



Organization for Security and
Co-operation in Europe
Mission to Bosnia and Herzegovina

A close-up, artistic rendering of the European Union flag, showing the blue field with white stars. The flag is draped and folded, creating a sense of movement and depth. The stars are bright white against the deep blue background.

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

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1. Introductory Remarks

Trafficking in human beings violates fundamental human rights. It destroys the dignity of survivors long after the period of exploitation ends, and young victims lose much of their childhood. With such concerns, the OSCE has long made it a priority to assist governments to put in place effective mechanisms for combating this illicit phenomenon. The OSCE Action Plan to Combat Trafficking in Human Beings, adopted by the Permanent Council in 2003, provides a framework for country-specific programmes in many Field Missions.¹

As regards Bosnia and Herzegovina, the crime of human trafficking had a boost in the mid to late 1990s, when thousands of women are believed to have fallen subject to organized trafficking rings operating throughout the country. A majority of victims were from Eastern Europe. Upon arrival to selected locations, often bars and nightclubs, victims were forced to offer their bodies to traffickers' customers, including -in many cases- international peacekeepers. Any attempt at refusal would be met with serious physical violence, threats toward family members or even murder by the traffickers or their accomplices.

After a series of more or less successful actions to curb the development, Bosnia and Herzegovina introduced bold measures in 2003 that enabled effective domestic prosecution of organized traffickers and strengthened the instruments for early detection of victims in transfer at State border crossings and elsewhere. The Court of Bosnia and Herzegovina was vested with jurisdiction over trafficking in human beings through amendments to the State Criminal Code in the same year.

Since then, the means and acts of trafficking have started to change globally as well as in Bosnia and Herzegovina. Today, the typical victim of trafficking is often a citizen

1 Organization for Security and Co-operation in Europe (OSCE), Action Plan to Combat Trafficking in Human Beings (PC.DEC/557) (2003). Commitment 9.1 of the Action Plan especially calls upon the OSCE Field Operations, where appropriate, to "promote and support legislative review and reform efforts in compliance with international standards."

of the country where traffickers offer their services and below the age of eighteen. Single or small groups of individuals increasingly carry out the crime. More often than before, the perpetrators resort to secluded locations, such as apartments and holiday homes.

In parallel, and partly as a result of the changing patterns, relevant international law is expanding. A notable result is the European Convention on Action against Trafficking in Human Beings (“ECATHB”), which entered into force in Bosnia and Herzegovina on 1 May 2008.² The European Court of Human Rights has also pronounced principles of law relevant to responses from the criminal justice sector to the crime of trafficking in human beings.³

Against that background, there is a need to analyse continuously the appropriateness of domestic criminal legislation and the justice system’s ability to sanction effectively offences of trafficking in human beings. Notably, the revised State Action Plan for Combating Trafficking in Human Beings in Bosnia and Herzegovina calls upon concerned actors to:

[A]nalyze further the effects of these criminal provisions and harmonize them in the elements and description of these criminal offences and ensure a uniform approach in the investigation of the criminal offences on the territory of the whole Bosnia and Herzegovina.⁴

This report presents the Mission’s views on these matters, especially as concerns trafficking with the purpose of sexual exploitation of the victim. Chapter Two looks into co-ordination of the system and the resort to specialized and effective prosecutorial instruments. It reasons that the available instruments are not utilized to their full extent and that unnecessary burdens might be put on the victims based on their willingness or ability to provide testimony. The chapter also points to the lack of a coordinated approach to the effect that these cases are often not handled by the Office of the State Prosecutor and the State Court, although these institutions are supposed to act as guarantors for appropriate criminalisation of the cases throughout Bosnia and Herzegovina.

In Chapter Three, the report reviews how domestic law defines, and justice actors qualify, the offence. It argues that whilst the State Criminal Code lives up to the test of international law, imprecise and misleading definitions in the Entity and Brčko District Criminal Codes do not. Moreover Entity and Brčko District definitions lead

2 European Convention on Action against Trafficking in Human Beings (“ECATHB”), 19 Jan. 2006, Europe. T.S. No. 197.

3 See, e.g., *Siliadin*, 2006-43 Eur. Ct. H.R. 16, 112: “States’ positive obligations . . . must be seen as requiring the penalization and effective prosecution of any act aimed at maintaining a person in such a situation”.

4 BOSNIA AND HERZEGOVINA COUNCIL OF MINISTERS, ACTION PLAN FOR COMBATING TRAFFICKING IN HUMAN BEINGS IN BOSNIA AND HERZEGOVINA 2008-2012, 8 (2008).

to inadequate qualification of the factual allegations that should be regarded as trafficking in human beings.

Chapter Four reviews the domestic penal policy for human trafficking. Special attention is given to the country's compliance with obligations concerning aggravating circumstances of the crime in law as well as in relation to individual cases. It reasons that while the legislation provides courts with a series of possibilities to consider severe conduct in line with the standards of international law, the emerging sentencing practice pays little attention to them. In a majority of cases courts rely upon a fallacy for mitigating punishment, disregarding aggravating circumstances.

At the time of writing this report, practice is only emerging. Case-law is limited, amounting to twenty closed trials in courts across the country.⁵ Findings from trial monitoring and a series of advocacy activities carried out by the Mission's Human Rights Department have been used in the analysis of practice within the criminal justice system. Another source of data has been derived from answers provided by law enforcement personnel and prosecutors to questionnaires sent by the Mission in 2007.

The Mission hopes that the findings will enhance understanding among practitioners of relevant international standards. However, not all principles enshrined in the ECATHB or the OSCE Action Plan to Combat Trafficking in Human Beings could be discussed at length for purposes of this report; by and large, protection measures for victims are not touched upon. More so, the report is not exhaustive in terms of all State obligations concerning criminal law, including questions of ancillary crimes, such as the use of services of victims. Finally, the Mission recognizes that the concerns identified in this report may not exclusively pertain to the shortcomings in prosecuting the crime of trafficking in human beings, but may rather reflect systemic challenges in the criminal justice system and be addressed under the auspices of general action plans, such as the Justice Sector Reform Strategy.

5 The Brčko District prosecutor's office did not report any cases of trafficking under the District's new Criminal Code .

2. Co-ordination of the System and Effective Investigations

2.1 International Standards

The UN Special Rapporteur on Trafficking in Human Beings, Especially Women and Children raised concerns over summary investigations and “precipitous” prosecution in her visit to Bosnia and Herzegovina in 2005.⁶ Her statement rests on the principle that a primary aim of investigations should be to prevent further violations of the victim’s human rights and provide him or her with a remedy.⁷ In this vein, the ECATHB articulates permissible activities to facilitate investigations leading to satisfaction from the victim’s perspective without infringing on the rights of suspects. Another purpose of the ECATHB is to improve international co-operation in investigating trafficking crimes. The treaty lays down a common understanding and minimum standards in terms of what European criminal justice actors are expected to achieve.

In terms of substantive State obligations, there is a general requirement that investigations into human rights violations be effective. The ECATHB underlines the need for efficient cooperation between prosecutors and law enforcement agencies on the one hand, and within different branches of the law enforcement on the other hand.⁸ Hence, in Article 29, the Convention requests from States that those responsible for enforcing legislation in this field are specialized and that the system is co-ordinated.⁹ The obligation would not mean that each court, prosecutor’s office and territorial unit of the police force should possess the knowledge requisite for expertise in the field. Rather, specific measures for specialization shall be undertaken when necessary for the effective prosecution of trafficking.

6 COMMISSION OF HUMAN RIGHTS, ADDENDUM, INTEGRATION OF THE HUMAN RIGHTS OF WOMEN AND THE GENDER PERSPECTIVE: REPORT ON THE SPECIAL RAPPORTEUR ON TRAFFICKING IN PERSONS, ESPECIALLY WOMEN AND CHILDREN, SIGMA HUDA, 62nd Session, E/CN.4/2006/62/Add.2, 30 Nov. 2005: “Prosecutors should be sensitized to the need to conduct thorough investigations and to avoid precipitous prosecution for offences carrying lesser penalties”.

7 *See, e.g., Siliadin v. France*, 2006-43 Eur. Ct. H.R. 16, 112 (2005): “Protection of human beings from slavery, servitude and forced or compulsory labour . . . [is] one of the fundamental values of democratic societies” and “no derogation from it is permissible”.

