



COMBATING
TRAFFICKING IN HUMAN BEINGS
THROUGH THE PRACTICE OF THE DOMESTIC COURTS



“Combating Trafficking in Human Beings through the practice of the domestic courts”

Skopje, November 2005

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ACKNOWLEDGEMENT

The Coalition ALL FOR FAIR TRIALS - Skopje is confronted with another significant challenge expressed through the project "Countrywide observation of Trafficking in Human Beings related cases", that was implemented in the period of 2004 and 2005, and with which the Coalition intends to give its own contribution in the implementation of the National Program of the Government of the Republic of Macedonia in the fight against the Trafficking in Human Beings and Illegal Migration.

The final report is a result of the enormous effort invested by the observers, the project assistant, other human resources of the Coalition, and of course of the project coordinator, who will provide for positive critic for the report with her devotion and readiness to sacrifice.

Being aware of the fact that the topic Trafficking in Human Beings is exploited enough by the expert public and the non-governmental sector, I can immodestly notice that the final report of the Coalition, according to the methodological and special scientific approach, makes it unique and recognizable.

In the process of implementation of this project we had complete collaboration and understanding of the presidents of the basic Courts where the cases were identified, and professional judges, as well, to whom, in my name and in the name of the observers I do extend my special appreciation.

Of course, the implementation of the project can not be achieved without the financial support of our strategic partner – the OSCE Spillover Monitor Mission to Skopje and of the Ministry of Foreign Affairs of Finland, with whose suggestions during the realization of the project activities and preparation of the final report, its quality is increased to a large extend.

President
Trajce Pelivanov



Executive Summary

The lack of thorough empirical analysis of the situation in the Republic of Macedonia regarding the issue of the state’s success in tackling the phenomenon of trafficking in human beings within the institutions responsible for its prosecution and suppression is a motive for developing the Report "Suppression of Trafficking in Human Beings through the practise of the domestic courts" of the Coalition "All For Fair Trial".

The research encompassed within the Report, for most of the cases in relation to the criminal offences of "Trafficking in Human Beings", "Mediation in Prostitution" and "Smuggling of Migrants" tried before the basic courts in Macedonia, is the first systemized data collection on a national level.

The following conclusions came out from the quantitative and qualitative data processing:

Victim protection

- In more than quarter of the cases, the witness at the main hearing was not informed about the right not to answer certain questions if there is a probability that, by this, he/she or his/her close relative would be exposed to serious embarrassment, material damage or criminal prosecution, although such obligation is stipulated in Article 223 paragraph 2 of the Law on Criminal Procedure. In 75 % of the cases, the examined witnesses in proceedings were victims.
- In none of the cases related to trafficking in human beings the witness denied to disclose personal data (in accordance with the provision of Article 223-a of the Law on Criminal Procedure), which has been foreseen for situations in which there is a probability that the statement or answering a question could expose the witness or another person close to him/her to a serious danger for his/her life, health or physical integrity. In addition to this, there was no case where the witness denied to make statement in the presence of the defendant, thus using the provision contained in Article 312 of the Law on Criminal Procedure, according to which the defendant may be removed from the courtroom in such situation.
- Witness or expert hearing via video conference has been carried out only in one case in the Republic of Macedonia.
- The special manner of witness hearing through the court in premises other than the courtroom (regulated by the provision of Article 270-a of the Law on Criminal Procedure) has not been applied in cases observed so far.

- The control at the entry to the court building in the basic courts before which cases involving trafficking in human beings have been observed is at a satisfactory level. It should be also noted that, in all cases in which the victim's presence at the main hearing has been secured, adequate physical protection was provided by the members of the Ministry of Internal Affairs, by security from the country of the victim's origin or by the court police.
- Space possibilities of courts are limited and they appear as a factor contributing to an increased probability for a secondary victimization of the victim of trafficking in human beings. Small courtrooms do not enable enforcement of the amendments to the Law on Criminal Procedure in Article 303-a, according to which the arrangement of the seats of the participants in the proceedings differs from the one in the past.

