consent to perform such labour or services should be evaluated on a case-by-case basis. However, when a child is concerned, any possible consent is irrelevant.

¹² For more about labour exploitation see L. Kablar – Sarajlić, *“Trafficking in Human Beings for the Purpose of Labour Exploitation, A Reference Paper for BiH”*, published by the OSCE Mission to BiH in 2011.

We find an explanation of labour exploitation, for the purpose of the trafficking in human beings, in the judgement of the **Appellate Panel of the Court of BiH, No. KŽK-03/10**, dated 22 November 2010. It was stated in the judgement's reasoning that the accused, C. M. and K. E., "committed a criminal offence of trafficking in human beings, by going to locations affected by abject poverty, often in the company of their daughter M., to find minors and young adults, exclusively females, in order to recruit them to work in the "T.K." cafe. This was accomplished with the aim of attracting visitors and with the aim of paying them minimal or no salary at all. They could achieve that only if the females were from materially and socially poor families. **Thus the accused earned money and profited by exploiting their vulnerability.** Since the recruited victims were children and young people, it is clear that they were not mentally or physically mature enough to understand the exploitation and forced labour situation they found themselves in. Seeing how helpless the families were, the accused gave the families, i.e. the parents of the victims, who had control over their children, minimum amounts of BAM 100 or BAM 50, in order to obtain their consent. **They deceived the families by claiming that the girls would be engaged in housekeeping or working as waitresses, after being transported to the above-mentioned facility, and that the girls would be paid for their work. However, the girls worked in the "T.K." café without any specified working hours, but in shifts, with the night shift lasting between 8 p.m. and 4 a.m., or longer, as long as there were guests present. The guests were most often drunk, aggressive and rude, and the girls were exposed to various forms of pathological behaviour, alcoholism, prostitution, delinquency and crime.** Thus it is understandable that a child at the age of 14, 15, and 16 (these were the age of the injured parties at the time in question) is susceptible to adopting such forms of behaviour, i.e. that the exposure to conditions which were not proper for the age of the victims affected their psychological and physical development.

The victims did not receive any proper or monthly compensation for their work in the café, unlike what is claimed without any basis by the defence attorneys of the accused. On the contrary, the alleged salary of the victims represented a method of exploitation. The victims were continually held accountable for alleged deficits which had occurred through guests not paying for their drinks and through deficits in the bar tally. In spite of the fact that victims worked to make up the alleged deficits, a statement of the witness M.A. implies that they also had to hand over tips which they had received from guests. Namely, during her testimony, M.A., as well as all the other witnesses, stated that they had to compensate the deficits and that was why they never received the salary which had been arranged with the accused. They always received some minimum amount. They would sometimes receive tips, which they could never keep, for they had to turn them over to the accused M., who took the tips because there was an alleged deficit which they had to compensate through their work.

Furthermore, the statements of the witnesses-injured parties imply that the girls were sometimes afraid to work in the café, since the guests were mostly drunk and aggressive. Hence M.A. stated that she had been afraid to be in the café when drunken men had thrown bottles and had cursed, while I.Ž. stated that her stay in the accused M's café had been unbearable and that she would have returned home immediately, but that she did not have any money. She said that alcohol had been consumed regularly, even drugs had sometimes been used openly, and that some of the guests had been armed, including the accused M."

One also finds this form of exploitation in the judgement of the **Higher Court in Podgorica, No. K 197/08**, dated 16 February 2011, in which it was established that the accused had deceived the injured party and brought her to U. for the purpose of labour exploitation. The reasoning of the judgement quotes the statement of the injured party: *"Next morning, after they woke up, DŽ. told her to go to work. He told her that she would be working as a waitress in a café. All four of them went to café "K." and left her there to work. A little bit later, M. came to work with her. She then understood that M. had been working in the café as the cleaner, while she would work as a waitress. They did not tell her anything about the salary. She asked D., the owner of the café, what her salary would amount to, and he responded that it was EUR 10 per day. She worked in the café for about a month and D. gave her money every day, but it was taken away by A., DŽ and M. who told her that the money was confiscated in order to pay for the apartment rent. She did not know how much money she was entitled to receive. She worked in the morning, from 8 a.m. to 1 p.m., and in the afternoon, from 6 p.m. to midnight (...) During the time she worked in the "K." café, D. was not always there and she did not know whether D. had any brothers. D. had also paid her EUR 450 in total for her work in "K.," as well as bought her some clothes. That amount does not include what V. paid her, i.e. EUR 10 per day, during the time they worked together, for approximately ten days. **All that money was taken away by DŽ and she did not even try to hide the money or to leave it in someone's care, because she was afraid of DŽ.**" It is interesting to note that, according to the opinion of the Court, the labour exploitation was only a way to bring the injured party into a position of servitude. That stems from the dispositive part of the judgement, in which it was mentioned that the accused were guilty because "between the unknown day of September and November 2007, in P. and U., acting in an organised manner, through the use of force and prevarication, they transported and held the minor G.A., with the aim of bringing her into a position of servitude. On the unknown day of September 2007, they came from U. to P. in order to deceive the injured party G.A. and bring her to U. for the purpose of labour exploitation..."*

In practice, one often finds **begging as a form of labour exploitation** with children as the most frequent victims of this form of trafficking in human beings. In order for this offence to exist, it is not necessary to use force, threats or any other means of perpetration of this criminal offence. This was emphasised in the judgement of the **Appellate Panel of the Court of BiH, No. S13 K 004249 12 KŽK**, dated 30 January 2013, in which it was stated: "The statement of the injured party A.P. undoubtedly implies that she was a minor at the time in question, that she was born on 15 February 1993, and that, in the second half of 2008, due to physical and psychological mistreatment by her father S.P. and her stepmother S.P, she had to move to the house of her mother S. B., who lived with the accused P.B. **P.B. forced her and his other children, immediately after her arrival, to beg and to bring back the money earned in this manner, thus abusing her poor family situation and her immaturity as a minor.** The above-mentioned is also implied by the statement of witness E.H., especially from the content of the statement which he gave earlier, as a witness, to the State Investigation and Protection Agency on 5 August 2010, which was filed as a piece of prosecution evidence by the Office of the Prosecutor due to a discrepancy with the statement provided at the trial, in which he stated that the accused **P. had forced the injured party A. to beg in neighbouring villages, together with the other children, during the time she had been in his care, and that they had to turn all the money over to him, upon their arrival home.** Also, this undoubtedly follows from the statement of the injured party who said that the accused P., together with her half-brothers, had followed her, imposing limits or preventing freedom of movement during the time she had been begging, and that all the money had been turned over to him and to A's mother, who was married and lived with the accused".