8 ECATHB, *supra* note 2, Art. 7.6, stating, for example, that “Parties shall strengthen co-operation among border control agencies by, inter alia, establishing and maintaining direct channels of communication”. EXPLANATORY REPORT ON THE COUNCIL OF EUROPE CONVENTION ON ACTION AGAINST TRAFFICKING IN HUMAN BEINGS 42 (2005), available at http://www.coe.int/T/E/human_rights/trafficking/PDF_Conv_197_Trafficking_E.pdf: “Article 5 . . . makes it a requirement to coordinate all the sectors whose action is essential in preventing and combating trafficking, such as the agencies with social, police, migration, customs, judicial or administrative responsibilities, nongovernmental organizations, other organizations with relevant responsibilities and other elements of civil society” (hereinafter EXPLANATORY REPORT).

9 ECATHB, *supra* note 2, Art. 29.1: “Each Party shall adopt such measures as may be necessary to ensure that persons or entities are specialized in the fight against trafficking and the protection of victims”.

Actual investigations should be carried out with particular understanding of the trauma that victims face. Practices from Bosnia and Herzegovina as well as other jurisdictions have shown that over-reliance on victims' ability or willingness to testify against perpetrators may jeopardize the results of criminal investigations and ensuing trials.¹⁰ For this reason, Article 27 requests that State parties to the Convention:

[E]nsure that investigations into or prosecution of offences established in accordance with this Convention shall not be dependent upon the report or accusation made by a victim, at least when the offence was committed in whole or in part on its territory.¹¹

In this connection, the drafters of the Convention draw attention to rules concerning special investigative measures in other treaties. Special investigative measures are extraordinary instruments and powers that courts shall approve when serious crimes are suspected of being committed. They serve to secure evidence that makes the forthcoming trial less dependant upon the willingness or ability of the victim to provide testimony. This might include covertly watching persons without audio surveillance, intercepting telecommunications and other means that can circumvent limited access to witnesses.¹²

2.2 Domestic Law

For reasons further elaborated in the next chapter, the definition of the crime of trafficking in human beings is only appropriately reflected in the State Criminal Code.¹³ This means that the State Court should act as a guarantor for appropriate criminalization of the offence, either by ensuring trial at this level or, on the basis of Article 27 of the State Criminal Procedure Code, by ensuring that another court assumes the competence in the specific case.

For the prosecutorial services, it is the State Prosecutor's Office of Bosnia and Herzegovina that has assumed a leading and specialized function for trafficking in human

10 See *infra* note 19 and accompanying text.

11 ECATHB, *supra* note 2, Art. 27.

12 For instance, in its Explanatory Report on obligations assumed under the Convention for Laundering, Search, Seizure and Confiscation for the Proceeds of Crime, the Council of Europe mentions the need to be "able to identify, trace, freeze or seize rapidly property which is liable to confiscation pursuant to Article 3 of the Convention." EXPLANATORY REPORT, EUROPEAN CONVENTION ON LAUNDERING, SEARCH, SEIZURE AND CONFISCATION OF THE PROCEEDS FROM CRIME AND ON THE FINANCING OF TERRORISM Art. 4 (1990). These investigative abilities have been integrated into the ECATHB. See EXPLANATORY REPORT, *supra* note 8, Art. 27.6 explaining that "collection of evidence by special investigative methods [was] already dealt with in Article 4 of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime . . . [and] it was thought better not to have a similar provision in the Convention".

13 Criminal Code of Bosnia and Herzegovina Art. 186, OG 3/03 as amended by no. 32/03, 37/03 54/04, 61/04, 30/05, 53/06, 55/06, 32/07, defining the crime of trafficking in persons (2003).

beings. Its internal criteria and recent developments in practice indicate that Department II of the Office, specialized in organized crime, economic crime and corruption, is supposed to accuse suspects of organized forms of trafficking and Department III plays the same role in relation to suspects of trafficking cases of a non-organized or internal nature.¹⁴ The efforts of the Office of the State Prosecutor are supported by the Border Police, the Foreigners' Affairs Service and the State Investigation and Protection Agency (SIPA) in investigations of trafficking-related offences. SIPA is the lead investigative agency in cases falling under the competencies of the State Prosecutor's Office. Besides, there is the *ad hoc* Strike Force for Combating Trafficking in Human Beings and Organized Illegal Migration.¹⁵ Established by the Council of Ministers in 2003, this force is still active, though it was to be dismantled once SIPA became fully operational.

At the Entity level, there are no such prosecutor's departments with designated specialized authority. Regarding the police forces, there are anti-trafficking liaison officers appointed in law enforcement agencies across the country. One would therefore assume that where Entity prosecutor's offices suspect that the crime of trafficking in human beings has been committed, they should refer the case to the Office of the State Prosecutor. Then, upon considering that the factual grounds correspond to the elements of the relevant criminal offence, one of the two specialized departments would take over the case and accuse the suspects under the State Criminal Code.

However, referral of investigations from the Entity to the State level, and the ensuing responsibility to prosecute the crime, is not circumscribed by clear rules. There are no strict guidelines for co-ordination between the Entity and State authorities. Besides that, every prosecutor in Bosnia and Herzegovina is legally required to inform both law enforcement agencies and victims on any decision not to conduct an investigation within three days of when a report is filed.¹⁶ Instead, what seems to be the decisive factor in the outcome of any given case is how the prosecutor qualifies the factual allegations at the preliminary stage of the investigation. In this respect, nothing seems to hinder the possibility that a prosecutor may decide to direct investigations into less serious offences enshrined in the relevant Entity Criminal Codes, such as enticement to prostitution, instead of involving or consulting the Office of the State Prosecutor.

14 See Annual Report of the Prosecutor's Office of BiH, 2007

15 Official Gazette of BiH, 3/04

16 See The Criminal Procedure Code of Bosnia and Herzegovina Art. 216.4, BiH OG 3/03 (2003), *as amended by* no. 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08; The Criminal Procedure Code of Republika Srpska Art. 216.4, RS OG 50/03 (June 2004), *as amended by* no. 111/04, 29/07, 68/07; The Criminal Procedure Code of the Federation of Bosnia and Herzegovina Art. 231.4, FBiH OG 35/03 (July 2003), *as amended by* no. 37/03, 56/03, 78/04, 28/05, 55/06, 27/07, 53/07; The Law on Criminal Procedure of the Brčko District of Bosnia and Herzegovina Art. 216.4, BD OG 10/03 (2003), *as amended by* no. 48/04, 6/05, 12/07, 21/07.

The next chapter will further explore how mistakes happen in respect of qualifying a chain of events as trafficking in human beings in accordance with the State Criminal Code.¹⁷ For now, the point is that when cases are processed entirely within the Entities, the necessity to consult or involve experts might be abandoned. This creates a problem in meeting the State obligation arising from the Convention.

With regards to special investigative measures, domestic law has already embraced the concept which ranges from surveillance of telecommunications and computer systems to covert recording and undercover investigators or informants.¹⁸ However, there are different approaches within the State Criminal Procedure Code when compared with those of the Entities and the Brčko District. The State Criminal Procedure Code foresees that special measures can be ordered for criminal offences under the chapter of the State Criminal Code dealing with crimes against humanity and values protected under international law, which includes trafficking in human beings.

At the Entity and the Brčko District levels though, the criminal procedure codes establish that special investigative measures can be ordered only for offences punishable by at least three years of imprisonment. With the exception of the offence of enticing minors into prostitution, other Entity provisions under which trafficking in human beings are investigated have proscribed sanctions with minimums of less than three years. As a result, it is only when the State Prosecutor's Office maintains competence over the crime of trafficking in human beings that special investigative measures can be used for investigating such offences.

In conclusion, Bosnia and Herzegovina has instituted specialized institutions that would serve to make prosecution of the crime effective. On the other hand, there is no guarantee that they will be consulted in investigations launched by the local police and Entity prosecutors. This is the result of the lack of a functioning co-ordination mechanism.

17 See *infra* Chapter 3.2, contrasting the laws in the Entities and the Brčko District with the State laws criminalizing trafficking.

18 Measures explicitly mentioned in law are as follows:

surveillance and technical recording of telecommunications; access to the computer systems and computerized data processing; surveillance and technical recording of premises; covert following and technical recording of individuals and objects; use of undercover investigators and informants; simulated purchase of certain objects and simulated bribery; and, supervised transport and delivery of objects of criminal offence.

See The Criminal Procedure Code of Bosnia and Herzegovina, *supra* note 15, Art. 116 defining "special investigative actions".

2.3 Domestic Practice

In 2007, the Mission sent out questionnaires to law enforcement agencies and prosecutors with any potential experience in investigating or prosecuting the crime of trafficking in human beings and related offences. The questionnaire indicated the agency of the relevant official, but answers were provided anonymously.