Compensation of the victims

- The basic courts in Macedonia, in spite of the widely established legal possibilities for compensation for victims of trafficking in human beings, have not yet established and developed practice of enabling compensation of pecuniary and non-pecuniary damage caused by the criminal offence.
- By introducing the compulsory obligation for the court, along with the verdict by which the defendant is found guilty, to decide with regard to legal property claim in criminal proceedings, either immediately or by passing additional decision, the legislator has created conditions for enforcement of a more prompt compensation for victims of trafficking in human beings. Unfortunately, these provisions have not been applied in the practice of domestic courts. So far, no decision for compensation of non-pecuniary damage to victims of trafficking in human beings or forced prostitution has been passed so far in the Republic of Macedonia.
- Provisions on confiscation of property or proceeds from crime gained through the perpetration of criminal act, as well as provisions on provisional security measures regarding property or proceeds from crime are rarely enforced in domestic courts' practice.

Duration of the criminal procedure

- More than half of the total number of observed cases is concerned with one defendant in the proceedings before the court and one victim of the crimes related to trafficking in human beings. At the same time, in 75% of the cases, the indictment refers only to one criminal offence.
- In 1/3 out of the total number of observed hearings, due to unsatisfied conditions for the main hearing to be held, it was directly postponed. The absence of the damaged party/witness, defendant and its defence lawyer is the most frequent reason for postponement.
- The measure of pre-trial detention, is mostly (50% of cases) ordered in cases related to the criminal offence of Smuggling of Migrants.
- In spite of variety of options available to the court for the purpose of securing the presence of the defendant in the proceedings, the tendency in the practice to apply the measures of pre-trial detention and apprehension very frequently is obvious. Although, the other preventive measures for securing the presence of the defendant have been introduced for more than one year, it seems that they did not really find their place in our basic courts.

- Presence of the victims/witnesses in the proceedings before the basic courts was provided in 31% of the cases. Therefore, in more than half of the situations, the hearing of victims was carried out of the main hearing.
- The assumption that the hearing will be postponed due to the absence of the parties in the proceedings is the most frequent reason the trial to be held in the office of the judge.
- In spite of indisputable impact of the summons service on the duration of the proceedings, still, it may be concluded that it is not a decisive factor.
- More than half of the cases in the framework of the issue of trafficking in human beings are postponed for a period longer than 30 days (mostly from 31 to 40 days).
- Therefore, 20% out of the total cases are considered postponed for a period longer than 60 days. Thus, the cases must start from the beginning pursuant to Article 297 (paragraph 5) of the LCP, which leads to unnecessary delay of the procedure.
- The speed within which the newer court cases in relation to trafficking in human beings come to their conclusion is much bigger than the cases filed before the second half of 2004. This leads to the conclusion that the effectiveness of the courts in punishment of the perpetrators of criminal offences of Trafficking in Human Beings, Mediation in Prostitution and Smuggling of Migrants has increased in 2005.

Penal Policy in the Republic of Macedonia

- Regarding the half of all the imposed effective punishments of imprisonment in the Republic of Macedonia for the crimes of Trafficking in Human Beings in the period from 2002 till 2004 and Mediating in prostitution in the period from 2000 till 2004, the length of the sentences had been below the special legal minimum.
- Too lenient approach of the courts in meting the punishments out in the field of trafficking in human beings points out that there is a gap between the court practice and the concept of the penal policy of the Republic of Macedonia expressed through the provisions of the CC on the severity of the punishments for the criminal offences in relation to Trafficking in Human Beings. There is a discrepancy between the severity of the crime and severity of the imposed punishments.
- In more than half of the judged cases, the court did not pronounce the verdict in accordance with the provisions of Article 344 of the LCP.

Profile of the accused

- Statistical data processing concerning defendant persons in cases observed before the basic courts, suggests that the potential perpetrators has the following features: person of male sex, with secondary school level completed, belonging to the age group between 18 and 25 or between 36 and 40, of Albanian ethnicity, formerly convicted, owner of a nightclub.

1

Basic Information

1. NGO Coalition "All for Fair Trial"

The NGO Coalition "All for Fair Trial", Skopje is a voluntary-based association with 22 NGO member-organisations from all over Macedonia, as follows:

MOST-Skopje, Youth Educational Forum-Skopje (MOF), SPPMD-Kavadarci, CDR-Tetovo, ARKA-Kumanovo, FEMINA-Kumanovo, ADI-Gostivar, Civic Tracks-Bitola, Association for Roma Rights, ARRP-Stip, Helsinki Committee for Human Rights in the Republic of Macedonia, Center for Children's Rights Protection-Skopje, MEDGASI-Skopje, PHURT-Delcevo, ROZPR-Skopje, ASVIN-Skopje, MPRC-Skopje, CIC Spectar-Stip and FOCUS-Resen, Temis-Skopje, Ani-Stip, Mesecina-Gostivar, Citizen's Association-Bitola.