3. Slavery or Practices Similar to Slavery

Human trafficking, where a human being appears as a commodity to be sold and bought, i.e. as an object of various forms of exploitation, is often depicted as a modern form of slavery. A similar stance is implied by relevant documents which list slavery or similar practices as a form of exploitation. The 2005 Council of Europe Convention on Action against Trafficking in Human Beings does not define slavery, but the definition of slavery can be found in other international documents, e.g. the 1926 Geneva Slavery Convention or the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery. Pursuant to Article 1 of the Geneva Slavery Convention, "slavery" is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, and the Supplementary Convention points out that a "slave" means a person in such a condition or status. Institutions and practices similar to slavery are defined pursuant to Article 1 of the Supplementary Convention. In accordance with that provision, practices similar to slavery are as follows:

- a) *Debt bondage, that is to say, the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined;*
- b) *Serfdom, that is to say, the condition or status of a tenant who is by law, custom, or agreement, bound to live and work on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status;*
- c) *Any institution or practice whereby:*
 - i) *A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family, or any other person or group;*
 - ii) *The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or*
 - iii) *A woman on the death of her husband is liable to be inherited by another person;*
- 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.*

When interpreting the term slavery, one could also use the provision contained in Article 172, Paragraph 2, Item c of CC BiH in which the term “enslavement” is defined as an element of crimes against humanity. In accordance with that provision, which is based on Article 7, Paragraph 2, Item c of the Rome Statute, enslavement means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children. Interpreting this element of the crimes against humanity, the International Criminal Tribunal for the former Yugoslavia, in its Trial Judgement in the Foča case, concluded that indications of enslavement include elements of control and ownership; the restriction or control of an individual's autonomy, freedom of choice or freedom of movement; and often the accruing of some gain to the perpetrator. The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim's position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions. Further indications of enslavement include exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and human trafficking. **The “acquisition” or “disposal” of someone for monetary or other compensation is not a requirement for enslavement. Doing so, however, is a prime example of the exercise of the right of ownership over someone.**¹³

In the Appeals Chamber judgement, dated 12 June 2002, **No. IT-96-23 and IT-96-23/1**, it was pointed out that the question on whether a particular phenomenon is a form of enslavement will depend on the operation of the factors or indicia of enslavement identified by the Trial Chamber. These factors include the “control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour”.

According to the stance of the **Supreme Court of the Republic of Croatia**, presented in the judgement **No. KŽ 741/04-5**, dated 7 October 2004, forced begging represents a condition similar to slavery. The following was stated in the judgement's reasoning: *“Finally, the Trial Chamber presented valid and well-founded reasons from which it found that the accused had put and had kept both injured parties in a condition similar to slavery, having thus committed the criminal offence he was charged with pursuant to Article 175, Paragraph 1 of the Criminal Code in concurrence, and not the criminal offences of illegal deprivation of liberty stipulated by Article 124 of the Criminal Code, since he had applied force and threats to keep them in a condition of servitude and had forced them to beg for him, posing as deaf-mute and handicapped persons, by carrying appropriate signs written in various languages, as well as wearing appropriate clothing....”*¹⁴

For the purpose of assessing whether slavery or similar practices exist, it would be interesting to review the **case of Andrade** which was prosecuted before a Brazilian court. The facts are as follows:

¹³ See John R.W.D. Jones, Steven Powles: International Criminal Practice, Humanitarian Law Centre, Belgrade, 2006, page 204.

¹⁴ See D. Derenčinović: Not for Sale – on rights of victims of trafficking following the judgement of the European Court of Human Rights in the case of Rantsev v. Cyprus and Russia.

"In November 2004, a Mobile Inspection Unit visited the Fazenda Boa-Fe Caru and found 19 workers, including a 16-year-old boy, in slave-like conditions. Most of the workers were illiterate. They had no access to drinking water, no sanitation, inadequate accommodation and no safety equipment. They had to buy all their food and working tools at the estate store, and the amounts were deducted from their wages. In addition, unidentified corpses were found buried on Andrade's land, but the determination for the cause of death was investigated in a separate procedure.

Labour inspectors testified that the conditions they observed in that facility were among the worst they had ever seen. Workers were living in shelters of canvas or straw, without walls or a floor, which did not protect them efficiently from the rain.

They had no access to potable water and would drink water from the river. They had no sanitation and therefore had to use the same place both to satisfy their physiological needs and as a source of water for cooking. Their work papers were not signed and, at the time of the inspection, some workers had not received any salary for five months. They were working from dawn 'til dusk, without the right to rest on Sundays. If they did not work, their hours would be deducted at double the daily rate. They did not have the right to send or receive letters. They did not have first aid kits. Workers were prohibited from leaving the farm, and regularly threatened to discourage them from attempting to do so. Escape was made all the more difficult by the extremely isolated position of the farm, which was about 220 kilometres from the nearest city. This distance constituted an unquestionable obstacle to the freedom of movement of the workers, who were entirely subjected to the will of the defendant. Combined with the fear factor, the distance involved practically cancelled any possibility of escape.

Workers incurred an initial debt towards the employer when recruited. The debt was then artificially maintained, because they had to pay for their transport to the farm and, subsequently, buy everything (garments, food, medicine and even working tools) in the farm shop, at prices far above those of the market."

The Court found Gilberto Andrade guilty of fraudulent recruitment through false promises of paid work, submission to degrading living and working conditions, and restriction of their freedom of movement. The Court insisted that he committed those crimes freely, consciously and deliberately, submitting workers to humiliating conditions purely in order to make financial profits by the exploitation of free labour.

Andrade was convicted for slave labour, for hiding cadavers and fraudulent recruitment and sentenced to 14 years in prison - the first prison¹⁵ sentence for forced labour. He was also ordered to pay days of penalty. In the absence of proof of the wealth of the defendant, the Court took into account that he owned seven farms, two apartments and one house in deciding that the value of the day should be five times the minimum wage. He was therefore sentenced to pay 7,200 minimum wages.

¹⁵ Federal Public Ministry v. Gilberto Andrade, Judgment Nº2000.37.00.002913-2, Penal Court of Maranhão State, 23 April 2008; See Forced Labour and Human Trafficking, Casebook of Court Decisions, a Training Manual for Judges, Prosecutors and Legal Practitioners - Special Action Programme to Combat Forced Labour, (International Labour Organization, 2009), pp. 71-73.