A first set of questionnaires related to the work of law enforcement agencies and questions centred on the number of investigations initiated, measures undertaken and the subsequent response by the relevant prosecutor. They were answered by individual police officers employed by SIPA, the Border Police, and the Ministries of the Interior in the Republika Srpska, the Federation and the Cantons respectively. A second set addressed the prosecutors. Questions related to co-ordination and investigations during the pre-trial stages.

Regrettably, the feedback by some police officers was poor. Some avoided indicating in accordance to which of the relevant offences a particular investigation was conducted, or their answers were incomplete for other reasons. Although this made it hard to draw any concrete conclusions, the answers indicate that it is difficult to gather information about the number of investigations conducted for offences related to trafficking in Bosnia and Herzegovina in a systematic manner.

What the questionnaires make clear, however, is that there is a significant discrepancy between the number of trafficking-related incidents reported by the police and the much smaller number of investigations ordered by the prosecutors as a result thereof. In this respect, the questionnaires repeatedly indicated a lack of guidance and directions from the prosecutors. For instance, according to answers provided by police officers from the Ministry of the Interior of the Republika Srpska, they received no response with regards to at least eleven criminal reports relating to trafficking in human beings filed with the State Prosecutor's Office. The Entity prosecutors cited lack of evidence as the main reason for terminating investigations.

Likewise, based on the feedback from the questionnaires, only scarce information is provided regarding practical use of special investigative measures by the law enforcement agencies when trafficking offences are suspected. Moreover, some of the returned questionnaires highlighted that law enforcement and prosecutors might build their case exclusively on witness testimony or, alternatively, disregard the investigation into a case once they lose access to the victim. Reference is made to the *Maraković* case.¹⁹ Tried in the Republika Srpska, the case resulted in the acquittal of a suspect merely on the basis that the court did not regard the prosecutor's evidence, based exclusively on the testimony of a minor victim, to be credible. Another example mentioned was a case where the Border Police allegedly secured evidence from various sources in a case of trafficking in human beings. The case involved ten sus-

19 *Enes Maraković*, 118-0- Kž-06-000 061 (2006), the Supreme Court of Republika Srpska.

pects committing the crime in large parts of the territory of Bosnia and Herzegovina. Upon the accidental death of the victim after filing the criminal report, however, the State Prosecutor's Office decided to terminate all further proceedings in the case.

While these incidents refer to the period prior to the entry into the force of the ECATHB, similar practice would henceforth stand in stark contrast to the obligations of the criminal justice system under Article 27 of the Convention.

3. Qualification of the Criminal Conduct

3.1 International Standards

The Palermo Protocol²⁰ defined trafficking in human beings in 2000. Using the same components in its definition of trafficking, however, the ECATHB explicitly criminalizes internal trafficking in human beings and regards organized criminality as an aggravating circumstance. By organized criminality, international law understands offences carried out by a group of three or more persons that act in concert over a period of time for the purpose of profit.²¹

Article 4 of the ECATHB defines trafficking in human beings as a composite crime, consisting of three main components: action, means and purpose. It is designed to ensure the legal recognition of a broad range of severe human rights violations that amount to trafficking in human beings when accumulated over time.

First, there is the required component of action, being:

[R]ecruitment, transportation, transfer, harbouring or receipt of persons.²²

Second, there is the means by which the act is carried out, consisting of:

[T]he threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person.²³

20 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the Convention against Transnational Organised Crime, U.N. Doc. A/55/383 (15 December 2000), *entered into force* 25 December 2003 (hereinafter the Palermo Protocol).

21 See, e.g., COUNCIL OF EUROPE, CRIME ANALYSIS: ORGANISED CRIME—BEST PRACTICE SURVEY NO. 4 (2002), *available at* www.coe.int/t/dgl/legalcooperation/economiccrime/organisedcrime/BestPractice4E.pdf: “Organised crime means: ...The illegal activities carried out by structured groups of three or more persons existing for a prolonged period of time and having the aim of committing serious crimes through concerted action by using intimidation, violence, corruption or other means in order to obtain, directly or indirectly, a financial or other material benefit.”

22 ECATHB, *supra* note 16.

23 *Id.*

Third, there shall be a special exploitative purpose of the act committed, including:

[A]t a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.²⁴

For instance, recruitment by threat of force of a person with the purpose of exploiting an individual for prostitution is an offence of trafficking in human beings. The act of harbouring a person by deceit with a recognized exploitative purpose might also amount to trafficking. In other words, trafficking in human beings would by necessity always commence prior to the actual exploitation of the individual, as the Council of Europe notes in its explanatory report.²⁵ The actual provision of sexual services, removal of organs or whatever the trafficker has in mind, is not relevant for the qualification of the crime, as long as exploitation was the purpose.²⁶

In a similar vein, trafficking in human beings for the purpose of providing sexual services can be regarded as a crime even in countries where prostitution is lawful. To the extent that prostitution occurs due to an exploitative purpose, and by acts and means otherwise falling within the Convention, the question of consent by the victim to sexual intercourse with customers to the trafficker becomes irrelevant.

Under international law, the component of means also becomes superfluous when victims of the crime are below eighteen years of age.²⁷ The ECATHB considers children to be automatically in a vulnerable situation vis-à-vis the perpetrator by virtue of their age, and replicates the position of the International Law Association that “a child should never be regarded as consenting to exploitation . . .”²⁸

24 *Id.*

25 The Explanatory Report of the European Convention on Action against Trafficking in Human Beings notes that:

Under the definition [of trafficking], it is not necessary that someone have been exploited for there to be trafficking in human beings. It is enough that they have been subjected to one of the actions referred to in the definition and by one of the means specified ‘for the purpose of exploitation. Trafficking in human beings is consequently present before the victim’s actual exploitation.

EXPLANATORY REPORT, *supra* note 8.87.

26 *Id.*

27 By the terms of the Convention, a child shall mean any person below the age of eighteen. The ECATHB, *supra* note 2, Art. 4. It goes beyond Article 1 of the Convention on the Rights of the Child in this respect, as the latter leaves discretion to States to set the age of childhood in domestic law. Convention on the Rights of the Child, 1577 U.N.T.S. 3, 28 I.L.M. 1448 (1989), *entered into force* 2 Sept. 1990. Article 1 of the Convention on the Rights of the Child states: “For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child majority is attained earlier”.

28 ANNETTE LANSINK, RAPPORTEUR, COMMITTEE ON FEMINISM AND INTERNATIONAL LAW, INTERNATIONAL LAW ASSOCIATION, INTERIM REPORT ON WOMEN AND MIGRATION 15 (2004).

Regarding substantive obligations assumed by the legislatures of Bosnia and Herzegovina, Article 18 of ECATHB states:

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct contained in Article 4 of this Convention, when committed intentionally.²⁹

This article imposes an obligation of result. It compels States to ensure, by incorporation or amendments of their criminal legislation, that the conduct described in the ECATHB is criminalized and made punishable. States would be at their discretion to design the specific language of the relevant domestic legal provisions and the institutional arrangement as long as they could achieve the intended result.³⁰

However, taking into account other international treaties, the obligation is to be carried out in conjunction with the principle that every person shall enjoy equality before the law. Factual circumstances should be treated in accordance with the same laws and standards. It is recalled that the significance of this principle is not merely abstract. A legal system that qualifies certain acts as human trafficking at random, whilst other similar conduct is classified as less serious, will not be able to achieve the overarching principles of equality before the law and legal certainty while maintaining public confidence. At worst, it might lead to human rights violations, if the crime of trafficking is qualified differently based on the group to which either the perpetrator or the victim belongs.

3.2 Domestic Law

As noted earlier, the domestic framework for criminalizing human trafficking varies widely within the State and the Entity Criminal Codes. At the State level, trafficking in human beings is defined by Article 186 of the State Criminal Code, which is part of the chapter of crimes against humanity and values protected under international

²⁹ ECATHB, *supra* note 2, Art. 18.