Vision

Powerful and stable organization, promoter and partner of the institutions of the system in the efforts to raise the Republic of Macedonia as a country where human rights and freedoms will be fully respected, and especially the fair trial standards as a basic condition for integration into the European Union.

Mission

Monitoring the implementation of human rights and freedoms, especially of the international fair trial standards through various forms of activities in the efforts to increase the level of their implementation, to initiate institutional and legal reforms, and to revive the public trust in the judiciary and other institutions of the system.

Aims of the Coalition

To increase the level of the basic freedoms and human rights observation, especially in the field of international fair trial standards.

To strengthen the citizen’s trust in the institutions of the system.

To identify the problems faced by the institutions of the system, and ways for their overcoming.

To raise public awareness of the constitutionally guaranteed rights, and rights guaranteed by the law and international documents.

Structure of the Coalition

The Assembly, which includes representatives of each of the above mentioned member Organizations, is the highest decision making body of the Coalition.

The President of the Coalition and at the same time a President of the Assembly represents the Association.

The Executive Body of the Coalition is the Executive Board consisting of 9 members.

The Executive Director is responsible for the implementation of the decisions and projects of the Coalition.

The National Office is composed of the managerial personal of the Coalition, which perform their duties in accordance with the obligations set in internal documents and the concept of projects they are managing.

Activities of the Coalition

The Coalition was established on 12 May 2003, with an aim to increase the public trust in the legal system and the judiciary, to identify the problems within the judicial system and to point out to the necessity of legal and institutional reforms, to increase the respect of international fair trial standards before domestic courts, as well as to inform the public on international fair trial standards.

In the framework of the foundation project, "Implementation of International Fair Trial Standards in Domestic Courts and Assessment of the Functioning of the Judiciary" in the course of 2003 and 2004, 100 observers from the Coalition, lawyers and attorneys observed total of 643 cases at 1010 hearings in criminal proceedings, and 720 cases at 907 hearings in civil proceedings in all Basic Courts in the Republic of Macedonia.

The Final Report has been created as a result of the analysis based on the data gathered through the questionnaires for observation of the criminal and civil cases, i.e. on the basis of the data received from the database through processing of data.

A Round Table took place in Skopje on 23 September 2004 in order to present the conclusions and recommendations from the Final Report of the Coalition on the one year observation of civil and criminal cases in all basic courts in the Republic of Macedonia. Participants on the Round Table included national legal experts in the field of criminal and civil procedure, high level representatives of the judiciary, the Ministry of Justice of the Republic of Macedonia, the Association of Judges, the Association of Public Prosecutors, the Office of the Ombudsman, the Office of the Council of Europe in Skopje, as well as representatives of international organizations that operate in the field of functioning of the judiciary.

In order to strengthen the structure of the Coalition, i.e. to provide support for the development of its member Organizations, to increase both internal and cooperation with other institutions and organizations that carry out activities aimed at strengthening the judicial system in the Republic of Macedonia, for the purpose of developing systems for quality information exchange in mutual interest, in January 2005, the Coalition commenced the implementation of the project "Strengthening the Capacity of the Coalition".

For the purpose of providing free legal counselling to the alleged victims of police misconduct, seeking help for filing out official appeals through various available administrative and legal mechanisms, in 2005, the Coalition has joined the network of five non-governmental organizations in order to carry out the "Project on Human Rights Support".

2. Project "Countrywide observation of Trafficking in Human Beings related trials"

In order to support the implementation of the National Programme of the Government of the Republic of Macedonia¹ for combating the trafficking in human beings and illegal migration, in November 2004, the Coalition "All for Fair Trials" commenced the implementation of the project "Observation of Court Cases in Relation to Trafficking in Human Beings in the Republic of Macedonia".

Namely, six elected observers, lawyers and attorneys, experienced in the field of observation of court cases, on 24 and 25 December, 2004 participated in the training organized in order to deepen their knowledge in the domain of trafficking in human beings. In January 2005 they started with the observation of cases before the Basic Courts in the Republic of Macedonia.

Pursuant to the topic of interest of the project, the attention of the Coalition has been focused on the cases in relation to the following criminal offences: "Trafficking in Human Beings" (Article 418 of the Criminal Code²), "Smuggling of Migrants" (Article 418-b of the CC), "Organising a group and conspiring to perpetrate the crimes of trafficking in human beings and smuggling of migrants" (Article 418-c of the CC), "Founding a slavish relationship and transport of persons in slavery" (Article 418), and "Mediation in Prostitution" (Article 191).