The existence of conditions similar to those of slavery was established in the case of *Public Federal Ministry v. Jose Gomes dos Santos Neto, Judgement No. 2007.5101.811659-4 (Criminal Court Rio de Janeiro, 22 April 2008)*. José Gomes dos Santos Neto was found guilty of maintaining workers in slave-like conditions. Workers had been recruited on the false promise of earning 600 reais per month by selling fishing nets. They were working every day from 7 a.m. until 11 p.m., a total of 112 working hours per week. One of the workers, Jarbel, was initially charged 4,000 reais for 'recruitment fees' (including transport and advance on wages for the family). When labour inspectors brought the facility under their control four years later, his debt had not merely failed to decrease but had increased to 4,190 reais. Another worker had an initial debt of 2,000 reais that had increased to 3,000 reais.

Workers had to buy all their food provisions, clothes, medicine and working tools in the shop owned by the employer, where prices were 25 per cent above market prices. Workers were obliged to pay back what they owed and the employer threatened workers and their families. On this particular farm, labour inspectors found workers with debts ranging from 2,000 to 8,000 reais. All workers said they could not leave this employer until they were able to pay back the debts.¹⁶

4. Removal of Organs of a Human Body

Article 186, Paragraph 7 of CC BiH mentions the removal of body parts and organs from the human body as a form of exploitation of a victim of trafficking in human beings. Article 21 of the Convention on Human Rights and Biomedicine stipulates the principle that the human body and its parts shall not, as such, give rise to financial gain. This principle was later confirmed in Article 22 of the Additional Protocol to the Convention concerning transplantation of organs and tissues of human origin which explicitly prohibited organ and tissue trafficking. The procedure and conditions for the transplantation of organs and human body parts was stipulated by the regulations on transplantation, while the criminal legislation in Bosnia and Herzegovina made it a criminal offence to transplant human body parts in contravention of the above-mentioned law. Thus, for example, Article 217 of CC RS stipulates that the transplantation of human body parts is a criminal offence that has several forms. Pursuant to the Article, the prohibited transplantation of human body parts occurs if a part of a human body is taken for transplantation or a part of a human body is transplanted. Namely, the transplantation of human body parts is unjustified according to the rules of medical science if a part of human body is taken for transplantation before death has been established in a prescribed manner, without consent of the donor or the recipient, or without consent of their legal representative. A separate form of the criminal offence occurs in the case where human body parts are sold without authorisation, for remuneration, of either living or dead persons, for transplantation purposes or if a person acts as an intermediary in the commission of the criminal offence. If the criminal offence of trafficking in human beings was committed in order to perpetrate a prohibited transplantation of human body parts, as stipulated in the criminal legislation, then it is a case of this form of exploitation of a victim of trafficking in human beings. At the same time, one has to take into account that the consent of the victim to the intended exploitation does not exclude the existence of the criminal offence of trafficking in human beings. Exploitation, as an element of trafficking in human beings, will also occur when the victim voluntarily agrees to sell parts of his or her body, e.g. a kidney.

¹⁶ Ibid. p.70.

Such a case of trafficking in human beings is found in the judgement of the **Basic Court in Pristina, No. P 309/10, P340/10**, dated 29 April 2013 (the Medikus case) in which the defendants were pronounced guilty of committing the criminal offence of Trafficking in Persons (Article 139 of the Criminal Code of Kosovo) because they recruited foreign citizens in 2008, abusing the position of vulnerability of victims due to their extremely dire financial circumstances, in order for them to travel to Pristina and to be subjected, at the Medikus clinic, for an agreed amount of money (which in some cases was either not paid at all or was paid in a smaller amount than previously agreed), to a kidney transplant for the benefit of an unknown recipient. Prior to that, the kidney recipients had paid the perpetrators an agreed amount of money. All of the donors were foreigners, in extremely dire financial circumstances, and aiming to resolve their financial problems by selling their kidneys.¹⁷

5. Other Forms of Exploitation

Bearing in mind that it is very difficult to list all the forms of exploitation which may arise as the purpose behind the human trafficking, in Article 186, Paragraph 7 of CC BiH the legislators added a general clause "or any other exploitation" to the already listed forms of exploitation, thus making it possible to apply the criminal offence of trafficking in human beings to some other, one might say, non-specific cases of exploitation of people. Of relevance in this respect is Directive 2011/36/EU, from 2011, which establishes a somewhat broader interpretation of exploitation as the purpose behind the human trafficking, with Article 11 recognizing as exploitation also the exploitation of criminal activity. This form of exploitation is most often manifested through the commissioning of criminal offences like pick-pocketing, shop-lifting, drug trafficking, and other similar criminal activities which imply financial gain for the perpetrator of the criminal offence of trafficking in human beings. As regard to this form of exploitation, it is important to bear in mind that the perpetrators are victims of trafficking in human beings, i.e. that no criminal procedure should be conducted against them for those acts.

Of relevance in this respect is a judgement of the **District Court in Jagodina, No. K 190/07**, in which K.M. was pronounced guilty of the criminal offence of trafficking in human beings because *"during 2007, in Jagodina, for his personal financial gain, he took advantage of the dire financial circumstances of a minor (... he knew that the person was born in 1996). He lent money, and demanded it at the same time from the minor ... to return amounts of money which were many times higher than the borrowed amount. The minor accepted that and used the money to place bets in betting shops. When the minor ... did not have enough money to pay back the debt, the accused K.M. incited him to engage in gambling and theft, in order to repay the debt though it increased manifold."* It was stated in the reasoning of the judgement that, *"It was established that the behaviour of the accused, as mentioned in the wording of the judgement, contained all the objective and subjective elements of the criminal offence of trafficking in human beings, stipulated by Article 388, Paragraph 3, in reference to Paragraph 1, of the Criminal Code. For starters, the statement of the minor injured party ... as provided before the investigative judge of the District Court in Jagodina, described in a detailed and*