³⁰ Besides, the ECATHB invites State parties to criminalize the use of victims, which would be possible under the Entity and the Brčko District Criminal Codes. They include a crime that concerns sexual intercourse or other sexual acts with a helpless person or a child, which should cover the elements that are to be considered for criminalization by the ECATHB. However, and although many of the cases reviewed would show proof that such conduct is widespread throughout Bosnia and Herzegovina, corresponding charges have not been brought. The Criminal Code of the Federation of Bosnia and Herzegovina, *supra* note 30, Arts. 204 & 207(2); the Criminal Code of Republika Srpska, *supra* note 29, Arts. 194–195; the Criminal Code of the Brčko District of Bosnia and Herzegovina, *supra* note 30, Arts. 201–202.

law.³¹ The three necessary components - the act, the means and the purpose - are enshrined in terms of the specific elements outlined in the Palermo Protocol and the ECATHB. Whether the victim consents or not to sexual intercourse is irrelevant for the crime to occur according to the article. It further makes the specific exemption of the element of coercion or other means when the victim is a child or a juvenile.³² Hence, the State Criminal Code complies with the ECATHB also in that respect.³³

The Entity and the Brčko District Criminal Codes have not made criminal the offence defined as trafficking in human beings by the ECATHB. However, some provisions entail parts of the composite offence. Article 198 of the Criminal Code of Republika Srpska prescribes that Trafficking in Human Beings for the Purpose of Prostitution is committed when:

Whoever, in order to achieve material gain, entices, incites or lures another into prostitution or whoever, in any way, enables turning a person over to another for the exercise of prostitution or whoever, in any way, takes part in organizing or managing prostitution . . .³⁴

31 Article 186.1 reads that trafficking in human beings occurs when:

means of use of force or threat of use of force or other forms of coercion, of abduction, of fraud or deception, of the abuse of power or of a position of vulnerability, or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, recruits, transports, transfers, harbours or receipts a person, for the purpose of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or similar status, servitude or the removal of organs or of the other type of exploitation.

The Criminal Code of Bosnia and Herzegovina, *supra* note 13, Art. 186.

32 Article 1 of the Criminal Code of Bosnia and Herzegovina defines a child as a person who has not reached the age of fourteen and a juvenile someone who is older than fourteen but below the age of eighteen years. *Id.* Art. 1.

33 In addition to this article, the State Criminal Code defines the crime International Procuring in Prostitution in Article 187; the Criminal Code of Bosnia and Herzegovina, *supra* note 13, Art. 187. It exists when “a natural person procures, entices or leads away another person to offer sexual services for profit within a state excluding the one in which such a person has residence or of which he is a citizen.” *Id.* The criminal offence of slavery and transport of slaves is defined in Article 185 the State Criminal Code. *Id.* Art. 185, which provides that:

Whoever, in violation of the rules of international law, places another in slavery or in a similar status or keeps him in such a status, buys, sells, hands over to another person or mediates the purchase, sale or handing over of such a person or induces someone else to sell his freedom or the freedom of the person he provides for or takes care of, shall be punished by imprisonment for a term between one and ten years.

Id.

34 The Criminal Code of Republika Srpska, Art. 198, RS OG 49/03, *as amended by* no. 108/04, 37/06, 70/06 (2003).

Article 210 of the Criminal Code of the Federation and Article 207 of the Criminal Code of the Brčko District stipulate a related criminal offence, but name it as “Enticing into Prostitution.” It occurs when:

Whosoever entices, incites or lures another into prostitution, introduces a person to another for the exercise of prostitution or takes part in organizing or managing prostitution .³⁵

In the ensuing paragraphs of these two articles, aggravated forms of the crime are set forth. For instance, the Federation Criminal Code establishes a crime in paragraph 2 of Article 210 that concerns:

Whosoever, in order to achieve material gain, introduces another into prostitution by force or threat of infliction of harm, or by deceit .³⁶

Though there might be references to the notion of trafficking in human beings in the Criminal Code of Republika Srpska, and paragraphs 2 to 4 of the relevant articles approximate the international standard in terms of the means, none of these provisions reflect the full composite crime enshrined in the ECATHB.³⁷

First and foremost, they do not acknowledge the vulnerable position of children and still require proof that offenders have incited, lured or coerced the child. Moreover, they are indifferent to the ways in which the suspect has acted to achieve his or her purpose. With an emphasis on prostitution, other elements of the purpose behind exploitation are ignored. This ambiguity of the elements of the offence is further corroborated by the fact that it is enlisted within the chapters protecting sexual integrity, freedom and morals.

Hence, while most forms of the conduct of trafficking in human beings contain the elements of the Entity offences, it does not mean that, *vice versa*, all criminal conduct according to the Entity and the Brčko District provisions can be criminalized as per the definition of trafficking in human beings in the State Criminal Code. Therefore, and even if offences prosecuted under the State Criminal Code could be subsumed by the other Criminal Codes, the former is more precise and contains special features to the effect that it should have priority over the latter. In specific terms, it is to be concluded that whenever the conduct identified amounts to trafficking in human beings, the State Criminal Code should be applied. Moreover, and as discussed in

35 The Criminal Code of the Federation of Bosnia and Herzegovina, Art. 210, FBiH OG 36/03, *as amended by* no. 37/03, 21/04, 69/04, 18/05 (2003); the Criminal Code of the Brčko District, Art. 207, BD OG 10/03, *as amended by* no. 45/04, 06/05 (2003).

36 *Id.* Art. 210.2.

37 The actual name of the criminal offence in the Criminal Code of Republika Srpska does not reflect the definition of trafficking in human being pursuant to the Palermo Protocol and the ECATHB. *Compare* the Palermo Protocol, *supra* note 19, and the ECATHB, *supra* note 2, *with* the Criminal Code of Republika Srpska, *supra* note 33, Art. 198.

the previous chapter, for that aim to be realized, the Office of the State Prosecutor must act as the accusatorial body.

3.3 Domestic Practice

Just as the law “on the books” varies in terms of its adherence to the established definition and prohibition of trafficking in human beings, the practice evinces similar shortcomings. Some judgments demonstrate proactive stances in favour of the victims of trafficking. However, fact-like circumstances are not always treated in the same manner. Conduct that is principally the same is sometimes regarded as trafficking in human beings, while at other times it is qualified under the Entity legislation as being primarily an offence related to prostitution.

By example, the case of *Nezirović Nedim and Zlatija* was processed at the State level.³⁸ It concerns a mother and son who kept a group of women who could not support themselves, and coerced them to provide sexual services. Some were single mothers of small and sick children; others lived with an unresolved legal status in Bosnia and Herzegovina. The appellate panel reasoned that because the mother and son had harboured the women in their apartment, threatened them and abused their vulnerable position for an exploitative purpose, they had committed the crime of trafficking in human beings under the State Criminal Code.³⁹

Conditions similar to what the Nezirovićs had subjected their victims to were also prevalent in the case of *Gvozdrenović and Subošić* case.⁴⁰ In that instance, the court found that two men had deceived a woman to believe that she owed money with interest to a third person. In order to return the debt, they incited her to engage in sexual intercourse with an unidentified number of men in the apartment of the two accused. The victim delivered almost the entire amount of money that the services brought in, before she succeeded to escape with the assistance of another person. However, this case was instead qualified as the crime of trafficking in human beings for the purpose of prostitution under the Criminal Code of Republika Srpska.

More so, in the *Mehić* case,⁴¹ the accused had abused the romantic relationship with the victim and ordered her, using physical force, to engage in sex with other men for money, which the accused collected. Despite all indications of trafficking in human

38 *Zlatija and Nedim Nezirović*, Kž-70/06 (2007).

39 *Id.* The two accused introduced the women to men for whom sexual services were provided. *Id.* During the deliberations at the first instance court, the indication of consent among the women became an important circumstance for acquittal. *Id.* However, the appellate panel of the State Court held that the question of ‘consent’ to provide the sexual services was of no relevance. *Id.* This case sets a benchmark for the consent of victims. *Id.*

40 *Mileva Gvozdrenović & Duško Subošić*, K-173/05, the Basic Court of Banja Luka.

41 *Elio Mehić*, KP 848/05 (2006), the Municipal Court of Tuzla.

beings, the conduct was qualified as Enticing into Prostitution under the Criminal Code of the Federation of Bosnia and Herzegovina.

Different treatment of fact-like circumstances becomes all the more apparent and problematic with regards to the qualification of crimes against underage victims. A prime example of this is the *Ćupina and Salčin* case.⁴² The accused were charged and found guilty under the State Criminal Code of forcing minor girls into prostitution in Mostar and Sarajevo. The State Court argued correctly that due to the victims' age, the question of coercion or abuse did not have to be considered in order to secure a conviction.

By contrast, in the *Gatarić* case,⁴³ which also relates to the exploitation of persons below the age of eighteen, the accused was charged under the Criminal Code of Republika Srpska. The court found that the accused had abused the vulnerable situation and lack of means of two runaway girls. He provided them with accommodation and lured the minors to provide sexual services to two men in exchange for money. This money was collected by the accused, and only a small portion of it was delivered to minors. Following these events, he transported the girls to another location and offered several men to engage in sexual intercourse with them for profit.

Other cases involving minors have been classified as Enticing into Prostitution under the Federation Criminal Code. The *Rustemović* case,⁴⁴ for instance, concerns two accused who confined two women and two minor girls and abused their difficult financial situation. The couple ordered the women and the girls to be with the couple's customers, either in a bar where they worked or in other locations to which they were transported. Although the court established the presence of all relevant elements of trafficking in minors under the State Criminal Code, it was nonetheless qualified as Enticing into Prostitution.

Similarly, in the *Pušilo* case, the court dealt with offences against a young woman who worked as a waitress in a café owned by the accused, where she was forced to provide men with sex for money, which he collected. When not at work, the minor was harboured and locked in a room of an apartment near the café. The conduct was determined as Enticing into Prostitution under the Federation Criminal Code and not referred to the State Court for review.

Hence, conduct amounting to trafficking in human beings is often undercharged, especially in cases concerning underage citizens falling victims to the crime. Victims

42 *Nermin Ćupina* (Igor Salčin, Predrag Leventić) Kž-45/06 (2006). The court in *Ćupina and Salčin* determined that they had initiated contacts with the victims by fake romantic relations. *Id.* With such illusions, they deceived the girls to collect and deliver a certain amount of money on a daily basis by providing sexual services to men. *Id.* Although the girls were free to move on their own, they took the misperceived relationships seriously and carried out the plans that the accused had made. *Id.*

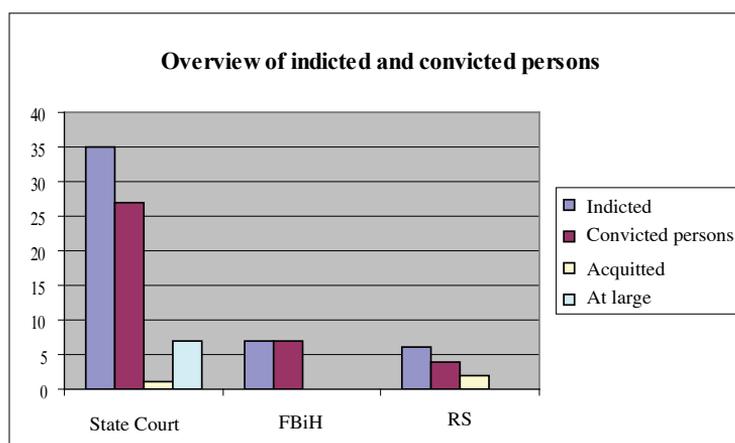
43 *Mladen Gatarić*, 011-0-K-06-000 024 (2006), the District Court of Banja Luka.

44 *Senahid and Fatima Rustemović*, 070-0- Kž-06-000276 (2006), the Supreme Court of the Federation of Bosnia and Herzegovina.

in these cases did not decide to engage in sexual activity. Rather, their vulnerable position was exploited in other ways for profit. Force, threat and physical violence were often used while the victims were deprived of their freedom of movement. Some were literally confined to a closed area. Other cases involve victims with such strong bonds with the accused, that they had no realistic opportunity to leave.

Although improper qualification of such conduct might be the result of a general lack of understanding of the elements of the criminal offence, it nevertheless means that many perpetrators have gone through trials which fail to consider the full extent of their exploitative and abusive actions. Considering the severe nature of the human rights abuses, including arbitrary deprivation of liberty, forced labour or even slavery-like treatment, the practice deserves notice.

On a positive note, however, most indictments for trafficking-related conduct have resulted in convictions. The ratio between the number of indicted and convicted persons before State and entity courts can be demonstrated in the following way.



As of the beginning of 2008, the State Court has pronounced final verdicts in ten cases of trafficking in human beings. These cases involve indictments raised against some thirty-five persons out of which twenty-seven have been convicted. Eighteen of the defendants concluded plea agreements.

There are at least eight cases consisting of conduct amounting to trafficking in human beings which have been qualified under other names in the Entity Criminal Codes. As regards the Federation, which accounts for five of them, seven defendants were found guilty under Enticing into Prostitution, two of which concluded plea agreements. In Republika Srpska, at least three cases convicting four persons under the Entity Criminal Code contain strong elements of trafficking in human beings. In addition, two cases in Republika Srpska resulted in acquittals.

4. Sentencing and Aggravating Circumstances

4.1 International Standards

Following conviction, the key element in the criminal procedure, naturally, is determining punishment. Sanctions for trafficking in human beings – as with all criminal activity – are essential both for generating a sense of justice for the victim and for deterring the offensive behaviour in general. Tough sentences are therefore crucial to demonstrate that trafficking in human beings is condemned by society as a serious crime.

Whereas punishments for human trafficking must be integrated with the existing domestic penal policies, State obligations in this field are generally not specific. Hence, the ECATHB does not fix a number of years of imprisonment, but requires that States in their legislation reflect the gravity and seriousness of the crime by providing appropriate sentencing range. The only formal requirement in that respect is that sentences foreseen for the crime of trafficking in human beings must not go below the sentencing range required for extradition to take place.⁴⁵ Rather, the specific sentencing range and punishment are left to the discretion of States to the extent that basic principles are fulfilled. Article 23 of the treaty calls upon State parties to:

[A]dopt such legislative and other measures as may be necessary to ensure that the criminal offences . . . are punishable by effective, proportionate and dissuasive sanctions.⁴⁶

In order to comply with the requirement of effective and dissuasive sanctions, the nature of the punishment must ensure that the perpetrator is deprived of the possibility to continue with trafficking activities after the verdict has been pronounced. Because of this, imprisonment would be a natural choice, unless there are strong reasons that would make possible a different kind of sanction that is still effective and dissuasive in the individual case.

Requiring proportionality foresees that sentences must be commensurate with penalties for other serious crimes in domestic criminal legislation. Circumstances of exploitation are to be dealt with similarly in terms of pin-pointing the punishment. The punishment has to be measured against both the facts of the case and other sentences that have been assessed for comparable crimes. One could argue that traf-

45 Extradition is an instrument by which a person is transferred from one State jurisdiction to another in order to face criminal charges in the latter. In European treaty law, the limit for a crime to be extraditable is set to a penalty where the maximum has to be at least one year. *See, e.g.*, the European Convention on Extradition, 13 December 1957, Europe. T.S. No. 24: “Extradition shall be granted in respect of offences punishable . . . under a detention order for a maximum period of at least one year or by a more severe penalty”.

46 ECATHB, *supra* note 2, Art. 23.1.

ficking cases are often comparable to the crimes of abduction, forced disappearance, serious bodily harm or murder, so the punishment should be commensurate and reflective of that fact.

Further, in Article 24, the ECATHB sets out four aggravating circumstances that must be taken into account both in law and as they apply to individual cases. So, whilst an ordinary or non-aggravated form of trafficking in human beings should on its own merits lead to a severe sanction, there are specific circumstances which, if applicable, should further increase the punishment. First of all, as Article 24 specifies, offences committed against a child are to be regarded as aggravating in terms of punishment. Second, the article proscribes harsher sanctions for perpetrators who expose their victims to life-threatening conditions, either due to gross negligence or by intention. Third, persons acting in an official capacity should also be subject to heavier sanctions than otherwise recommendable. Last, offences committed by criminal organizations are to be regarded as aggravating circumstances for States party to the ECATHB.⁴⁷

The list is not exhaustive, but should be regarded as a minimum. In the spirit of the purpose of the treaty and other international instruments, cases that grossly violate human rights for other reasons should lead to the imposition of bold sanctions as well. Moreover, it follows from the wording that circumstances can be applied in an accumulated fashion if, for instance, an organized network should traffic children and exposes them to life-threatening conditions.

As regards the penal policy in Bosnia and Herzegovina, a number of international human rights mechanisms have pointed out prior to the accession to the ECATHB that the penal policy for trafficking in human beings is problematic. For example, in its concluding observations, the UN Human Rights Committee was concerned:

[A]bout the leniency of the sentences imposed on perpetrators of such acts of trafficking.⁴⁸

This does not suggest that Bosnia and Herzegovina and other State parties are prevented from taking into account mitigating circumstances on behalf of the accused

47 ECATHB, *supra* note 2, Art. 24 reads:

Each Party shall ensure that the following circumstances are regarded as aggravating circumstances in the determination of the penalty for offences established in accordance with Article 18 of this Convention:

- a. the offence deliberately or by gross negligence endangered the life of the victim;
- b. the offence was committed against a child;
- c. the offence was committed by a public official in the performance of her/his duties;
- d. the offence was committed within the framework of a criminal organisation.