¹⁷ This judgement is available at [http://www.eulex-kosovo.eu/docs/justice/judgments/criminal-proceedings/BasiCourtPristina/\(2013.04.29\)%20JUD%20-%20L.D.%20et%20al.%20\(BC%20Pristina\)_ENG.pdf](http://www.eulex-kosovo.eu/docs/justice/judgments/criminal-proceedings/BasiCourtPristina/(2013.04.29)%20JUD%20-%20L.D.%20et%20al.%20(BC%20Pristina)_ENG.pdf) (Last accessed on 27 August 2015)

convincing manner, the ways and under which circumstances he had committed the criminal offence he was charged with. He stated that he had spent a lot of time in betting shops, where he had often seen the accused K.M., this was also confirmed through the statement of witness D.M. from Belgrade, the manager of the betting shop, who had known the accused as a frequent customer. The witness said that the injured party had also been present very often and that he had seen them communicating, which the accused did not deny. The injured party stated that the accused lent him money multiple times, intended for gambling, but that he demanded from the injured party to return amounts of money which were much larger than the borrowed amount. When he could not repay such a debt, the accused forced him to engage in the criminal offence of theft in order to repay the money. He said that during the summer of 2007, upon orders issued by the accused K.M., he had stolen a wallet and a mobile phone, in Sinđelićeva Street in Jagodina from a perambulator, and had handed those things over to the accused who had waited for him nearby. The accused confiscated both the wallet and the telephone, without giving him any money. The injured party said that he had committed this criminal offence upon an order of the accused, because he could not repay the money, in an amount of RSD 1,000, which had been lent to him the previous day in the betting shop. The owner of a shop ... from Jagodina, whose shop was opposite the location of the theft of the wallet and of the mobile phone, testified that he had seen the minor injured party with a Roma person, aged 30-40, walking along Sinđelićeva Street, where the shops were located. The witness claimed that the minor ... approached the pram which had been stationed in front of shop "N.", while the older person had gone ahead and had stopped in the vicinity of "Ž.M.", and that the minor ... having stolen things from the pram, started to run towards the location where, according to the witness, the older person literally had waited for him. He had seen the moment when the minor ... had handed over the wallet to the older person waiting. His statement was trusted, because the person was completely impartial in relation to both the accused and the minor injured party..." In reference to the relationship between the accused and the injured party, the Court stated, "Also, it could be determined from the statements of the minor injured party and of the witness that the minor injured party was afraid of the accused due to threats that he would beat him up, take him into the hill and rape him, and the fact that he had slapped him once and took his money forcibly.

Thus it is the opinion of the Court that the minor injured party was forced to steal. Bearing in mind the type of behaviour of the accused towards him, and knowing that the victim was inferior to the accused taking into account his age, emotional immaturity and low level of intelligence. The victim was aware that the accused had been committing criminal offences and that he would be exposed to harm if he were not to act in accordance with the accused's orders and instructions, i.e. if he were to not accept his initiatives and proposals to commit crimes for the financial benefit of the accused or to engage in gambling and turn over any winnings to the accused.

We find an interesting stance of the Court regarding the existence of this element of a criminal offence i.e. of exploitation as a purpose of an act of perpetration in the judgement of the **Higher Court in Bijelo Polje, No. Ks 12/12**, dated 3 December 2012. The case concerned the transportation of foreign nationals, four persons from Bangladesh, who were injured parties. They were brought to Kosovo by deception and were convinced that they were allowed to stay there, that they could develop the textile market, earn a lot of money, and move freely. With that goal in mind, they brought money with them in an amount of approximately EUR 5,000 and USD 2,000 and left that money, as well as their

earnings, in the care of persons who housed them in Kosovo until they moved to Montenegro. The perpetrators subsequently transported the victims across Montenegro, from one locality to another, with the intent of transferring them to Bosnia and Herzegovina. The injured parties were convinced that they were travelling to the town of Berane, Montenegro, where they were supposed to start their business. The police discovered and arrested the injured parties, and uncovered the perpetrators. The injured parties were then subject to misdemeanour proceedings. In the explanation of this element of the criminal offence, the Court stated, *"In this specific case, bearing in mind the above, the Court took into account the aforementioned that it was not necessary for the goal to be achieved in order for the offence to occur, because there was no doubt whatsoever that the criminal intent of the accused covered not only the act and means of perpetration, but also its goal, which represented a state in which the injured party, under these created conditions, could only be brought into a position of subservience and exploitation in their country of destination. From the point of view of everyday life, such interpretation of the legal norm is justified, because if one would wait for the goal to be attained in order to gather physical evidence, the consequences would be irreversible in terms of the interests of the injured parties.* Thus, the Court did not explain nor indicate what the exploitation of the injured parties was about, although it existed in the fact that the injured parties were deceived into handing over the money they had brought and earned, which leads to a conclusion that it was a type of economic exploitation which could be categorised as labour exploitation of the injured parties.¹⁸ In the context of the legal description of the criminal offence of trafficking in human beings in the criminal legislation in Bosnia and Herzegovina, the above exploitation could be categorised as "other forms of exploitation".

6. Consent of the Victim of Trafficking in Persons to Planned Exploitation

The consent of the victim of trafficking in persons to planned exploitation is not relevant to the existence of the criminal offence. That was explicitly emphasised both in Article 186, Paragraph 9 of CC BiH and in all relevant international instruments. In reference to this, no dilemmas exist in jurisprudence, which the **Court of BiH** explained in detail in the judgement **No. KŽK-1/07**, dated 15 February 2007:

"...Furthermore, the claims of the defence attorneys of the accused that the above-mentioned women agreed willingly to provide sexual services, and that they also profited financially by providing those services is of no importance, because neither of the previously mentioned circumstances is of any importance for the existence of this criminal offence, if all the preconditions are fulfilled for it to exist. Namely, it stems from the nature of this criminal offence that its sense is to provide criminal justice protection to a passive subject, even if the subject consented to committing the offence, while the other party is punished (an option of

¹⁸ Here it must be noted that the basic form of the criminal offence of trafficking in human beings, stipulated by Article 444 of the Criminal Code of Montenegro, reads as follows: "Anyone who by force or threat, deceit or keeping in delusion, by abuse of authority, trust, relationship of dependency, difficult position of another person or by keeping back identification papers or by giving or receiving money or other benefit for the purpose of obtaining consent of a person having control over another: recruits, transports, transfers, hands over, sells, buys, mediates in sale, hides or keeps another person for exploitation of work, submission to servitude, commission of crimes, prostitution or begging, pornographic use, taking away a body part for transplantation or for use in armed conflicts shall be punished by imprisonment for a term of one to ten years."

the so-called unilateral criminal offences as a necessary complicity, which is the essence of Article 186, Paragraph 4 of CC BiH), thus the defence of the primary accused that she was coerced in a way by the very service users and by girls to commit those criminal offences is baseless. Even if the accused only rented the rooms used for provision of sexual services, as the accused stated in her defence, if she did that, during that time, by using threats or other forms of force or abuse of the vulnerability of some of them (or of some new ones) to recruit them for the purpose of sexual exploitation, that fulfilled the subject-matter of the criminal offence, i.e. the trafficking in human beings for the purpose of sexual exploitation...”.