48 Paragraph 16, Consideration of Reports Submitted by States Parties under Article 40 of The Covenant, CONCLUDING OBSERVATIONS OF THE HUMAN RIGHTS COMMITTEE, BOSNIA AND HERZEGOVINA (CCPR/C/BIH/CO/1, 22 November 2006).

in accordance with a consistent domestic practice. Rather, it may reflect the need to reconsider the weight given to mitigating factors, especially in light of aggravating circumstances. Most often defence attorneys raise questions of mitigating factors and the court must reflect its assessment of these also in the balancing test preceding the determination of the particular sanction for the case. Hence, in its 1996 review of international criminal law, the International Law Commission pointed to the extenuating circumstances of the perpetrator's age, experience, family responsibilities and co-operation in the prosecution of other suspects as general principles of law of relevance to sentences for war crimes.⁴⁹ These would apply, *mutatis mutandis*, to cases of trafficking in human beings.

However, the fundamental aspect of Articles 23 and 24 is that States may have to change their domestic penal policy if it frustrates the desired effect of the ECATHB, which is that any offence of trafficking in human beings is prosecuted effectively as a serious crime.

4.2 Domestic Law

All criminal codes in Bosnia and Herzegovina are very explicit in determining the overall purpose of penalties.⁵⁰ The operative policy is to express society's condemnation as well as to deter the offender and others inclined to commit the crime. According to the codes, the verdicts should also inform the public at large of the seriousness and the fairness of particular sanctions.

For the courts, this policy is converted into two major issues which would determine the exact punishment for any criminal culpability. First, there is the question of the statutory sentencing range which is set to a minimum and maximum sanction. The more serious the legislator regards the crime to be, the higher the minimum and maximum are set. Second, the criminal codes request that courts make an assessment of the particular circumstances of the case, where any relevant facts are to be weighed against each other in order to mete out an individualized sanction within the limits of the law.

As to the first of the issues, the statutory range, the State Criminal Code foresees imprisonment for a term between one and ten years for the basic offence of trafficking in human beings.⁵¹ In comparison to other offences, it seems both proportionate and commensurate. For example, slave trade, the unlawful killing or wounding of the enemy and the membership in a group of people organized for the perpetration

49 DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND WITH COMMENTARIES, REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-EIGHT SESSION, p. 42.

50 See *supra* note Art. 39.

51 *Id.* Art. 186.

of genocide has the same statutory sentencing range.⁵² The range for trafficking in human beings also encapsulates part of the sentences pronounced for murder in the Entity and the Brčko District Criminal Codes, which begins at a minimum of five years.

More so, for some of explicitly recognised aggravating circumstances under the ECATHB, such as trafficking offences committed against minors, the State Criminal Code increases the minimum and imposes very harsh sentences. Five to twenty years of imprisonment is foreseen in such cases. Likewise, organized trafficking in human beings establishes a minimum of ten years imprisonment.

There is an apparent gap in terms of what Article 24 of the ECATHB proscribes in that the State Criminal Code does not enhance the range for trafficking offences when perpetrators have abused their official position or exposed their victim to a life-threatening situation.⁵³ Consequently, by the law, up to ten years of extra imprisonment may be pronounced for trafficking of children and organized crime in comparison to trafficking offences involving abuse of office or exposing to life-threatening conditions. Potentially, this gap could be filled by charging the accused with additional accessory offences. Guilt for both trafficking in human beings and, for instance, the infliction of serious bodily harm would prompt the court to announce a compound and, hence, harsher sentence than the minimum foreseen for trafficking in human beings alone.

Domestic law, however, is not very clear in defining to what extent a joinder of such charges is possible in cases before the State Court and practice in this regard has yet to crystallize. Offences against body and limb are only enshrined in the Entity and the Brčko District Criminal Codes. In relation to the offence of abuse of office, the State Criminal Code covers State employees, whereas the Entities maintain competence over abuses of office at the Entity level. For example, in a first instance judgment which concerned smuggling in persons, the State Court confirmed that it might be willing to join proceedings and assume jurisdiction over offences enshrined in the Entity or the Brčko District Criminal Codes. Extortion as defined by the Federation Criminal Code was tried as an accessory offence to smuggling in persons.⁵⁴ Yet, this

52 *Id.* Arts. 176(2), 177 and 186. The actual commission of genocide, crimes against humanity and serious war crimes is considered more severe than trafficking. Penalties range from 20 years up to the absolute maximum of 45 years.

53 Similarly, the Entity and the Brčko District Criminal Codes make reference to the organized criminal activity in a separate provision which can be charged again in concurrence with trafficking-related offences. See *supra* note 33, Art. 383, and *supra* note 34 Arts. 342 and 2.18.

54 *Dizdarević Aziz and Others*, X-K-05/03 (2008). The verdict was appealed, but the Appeals Chamber did not touch upon procedural matters.

does not always occur, although the established facts strongly suggest that the offenders committed accessory crimes enshrined in the Entity Criminal Codes.⁵⁵

Inversely, the transfer of jurisdiction for trafficking offences from State to the Entity level, when such circumstances apply, is impossible in light of the inadequate elements of the main offence. In addition, and partly as a result of these shortcomings, the statutory sentencing range differs at this level. In Republika Srpska, the sentencing range for Trafficking in Human Beings for the Purpose of Prostitution is between six months and five years or, alternatively, between one and five years where means of coercion have been used.⁵⁶ The Federation's corresponding crime, Enticing into Prostitution, is punishable between one and five years; when coercion is used, the punishment increases up to ten years maximum.⁵⁷ There is, in other words, a five-year statutory difference of maximum imprisonment for the ordinary form of the offence between the respective Criminal Codes.

Rather, for aggravated circumstances such as abuse of office and exposing to life-threatening conditions to be recognized when considering punishment, the State Court would have to apply Article 48 of the State Criminal Code which sets forth the relevance of particular circumstances of any offence. But unlike the provisions for statutory sentencing range, this provision is neither self-executing nor sufficient to resolve the existing differences in sentencing range. In other words, an amendment that increases the minimum and maximum penalty for these latter circumstances seems to be the safest way to ensure that the corresponding standards in the ECATHB are incorporated in the penal law.

The relevance of Article 48 and corresponding provisions in the Entity and the Brčko District Criminal Codes concern instead the second aspect of the courts' obligation to realize the penal policy. So, once the statutory sentencing range is determined on the basis of proven guilt, the article reads that the court shall take into particular account:

[T]he motives for perpetrating the offence, the degree of danger or injury to the protected object, the circumstances in which the offence was perpetrated, the past conduct of the perpetrator, his personal situation and his conduct after the perpetration of the criminal offence, as well as other circumstances related to the personality of the perpetrator.⁵⁸

55 Tried at the State Court, the case records of *Golić et al.* confirms that the offenders had exposed their victims to life-threatening conditions. However, no accessory charges were raised. *Dženan Golić & Zdravko Vidović* Kž-125/05 (2005). See *infra* note 62 and accompanying text.

56 See *supra* note 33, Art. 198.

57 See *supra* note 34, Art. 210.

58 See *supra* note 12, art. 48.

Read in conjunction with the statutory range for trafficking in human beings, it seems that verdicts pronouncing a minimum sanction would only be plausible where no aggravating circumstances have been established, and several mitigating circumstances are at hand. By the same token, there would be good reason to mete out a harsh sentence for trafficking of minors within the applicable statutory range for an offender who took part in trafficking of a very young child or several children. Other serious means of force, the number or nature of infringements to the sexual integrity of the victim caused by the offender and their effects on the victim's health would also be considered as of relevance to the application of these provisions.

However, the list of aggravating and mitigating circumstances in Article 48 is not exhaustive. Not surprisingly, sentencing practice suggests that there is no uniform methodology used in its application. Not all judgments seem cognizant of the purpose of sanctions or provide justifications that are mindful of the need achieve an overall consistency in the punishment pronounced. It would, therefore, seem fair to recommend that the justice sector should standardize the usage of provisions such as those in Article 48, for instance by a review of the matter in a general session of judges.⁵⁹ In any case, a solution must be found that ensures that the requirements of both dissuasive and proportionate sanctions under the ECATHB are upheld by the domestic legal system with adequate precision.

4.3 Domestic Practice

At the State level, only trafficking cases involving organized criminal networks have received high sentences. Other trafficking cases display a wide variation in the length of sentences, even those that are comparable in nature and gravity.