The same court, in the judgement **No. KŽK-03/10**, dated 22 November 2010, while responding to the statement of the defence attorney of the second defendant K. E., according to which the *“presented evidence does not support the state of facts of the indictment, i.e. it does not prove a constituent element of a criminal offence of trafficking in persons, the economic exploitation. Namely, the defence attorney of the second defendant claims that no witness stated that there had been economic exploitation by the accused. In that sense, there are no forms of economic abuse or deception, since the parents were aware of the location where their children worked and under what conditions, as well as the fact that the accused provided compensation for the work either to them or to their parents...”* pointed out that *“Article 186, Paragraph 4 of CC BiH stipulated the matter which is of decisive importance for this case,, i.e. the consent of the person to exploitation mentioned in Paragraph 1 of the Article is of no relevance to the existence of the criminal offence of trafficking in persons. Therefore, the consent of the victim of trafficking in persons to planned exploitation is of no relevance in any case and especially if the victim of the criminal offence is a child or a minor, which is the case here.”*

2. MINORS AS VICTIMS OF A CRIMINAL OFFENCE

Trafficking in human beings, as a form of violation of fundamental human rights and freedoms and a violation of human dignity, has an extremely negative consequence for young people who find themselves in the role of a victim of any form of trafficking in human beings. Accordingly, the perpetration of this criminal offence against minors, i.e. persons below 18 years of age, is regarded as an aggravated form of the offence, and for it to exist it is sufficient to prove that an alternative act of perpetration was committed with the purpose of exploitation through prostitution or through another form of sexual exploitation, forced labour or services, slavery or similar practices, servitude, removal of organs of human body or for the purpose of another form of exploitation. Therefore, it is not necessary for the acts of perpetration to be committed with the application of an alternative means of perpetration which represents an important characteristic of a criminal offence committed against adults.

Thus, for example, the **Court of BiH** stated in the reasoning of the judgement **No. S1 3 K 005873 11 KŽK**, dated 27 October 2011, "The accused C. conducted the actions of recruitment by connecting the injured parties with other men, i.e. by bringing them into such situations in which they became an object of sexual exploitation. During the conduct of such actions, no threats, deceit or fraud were used by the accused. However, for the existence of a qualified form of a criminal offence of trafficking in human beings, as stipulated by Article 186, Paragraph 2 of CC BiH, the above-mentioned ways of perpetration are not relevant, hence the action of recruitment, i.e. incitement of minors to engage in prostitution, in this specific case, was conducted by actions through which the accused brought the injured parties into situations in which they became an object of exploitation, i.e. conducted the actions through which he obtained minors for the purpose of sexual exploitation."

An issue which may arise as contentious in concrete cases is **whether the perpetrator of the offence knew the age of the passive subject**. If it is proven during the proceedings that the perpetrator was genuinely unaware and mistaken regarding the age of the passive subject, i.e. that the perpetrator did not know that the person was under the age of 18, the perpetrator will not be held responsible for this form of the criminal offence. This certainly does not mean that there will be no responsibility for the basic form of the offence if the passive subject was subjected not only to an alternative act of perpetration but also to an alternative means of perpetration of this criminal offence. During the determination of this circumstance, the court must take into account all the facts that are relevant for assessment. For example, the **Higher Court in Podgorica**, in the reasoning of the judgement **No. K 6/13**, dated 18 November 2013, stated the following: "*The Court reached a completely opposite conclusion, on the basis of interpreted telephone conversations, from the conclusion of the accused and of minor P.D., because it is completely clear from those conversations that he took them to his premises for the purpose of engaging in prostitution with other men and that he had completely different plans with her from those he mentioned to her initially, when he solved her financial problem by employing her in a café in which she*

worked for only five to six days. In that sense, the accused quickly turned the plan into action and he undoubtedly knew that she was a minor, because it can be clearly concluded from the conversation which he had with an unknown man on 14 May 2012 at 12:13, in which he informed him that two girls were waiting for him in the apartment, one black-haired and the other one blonde, and that the one "aged 18 was inexperienced", that he knew very well the age of all the girls he provided to other men for the purpose of prostitution. In any case, he met her in a café in the vicinity of her school. She was accompanied by her female classmates, and he often paid for her drinks, drove her home and, when he employed her in a café, he knew that she had quit school and whatever he did subsequently by giving her to men for prostitution, he did by abusing her difficult financial situation."

In the verdict of the **Higher Court in Niš**, judgement **No. K 303/10** from 12 May 2010, the Court's stance was that *"the accused, who transports his own children and the children of his friends for the purpose of begging from place to place, even when he does not use force and threats, and does not abuse the difficult situation or trust of another person, still perpetrates the criminal offence of trafficking in human beings."*

In the rationale of the judgement it was noted that: *"In this specific case, the accused jointly transported their minor children and the minor children of the male injured party, D. M., and female injured party, V, for the purpose of begging in the city streets in Montenegro. This was done using a truck owned by the accused, T. S., and the car of the defendant, S. S., so that the minor children being transported could be engaged in begging in cities in the Adriatic region, using the presence of a large number of tourists, and turning over the money to their parents."*

3. CONFISCATION OF MATERIAL GAIN ACQUIRED THROUGH PERPETRATION OF A CRIMINAL OFFENCE

The criminal offence of trafficking in human beings is often perpetrated for the purpose of acquisition of material gain. According to some sources¹⁹ trafficking in human beings represents the third-largest global source of illegal profit, after illegal narcotics trade and illegal arms trade. Thus one of the most efficient measures in the fight against this form of crime, irrespective of whether it is perpetrated nationally or internationally, is the confiscation of property acquired through perpetration of a criminal offence. However, in practice the judiciary uses the legal opportunities at hand insufficiently and rarely pronounces the criminal justice measure of confiscation of material gain acquired through perpetration of a criminal offence.

It has been noticed that in specific cases courts often do not determine the amount of illegal material gain, which leads to the conclusion that the courts have not yet accepted international and European standards²⁰ related to the fight against this form of crime. The most-often stated reasons are difficulties in determining the amount of material gain. However, there is good practice in the jurisprudence of the Court of BiH in this respect, including in relation to the judgement of the **Appellate Panel of the Court of BiH, No. X-KZ-06/181**, dated 21 April 2009. The following was stated in the reasoning of the Judgement: *"Also, the Panel concluded from the statement of witnesses who were injured parties, as well as from the statement of M.A., the financial expert witness of the Office*

19 "Trafficking in human beings is one of the three most profitable criminal activities (apart from drug trafficking and arms trafficking). The profit from trafficking in human beings is assessed in the amount of USD 7 - 60 billion per year, and according to some estimates up to USD 507 billion per year" - see L.J. Slijepčević: Protection of Rights of the Victims of Trafficking in Human Beings in accordance with the Council of Europe Convention on Action against Trafficking in Human Beings, Bulletin of the Appellate Court in Novi Sad, No 4/2012, Intermeks, Belgrade.

20 Most documents adopted at the international and European levels recommend to states, as a measure against this form of crime, the introduction of such criminal sanctions which would confiscate the perpetrators' property acquired through perpetration of a criminal offence. For example, Joint Action 97/154/JHA of the European Council (Chapters A, B, and C) from 1997, apart from other penalties, proposes the introduction of confiscation of property in case of that crime. The OSCE, in the conclusions of the 2000 Supplementary Human Dimension Meeting on Trafficking in Human Beings, recommended to the participating States that they should introduce measures allowing the confiscation of traffickers' earnings and should use the confiscated assets to supplement government funding for programs that address the needs of victims of trafficking. The 2000 Palermo Convention also obliges States Parties to adopt such measures as may be necessary to enable confiscation of proceeds of crime derived from offences covered by this Convention or property the value of which corresponds to that of such proceeds, as well as property, equipment or other instrumentalities used in or destined for use in offences covered by this Convention (Article 12 of the Convention). The 2005 Council of Europe Convention, in its Article 23, also stipulated that each Party shall adopt such legislative and other measures as may be necessary to enable it to confiscate or otherwise deprive the instrumentalities and proceeds of criminal offence of trafficking in human beings, or property the value of which corresponds to such proceeds. Therefore, the fundamental postulate in the fight against this form of crime is the confiscation of property acquired through perpetration of this criminal offence; hence the courts would have to take into account not only the provisions of the national legislation, but also the provisions of the above-mentioned documents. The legal instrument for the implementation of such a requirement, according to our legislative solution is the criminal justice measure of confiscation of material gain acquired through perpetration of a criminal offence. We emphasise that the implementation of this measure is obligatory for the court in all cases in which it is determined that the perpetrator acquired material gain through perpetration of a criminal offence.

of the Prosecutor, what the amount of illegal material gain was, which stemmed exclusively from the illegal activity of exploitation of the injured parties for the purpose of prostitution.

The male accused K. and female accused P. acquired material gain from charging for sexual services in the amount of BAM 209,600, and for charging for the use of a motel room for every half hour of sexual services, as a result of the criminal offence, in the amount of at least BAM 76,840.

The Panel reached the conclusion by taking into account the statements of the injured parties who said that a half hour of sexual services cost BAM 60, of which BAM 25 was retained by the injured parties, and BAM 25 was taken by accused M., while the room was paid BAM 10. The injured parties mentioned an average number of clients per day that it varied and was larger in the summer. The injured party witness ... said that she had four to five clients, up to eight in the summer, while injured party witness ... said that she had one to eight clients.

Since those are approximate, and not exact numbers, the Panel calculated an average number of four clients per day per victim (which is certainly a figure that favours the accused) and the sum, according to the calculation made by expert A, is BAM 209,600 of illegal material gain from exploitation of women for the purpose of prostitution, and the amount used to rent rooms for the same average number of clients is BAM 76,840 of illegal material gain, having in mind that the expert calculated 20 days of average engagement of the girls in a month.

The defence attorney complained against the findings and against the opinion of the expert, saying that there was no material documentation on the basis of which a precise assessment could be made. However, the statements of the witnesses on which the findings are based represent a credible material fact per se, of equal value as the material documentation, especially because the statements of the female witnesses, who are simultaneously the injured parties, are credible and consistent, especially when it comes to the price of sexual services."

*In accordance with the established facts, the Court issued a decision whereby "pursuant to the implementation of legal provisions of Article 110 (1) of CC BiH, the male accused T. K. and the female accused P. shall have their **material gain acquired through perpetration of a criminal offence confiscated**, in the amount of BAM 286,440."*

*The following was established in the judgement of the **Court of BiH, No. K-71/05**, dated 25 April 2006: "Pursuant to Article 110, and in reference to Article 111 (1) of CC BiH, the accused shall have his material gain acquired through perpetration of a criminal offence confiscated, as follows: an apartment located on the roof terrace of a housing facility built on a land plot listed as "k.č. 3235" ... in M. in the B.F. Street, area 82 m², built with the use of financial resources in the amount of BAM 61,481, as part of material gain acquired through perpetration of a criminal offence, and the accused is simultaneously obliged to pay the outstanding amount of BAM 45,000 of material gain acquired through perpetration of a criminal offence, all of it not later than 15 days after the judgement becomes legally binding, while pursuant to Article 188 (1) of the Criminal Procedure Code of BiH the accused C. N. is obliged to cover the expenses of the criminal proceedings the amount of which will be decided through a separate decision."*

The following was stated in the reasoning of the judgement: *"...Namely, both witnesses pointed out that their daily "turnover" should have been BAM 300 - 400 each, which was later decreased, and the price of the service per client was BAM 100... Through their exploitation, i.e. the exploitation of their prostitution, during 2002 and 2003, when some girls earned more, while others earned less, the accused acquired material gain in the amount of at least BAM 100,000. Naturally, this stems from the statements of the injured parties, which the Court considered in conjunction with the findings and the opinion of financial expert witness M.A., which the Court accepted in its entirety as an objective and a professional one, from which it stems, as determined above, that the girls earned at least BAM 100,000 during that period of time. The expert did not exclude the possibility of an amount of BAM 200,000, depending on the price of sexual services, but the Court accepted the determined amount of BAM 100,000, which the victims turned over to the accused, and thus he acquired material gain through exploitation, i.e. the exploitation of prostitution of the victims."*

Regarding facts on the basis of which the Court confiscated the apartment owned by the accused, as part of material gain acquired through perpetration of a criminal offence, the following was stated in the judgement: *"The Court determined without any doubt that the accused C.N. used the money, during 2002 and 2003, in the amount of BAM 61,481.55, which was found to have been acquired through exploitation i.e. the exploitation of prostitution of the victims... to finance and build the apartment in M. in the B.F. Street, in a building in which he got the permit to build an apartment located on the roof terrace. Namely, the accused C.N., as stated in the certificate of the Employment Bureau, was registered as unemployed between 26 January 2001 and 25 January 2006, which includes the period covered by the amended indictment. Also, the accused did not provide the Court with any relevant proof that he had earned money at the time of the construction with which to cover its costs. However, the Prosecution offered relevant proof that the accused could have only built the apartment of that value through material gain from exploitation of those girls. Therefore, the accused C.N. did not have a permanent occupation, nor any other reliable source of income, and any profit he might have had from the work of an unregistered café "D." was negligible because, according to the statement of the accused himself and the statements of the witnesses, the café was in operation for a very short time... Therefore, the Court established without any doubt that the above-mentioned apartment had been built by the accused from the very material gain acquired through exploitation, i.e. the exploitation of prostitution of those women."*