As a matter of record, the harshest sentences for persons guilty of the crime of trafficking in human beings ever pronounced in Bosnia and Herzegovina relate to organized criminal activity, in the case of *Ćupina and Salčin*.⁶⁰ The appellate panel of the State Court delivered a compound sentence of fourteen years of imprisonment for the first accused, out of which nine related to trafficking in human beings. It found that the first instance had not assessed the aggravating circumstances to the necessary extent, especially given the severity of physical violence suffered by underage victims and the effect of such violence to their psychological and physical wellbeing.

59 For instance, the verdicts in the trafficking case of *Nermin Ćupina* as well as the genocide case of *Stupar et. al.* contain informative and clear interpretation of the sentencing law of the State Criminal Code. The justification behind the specific sanction imposed in the cases clearly indicates that prior to assessing the particular circumstances of the cases, the Court took into consideration the general penal policy, the sentencing range of the respective offences and issues of consistency and proportionality. *Nermin Ćupina* (Igor Salčin, Predrag Leventic) Kž-45/06 (2006), *Stupar et al.* (X-KR-05/24) 2008, p.188.

60 *Nermin Ćupina* (Igor Salčin, Predrag Leventic) Kž-45/06 (2006).

Similarly, the *Milaković* case was a larger scale enterprise involving 18 individuals accused of trafficking foreign women of horrific proportions of abuse.⁶¹ These individuals forced victims to have abortions and forged the medical records of some victims who had tested positive for HIV or syphilis. Following a plea agreement, the first accused was sentenced to nine years for organized trafficking in human beings.

By contrast to these organized crime cases, the previously mentioned *Nezirović case*, also tried at the State Court, resulted in the defendants receiving one year of imprisonment each for the exploitation of several women.⁶² In its decision, the Appellate Chamber gave particular weight to extenuating circumstances, as the perpetrators had no previous convictions and one of them was in poor health.

Perhaps even more noticeable from the viewpoint of sentencing practice and aggravating circumstances is the *Golić and Vidović case*,⁶³ again tried at the State Court. The defendants bought foreign victims and forced them to engage in sexual intercourse with men. One victim died from multiple sexually transmitted diseases within hours of reaching the hospital. In the ensuing judgment, the court established that the death of the victim was caused by lack of timely medical attention and sexual exploitation. However, it justified a sentence of two years for one of the accused as follows:

[T]he accused was not previously convicted, his personal situation and his behaviour after committed offence, when he took the victim [...], to the hospital for treatment warranted a sentence of two years imprisonment.⁶⁴

As for its justification, the State Court claims to have taken into account the general purpose of the penal policy and the circumstances and nature of the offence, including several applicable mitigating circumstances, such as the fact that the accused had shown remorse by admitting guilt and the fact that he had custody over two children. On the other hand, there is no reasoning with regards to the objective of either dissuasive sanctions or the need to provide just satisfaction for the victim, who, notably, died as a result of the abuse. Moreover, the sum total of the circumstances might not be appreciated as favouring an opinion about the personal circumstances of the accused in light of the law. After all, his willingness to assist in providing the victim with medical care in a life-threatening situation should have come earlier and does not change the fact that he contributed to the victim's death by keeping her subjected to exploitation regardless of her medical condition. One would also question the specific motive behind his purported humanitarian act.

61 *Milaković*, KVP-03/03-A (2004) (convicting four out of eighteen persons indicted)

62 *Zlatija and Nedim Nezirović*, Kž-70/06 (2007).

63 *Djenan Golić & Zdravko Vidović*, Kž-125/05 (2005).

64 *Id.*

On the other hand, if the law provided for a harsher sentencing range for crimes exposing victims to life-threatening danger in accordance with the ECATHB, it is likely that the punishment would have been more reflective of the circumstances of the case and hence in line with the principles of international law.

Similar concerns can be raised through an examination of the judgment in the *Dodig* case.⁶⁵ Its sentencing part seems to ignore the importance of aggravating circumstances related to the suffering of the victim. In this case the State Court found a woman guilty for forcing a minor to have sex with several men. The victim was not allowed to leave the apartment where she was harboured and her travel document taken away from her. On the occasion of the first forced sexual intercourse, she was still *virgo intacta*. The court gave Dodig a suspended sentence of two years imprisonment with a probationary period of three years for the severe form of trafficking minors. In its justification, the court reasoned:

[T]he accused is a mother of three minor children and she admitted guilt for the offence. As well, the court found that the accused assisted the prosecutor's office in the detection of other similar criminal offences.⁶⁶

Although the circumstances identified as mitigating might be reasonable, the judgment is nevertheless questionable because it shows no consideration of the particular danger and injury Dodig caused the victim. The judgement seems to ignore the traumatic consequences this experience must have had on the child for her future psychological well-being. Likewise, there seems to be no appreciation of the high level of abuse imposed by repeated instances of severe sexual exploitation. As a result, Dodig received the absolute minimum penalty for trafficking in minors.

As regards sentencing in the Entities, practice is still contradictory and perhaps even more inclined towards leniency, including when weighed against particular abuse or suffering. Some direction as to the practice of the penal policy of the Federation was provided in the *Rustemović* case, appealed and reviewed by the Supreme Court of the Federation.⁶⁷ Here, a husband and wife each received three years of imprisonment. Although the Supreme Court took into account the fact that they were parents of a child, it emphasized that the husband had been convicted before and that he had showed persistence in committing the offence.

Moreover, the *Ćelosmanović and Salibašić* case,⁶⁸ which concerns two men who trafficked a woman from Romania and exploited her for several years, concluded in a

65 *Sladjana Dodig*, K-46/05 (2005) (PBA: KT-187/05, 07.07.2005).

66 *Id.*

67 *Senahid and Fatima Rustemović*, 070-0- Kž-06-000276 (2006), the Supreme Court of the Federation of Bosnia and Herzegovina.

68 *Mujaga Salibašić & Hajrudin Ćelosmanović*, 003-0- Kž-06-000363 (2007), the Cantonal Court of Tuzla.

sentence well below the minimum. At first instance, they were sentenced to the statutory minimum of one year each for Enticing into Prostitution under the Federation Criminal Code. However, the appeals instance found that:

[T]he first instance court has not sufficiently considered the mitigating circumstances on the side of the accused and overestimated the importance of established aggravating circumstances therefore.⁶⁹

Namely, the Cantonal Court of Tuzla thought that more attention should be paid to the fact that the perpetrators were married with children and less attention to their previous convictions for minor offences. On the other hand, the prosecution's description of the offence as violating international human rights standards was not addressed in the verdict. It ignored the harsh conditions under which the victim lived during the period in which she was trafficked and the fact that she was transferred across several international borders. In the end, the court pronounced a sentence of ten-month imprisonment, which is barely dissuasive and clearly incommensurate with the specific circumstances of the case.

Similarly, in *Mehić*,⁷⁰ who trafficked a minor, the sentence was set to one year less than the statutory minimum of the Federation Criminal Code. Rather than weighing in the injury caused, the Municipal Court of Tuzla discussed the personal character of the offender in the verdict. It reasoned that although prior convictions represent aggravating factors,

Correct attitude [of the accused] during the proceeding and admission of guilt represent extenuating factor.⁷¹

Although expressions of remorse are relevant according to general principles of law, the court apparently disregarded the impact of two aggravating circumstances, namely, that the victim was a minor and that she suffered severe forms of exploitation.

Indeed, to some extent the penal practice seems to work against the interest of child victims and on behalf of offenders. The existence of family responsibilities and lack of previous criminal record often take precedence and prompt courts to pronounce lenient sentences. In addition to a questionable compliance with the principle that in any matters affecting a child, his or her interest shall be of primary concern, one also has to ask whether it is the lack of criminal record that should be regarded as mitigating or the burden of criminal record that should be regarded as aggravating. Furthermore, a blanket mitigation of the severity of the crime on the basis of having a family might also send dubious signals to the society at large.

69 *Id.*

70 *Elio Mehčić*, KP 848/05 (2006), the Municipal Court of Tuzla.