Having in mind the previous judgements, it is surprising that the Court of BiH did not pronounce a criminal justice measure of confiscation of material gain acquired through perpetration of a criminal offence in some other cases where the existence of the criminal offence of trafficking in human beings through the exploitation of prostitution of other persons was also determined. For example, in case N., in the reasoning of the judgement, the facts that the injured parties provided sexual services for money and that they turned over a portion of that money to the accused N.Z. were mentioned as established facts. It was stated in the reasoning, among other things, that *"...witness A.A. stated that she had one to five clients per day, that the money was paid to Z, which she had never witnessed, and*

that she had received money after the job, in the corridor. She said she did not know how much Z. had charged for the services which had been provided, but she said that some clients had told her that they had paid even BAM 40 and 50, and one of them said that he had paid BAM 100..." Another witness, M.A., stated that she "...went to Z. twice a day and earned BAM 30-50, and Z. kept BAM 10 every time...", while the third witness, B.M., pointed out that "...Z. charged BAM 60 per hour, of which she earned BAM 40, and Z. earned BAM 20..." As in the above-mentioned cases, one could also determine in this specific case, and on the basis of witness statements, the minimum amount earned by the accused in this way, and to subsequently confiscate it through the implementation of this criminal justice measure.

As already stated above on several occasions, the motive of perpetration of this criminal offence is the acquisition of material gain. Having in mind that such material gain is often invested in certain legal businesses; the question arises of the correlation between the criminal offence of trafficking in human beings and the criminal offence of money laundering.

In contemporary jurisprudence there are two different stances on the same case, i.e. on the case of C.N. in which the Trial Panel did not accept the legal qualification of the Office of the Prosecutor that one could find elements of the criminal offence of money laundering in the actions of the accused (the construction of an apartment with the funds earned through sexual exploitation of the injured parties). In the reasoning of the judgement **No. K-71/05**, dated 25 April 2006, the Trial Panel of the Court of BiH pointed out the following: *"The Court did not accept the legal qualification stipulated by the Office of the Prosecutor of Bosnia and Herzegovina, in which it had qualified the actions of the accused as a criminal offence of money laundering, stipulated by Article 209, Paragraph 3 of CC BiH, clearly taking into account the facts, circumstances and actions undertaken by the accused...Namely, the Court found justification of the stance, in respect of, first of all, the actions undertaken by the accused, his goals and intentions, that the accused had primarily wanted to engage in matters of criminal justice, i.e. in trafficking in human beings, with which, without a doubt, he acquired material gain through recruitment and exploitation, i.e. he acquired material gain through the exploitation of prostitution of the injured parties, the money which he partly invested in the construction of the apartment. In this case, in the opinion of the Court, the criminal justice matter..., which the prosecutor qualified as a criminal offence of money laundering, has been incorporated into the actions of the continued criminal offence of trafficking in persons."*

However, in the **Appellate Panel of the Court of BiH** judgement **No. Kž-45/06**, dated 25 October 2006, **a different and more appropriate stance was taken**. It was stated in the judgement's reasoning that, *"When it comes to the appeal filed by the Office of the Prosecutor of BiH, this Panel finds the appeal's indication well-founded, i.e. that the Trial Panel made a mistake, when it assessed the actions described in Point 3 of the revised indictment and of the Trial Judgement as actions which, together with actions from Points 1 and 2 of the indictment, constitute a single continued criminal offence of trafficking in persons from Article 186, Paragraph 2, in reference to Paragraph 1 and to Article 54 of CC BiH. This Panel accepts the appeal that those actions have all the characteristics of the criminal offence of money laundering stipulated by Article 209, Paragraph 2, in reference to Paragraph 1 of CC BiH, and that it exists as an autonomous criminal justice matter, i.e. as an independent criminal offence which, according to its criminal justice nature, is different from the from the criminal offence stipulated by Article 186 of CC BiH."*

Therefore, although there is a functional link with that criminal offence, which is, indeed, a characteristic of the criminal offence of money laundering, there is still an important difference in its basic elements, for instance the consequence of the act of perpetration, as well as it being directed towards another object of protection, for which reason it was stipulated in another chapter of criminal offences (Chapter XVIII – Criminal Offences against the Economy and Market Integrity). Therefore, a statement in the appeal was well-founded that the Court had concluded wrongly when it assessed those actions, in legal terms, as an act which is of the same type as the criminal offence of trafficking in human beings, stipulated by Article 186 of CC BiH and that, as such, based on Article 54 of CC BiH, it included in the construction of the continued criminal offence as a single criminal offence, instead of legally qualifying them as separate criminal offences perpetrated in concurrence, which this Panel also accepts.”

Conclusion

The process of harmonisation of criminal legislation in Bosnia and Herzegovina with international standards as it pertains to the trafficking in human beings, i.e. with the provisions of the 2005 Council of Europe Convention on Action against Trafficking in Human Beings, is in its final phase. It remains necessary to adopt amendments to the CC FBiH. Bosnia and Herzegovina will then meet its normative obligations in this area. However, the fulfilment of obligations undertaken by the signing of the Convention does not conclude there. Bosnia and Herzegovina will need to ensure adequate implementation of all the legal provisions and an adequate protection of victims of this form of crime, which further means that the justice system in Bosnia and Herzegovina must have sufficient capacities to identify and recognise all forms of trafficking in human beings.

Raising proper indictments and mentioning relevant facts and circumstances is of extreme importance in determining elements of a criminal offence. It should not happen that an office of the prosecutor exonerates users of services provided by victims of trafficking in human beings from criminal responsibility by not filing criminal charges against them. Such failures of prosecutors hamper prevention and suppression of this form of crime and undermine the confidence of the general public in the judicial system.

As regard to the interpretation of certain elements of criminal offences in BiH, a significant number of judgements showed that there was disharmony in stances on the essence of certain forms of a criminal offence. This disharmony was so pronounced that one panel did not find elements of a criminal offence, whereas another panel, using the same facts of the matter and the same evidence, determined in a well-reasoned manner the existence of the criminal offence. Such practice shows that there remains a lack of understanding of the essence of trafficking in human beings, especially when voluntary prostitution appears as a form of exploitation (a case was mentioned in this compendium in which a legal provision according to which the consent of the victim is irrelevant for the existence of a criminal offence of trafficking in human beings was disregarded).