71 *Id.*

For instance, *Pušilo*,⁷² who confined a minor victim and exploited her sexually in a café over a long period, was sentenced to one year and six months of imprisonment by the Cantonal Court of Gorazde under the Federation Criminal Code. The court reasoned that there are:

[H]ighly extenuating circumstances at hand, being it the fact that the accused is a younger family man with three minor children.⁷³

In *Gvozdrenović* case⁷⁴, a woman and her boyfriend who deceived a victim into repeated instances of sexual exploitation were found guilty as part of a plea agreement. The crime proscribes a minimum of one to five years of imprisonment; however, the Basic Court of Banja Luka pronounced a sentence of five months and fifteen days after citing several mitigating circumstances. Similarly, in the case of *Gatarić*, the accused escaped harsh sentence for these reasons, even though the case reached the appellate level in Republika Srpska. Although *Gatarić* had abused the vulnerable situation of two girls on the run, the Court sentenced him to one year and one month, among other reasons because:

[The accused] is in a difficult material situation, his correct behaviour during the procedure and the fact that admitted guilt for the offence.⁷⁵

It should thus appear that a large number of persons convicted for trafficking in human beings have received suspended sentences. It appears that the circumstances taken into account predominantly relate to the civil status and other personal circumstances of the accused, such as his or her family situation. On the other hand, physical and psychological harm suffered by the victims, especially children, are systematically disregarded during the evaluation of the circumstances of the case and the ensuing sentence. Furthermore, while some of the convicted persons occupied a low position in the trafficking chain, the fact remains that they have subjected minors or women to harsh conditions and forced sex for material gain.

In sum, the courts at all levels demonstrate a fallacy for lenient sentences in trafficking-related cases, including in those involving minor victims, and the emerging practice is hard to defend from the perspective of State obligations on proportionate and dissuasive sanctions.

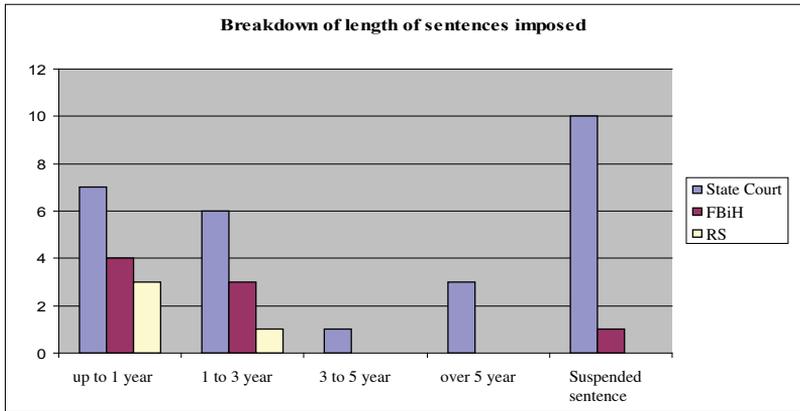
72 *Mirsad Pušilo*, K:3/04 (2005), the Cantonal Court of Gorazde.

73 *Id.*

74 *Mileva Gvozdrenović & Dusko Subošić*, K-173/05, the Basic Court of Banja Luka.

75 *Mladen Gatarić*, 011-0-K-06-000 024 (2006), the District Court of Banja Luka.

The overall ratio between different types of sanctions imposed can be depicted in the following way:



With respect to the State Court's verdicts, only three persons have received prison sentences of over five years, which should be the minimum for crimes committed against minors. The longest prison sentence among them is nine years. One person received a prison sentence of between three and five years. Six of the convicted persons received prison sentences of between one and three years. Seven persons have been convicted to prison sentences of up to twelve months. The shortest sentence was three months. As regards the Entities, four persons received prison sentences of between one and three years, while seven sentences of less than one year were imposed.

In other words, not many crimes have led to imprisonment of over three years. The vast majority of sentences have been set at around twelve months or suspended sentences have been pronounced. This does not give the impression that trafficking in human beings is punished by effective, proportionate and dissuasive sanctions.

5. Concluding Remarks and Recommendations

Action against trafficking in human beings has become an integral part of measures aimed at strengthening the rule of law and human rights protection mechanisms in the post-conflict recovery of Bosnia and Herzegovina. In 2003 the criminal justice system was equipped with veritable structures to combat this phenomenon; the State Court assumed subject matter jurisdiction over the offence and the Office of the State Prosecutor, as well as SIPA, became specialized in combating organized forms of trafficking of human beings. Since then, the issue has been on the agenda of the Council of Ministers, evinced among other things by three consecutive and amended State Action Plans for Combating Trafficking in Human Beings. The latest Action Plan calls for a review of criminal law and practice.

Such a recommendation seems justified. Non-specialized law enforcement personnel and Entity prosecutors fail to refer cases to their colleagues with thematic expertise working within the State institutions. The Entity and the Brčko District Criminal Codes fall short in their definitions of the offence of trafficking in human beings as per the definition under international law. Neither does the State Criminal Code automatically increase the statutory provisions for all severe forms of trafficking in human beings.

As a result, particular offences of trafficking in human beings are often inaccurately qualified as less severe crimes, to the effect that crucial aspects of the suffering of victims might become ignored at the trial. In light of the emerging practice, regrettably, this seems to affect particularly children. Moreover, a review of the case law shows that many offenders receive a bare minimum of what the statutory punishment range foresees. This is not only a result of problems with substantive law, but is caused also by summary assessment of the circumstances of the case and questionable consideration of the weight that should be given to certain mitigating factors.

Following the 2008 ratification of the ECATHB, such gaps in the system are troubling from the viewpoint of domestic priorities. Through accession to this instrument, Bosnia and Herzegovina has assumed new international obligations, including for substantive standards for the prosecution and punishment of the offence which go beyond what the domestic criminal justice system is currently able to offer.

Hence, these and other circumstances outlined in this report call for a continued and accelerated development of the legal and institutional arrangements for the protection of victims which were initiated by measures in the criminal law reform since 2003. It seems crucial to refine the referral tools, so that cases bearing elements of trafficking in human beings are transferred from the Entities to the appropriate State institutions in a timely manner. For their part, all officials involved, including investigators, prosecutors and judges would have to become much more vigilant in cases which, *prima facie*, are assessed as Enticing into Prostitution and Trafficking in Human Beings for the Purpose of Prostitution. Among these cases, extra attention has to be paid to those involving minors. In particular, the State Court and Office of the

State Prosecutor must consider means to curb the emerging practice towards lenient sentences and must standardize their approach to aggravating circumstances in indictments, assessments of guilt and sentencing, mindful of the interest of victims. As Entity courts continue to deal with cases of trafficking in human beings, their judges will have to fill the gaps within the applicable criminal law through the direct application of the standards under the ECATHB.

Such institutional measures would have to be complemented by incorporating all aggravating circumstances enshrined in the ECATHB in domestic penal law. Therefore, the legislators and the Ministries of Justice should lend their support to amendments to the criminal legal framework.

For these reasons, the Mission urges:

5.1 Legislators, in consultation with the relevant ministries of justice, to:

- a) Amend the sentencing ranges within the BiH Criminal Code to reflect that trafficking offences committed by a public official in the line of duty, or which deliberately or by gross negligence endanger the life of the victim are aggravating factors;
- b) Amend the titles and definitions of the Entity and Brčko District Criminal Codes for offences related to Trafficking in Human Beings for the Purpose of Prostitution and Enticing into Prostitution so as to eliminate the risk of charging improperly the international crime of human trafficking;
- c) Ensure that the recommendations below find the appropriate support in law.

5.2 The judiciary, prosecutors and law enforcement officials, as applicable, to:

- a) Refer cases to the Office of the State Prosecutor, alternatively to the State Court, whenever any doubts arise as to the qualification of criminal conduct containing elements of trafficking in human beings;
- b) Consider all aggravating circumstances prior to evaluating mitigating circumstances; such an assessment should include the weighing of potential infringements of human rights, giving specific attention to the age of victims, their number, the degree and duration of exploitation and the conditions to which the victims were exposed;
- c) Develop work aids for a consistent interpretation and human rights-oriented methodology in the application of Article 48 of the State Criminal Code and corresponding clauses in the Entity and the Brčko District Criminal Codes, upholding the international penal standards of effective, proportional and dissuasive criminal sanctions in cases of trafficking in human beings;
- d) Endorse special investigative measures and other extraordinary prosecution tools for trafficking in human beings which enable the collection of evidence other than victims' testimony when justified by the security of potential victims and other human rights principles;
- e) Suggest to legislators the contents of guidelines and other instruments that enhance co-ordination in line with the findings of this report.

5.3 The Judicial and Prosecutorial Training Centres to:

- a) Provide training on the elements of trafficking in human beings as understood by international law, with particular attention to the differences of the State and the Entity or the Brčko District Criminal Codes and the applicable criminal procedure;
- b) Provide training on penal law and techniques for assessing aggravating circumstances and other factors which have an influence on the determination of the sanction.