The confiscation of material gain acquired through perpetration of a criminal offence is a criminal justice measure of subsidiary character, whose implementation is obligatory in all cases in which a court determines that the perpetrator acquired certain material gain. One does not require expertise to conclude that acquiring material gain is the foundation of trafficking in human beings. This is effectively illustrated by the above-mentioned judgements. However, courts seem to overlook that obligation, and very rarely pronounce this criminal justice measure. A judgement was mentioned in the text of this compendium, in whose reasoning the court clearly stated the amounts of money turned over by the victims to the perpetrators, yet eventually failed to pronounce the criminal justice measure of confiscation of material gain acquired through perpetration of a criminal offence.

The above-mentioned examples show that the practice of judicial institutions, in terms of prevention and suppression of trafficking in human beings disregards both the international standards in this area and the national legislation. Two reasons for such a situation could be insufficient knowledge about the legislation and a lack of developed jurisprudence in that area. Accordingly, this publication presents both the judgements from Bosnia and Herzegovina and good judicial practice from neighbouring countries, as well as court decisions from Brazil and from the International Criminal Tribunal for the former Yugoslavia at The Hague. The above-mentioned judgements contained interpretations of certain elements of the criminal offence for which there are no examples, or where there are very few examples, in domestic judicial practice. These judgements should provide answers to some of the questions which have appeared or which will appear in reference to the jurisprudence concerning the criminal offence of trafficking in persons.

ANNEX

Court cases cited in this publication

ACTS					
	Recruitment	Transportation	Transfer	Harbouring	Receipt
	Court/Case No	Court/Case No	Court/Case No		Court/Case No
Bosnia and Herzegovina	Court of BiH/K-71/05 Court of BiH/S1 3 K 994249 12 Court of BiH/KžK-1/07 Court of BiH/S13 K 005873 11 KžK Court of BiH/S1 3 K 004249 11 K Court of BiH/K-34/06 Court of BiH/K-54/08 Court of BiH/Kž-61/09 Court of BiH/Kž-76/08 Court of BiH/Kž-31/10		District Court in Doboj/No. 13 O K 003360 15 K		Court of BiH/X-KŽ-06/181
Serbia	Appellate Court in Novi Sad/Kž I 455/11 Higher Court in Kraljevo/4K. 63/11 Municipal Court of Pančevo /No. K.756/2005	Supreme Court of Serbia/Kz. 483/04 District Court in Belgrade/K. 1038/03			
Montenegro		Higher Court in Podgorica/K. 197/08 Higher Court of Bijelo Polje/ Ks. 12/12	Higher Court in Podgorica/K. 6/13		

MEANS

	Threat or use of force or other forms of coercion	Abduction	Fraud and deception	Abuse of power or of a position of vulnerability	Giving and receiving payments or other benefits to achieve the consent of a person having control over another person
Bosnia and Herzegovina	Court of BiH/KžK-1/07 Court of BiH/71/05 Court of BiH/S13 K004249 11 KžK Court of BiH/No. S13K 004249 12 KžK Doboj District Court/ 13 O K 003360 15 K		Court of BiH/Kž-76/08 Court of BiH/X-Kž-06/181	Court of BiH/X-Kž-06/181 Court of BiH/S1 3 K 005873 11 KžK Court of BiH/KžK-1/07	Court of BiH/KžK-03/10 Court of BiH/ K- 49/08, Court of BiH/K-71/05
Serbia	Appellate Court in Novi Sad/Kž. I4897/10 Higher Court in Novi Sad/K. 532/10 Higher Court in Novi Pazar/ No. K 11/10 Municipal Court in Pančevo/ K.756/2005 Appellate Court in Belgrade/KžI 6471/11 Higher Court in Belgrade/K. 378/10	District Court in Belgrade/Kž. 312/03 Second Municipal Court in Belgrade/ K. 1295/01 Supreme Court of Serbia/Kž. 633/05, District Court in Belgrade/K. 1134/03 Supreme Court of Serbia/Kž. Ok.1/05 District Court in Belgrade – Special Division/K. P. 8/03	Higher Court in Kraljevo /4K. 63/11	Appellate Court in Novi Sad/Kž. I4897/10 Higher Court in Novi Sad/ K. 532/10	Supreme Court of Serbia/No: Kž I 664/05
Montenegro	Higher Court in Podgorica/K 198/08				

EXPLOITATION

	Prostitution of others or other forms of sexual exploitation	Forced labour or services	Slavery or practices similar to slavery	Removal of organs	Other forms of exploitation
Bosnia and Herzegovina	Court of BiH/K-76/08 Court of BiH/ Kž-61/09 Court of BiH/No: S13 K 994249 12 KžK Court of BiH/K-71/05 Court of BiH/ KžK-1/07 Court of BiH/ SI 3 K 005873 11 KžK Court of BiH/X-Kž-06/181	Court of BiH/KžK-03/10 Court of BiH/S1 3 K 004249 12 KžK			
Serbia	Appellate Court in Kragujevac/ Kž.1-243/11 Appellate Court in Novi Sad/Kž. 1 2386/ (definition of exploitation) Appellate Court in Novi Sad/Kž. 1 2386/12 Higher Court in Novi Sad/No: K. 207/11 Higher Court in Novi Sad/ K.193/11 Appellate Court in Novi Sad/Kž. I 247/12 Appellate Court in Novi Sad/Kž I 4358/11 Higher Court in Novi Sad/K.165/11 Higher Court in Kraljevo/4K 63/11				Jagodina/K 190/07
Montenegro	Higher Court in Podgorica/ K.br.6/13	Higher Court in Podgorica/K 197/08			Higher Court in Bijelo Polje/Ks 12/12
Croatia			Supreme Court of the Republic of Croatia/Kž 741/04-5		

Brazil			Criminal Court Rio de Janeiro/2007.5101.811659-4 Penal Court of Maranhão State/2000.37.00.002913-2		
ICTY			ICTY/IT-96-23 & 23/1		
Kosovo¹				Basic Court of Pristina/ No P 309/10, P340/10	
OTHER ISSUES	Intent to exploit	Consent to exploitation	Children	Confiscation	
Bosnia and Herzegovina	Court of BiH/Kž-125/05	Court of BiH/No KžK-1/07 Court of BiH/No KžK-3/10	Court of BiH/S13 K 005873 11 KžK	Court of BiH/X-Kž-06/181 Court of BiH/K-71/05 Court of BiH/Kž-45/06	
Serbia	Supreme Court of Serbia/Kž-I-1863/06 District Court in Kragujevac/K-19/06		Higher Court in Niš/K 303/10		
Montenegro			Higher Court in Podgorica/K 6/13		

¹All references to Kosovoin this text, whether to the territory, institutions or population, should be understood in full compliance with United Nations Security Council Resolution 1244.