The observers, upon completion of the observation and based on the data on the case obtained at the hearing fill in a **questionnaire for observation** prepared especially for the purpose of monitoring the cases in the field of trafficking in human beings, and submit the filed questionnaire to the National Office of the Coalition.

All data on the observed cases are entered into specially prepared, according to the questionnaires for observation, **database** that provides further crossing and systematization of data.

Aware of the sensitiveness of the data on the cases in relation to the trafficking in human beings and attempting to provide balance between the principle of data confidentiality and useful information exchange, aiming to enable more effective fight against the perpetrators of the criminal offences in the field of human trafficking, the Coalition has adopted the "Rulebook on determining the degree of data confidentiality".

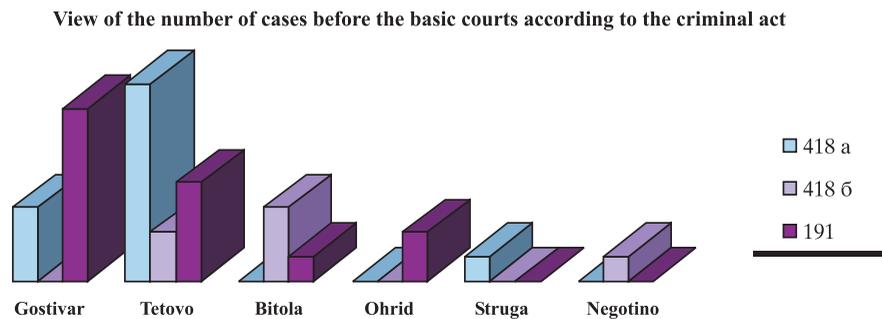
According to the above mentioned Rulebook, all actors involved in the process of observation of cases in relation to human trafficking are obliged to obey the principle of confidentiality of the data obtained.

¹ Report by Barbara Limanowska, Trafficking in Human Beings in South Eastern Europe, March 2005, page 138.

² Criminal Code, "Official Gazette of the Republic of Macedonia", No. 37/96;80/99;4/02;43/03;19/04, hereinafter CC.

The Report "Suppression of Trafficking in Human Beings through the practice of the domestic courts" is a result of the analysis based on the data gathered through the questionnaires for observation of criminal cases, i.e. on the basis of the data received from the database through data processing, as well as on the basis of comparative research on the different legal solutions regarding topics in direct correlation with the position of the victim in the proceedings before courts, and on the effectiveness in the prosecution and punishment of the perpetrators of criminal offences in the field of human trafficking.

In the period between January and September 2005, total of 32 cases at 102 hearings against 83 perpetrators of criminal offences in the field of human trafficking were observed.



Most of the cases in relation to the criminal offence of "Trafficking in Human Beings" (Article 418-a of the CC) have been represented before the Basic Court in Tetovo, while the cases in relation to the criminal offence under Article 191, "Mediation in Prostitution" prevail in the Basic Court Gostivar. In the Basic Court Bitola, most of the cases in relation to the criminal offence of "Smuggling Migrants" have been observed³.

³ Cases in relation to trafficking in human beings are being tried only in the above mentioned six courts out of total of 27 Basic Courts in the Republic of Macedonia.

2

Legal regulation of the phenomenon of trafficking in human beings

3. Crime control through establishment and development of effective criminal legislation on the crimes of "Trafficking in Human Beings" and "Mediation in Prostitution"

The history of the international community is filled with vast number of initiatives and activities undertaken in order to suppress the trafficking in human beings as one of the crudest violation of human rights. Enormous number of documents, drafted and adopted by the OSCE, United Nations, Council of Europe, are trying to respond to the need for precise defining of the notion of trafficking in human beings. However, most of them are related solely to the trafficking in women and/or only for the purpose of forced prostitution.

A significant step forward is the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children⁴, supplementing the United Nations Convention against Transnational Organized Crime. The definition of the crime of trafficking in persons set forth within the Convention provides for sufficient frameworks to encompass all types of trafficking in persons such as, besides the sexual exploitation and forced labour, also the slavery, servitude and slavery position. Simultaneously, this Protocol determines that any person may appear as a victim of this crime and not only woman or girl. It is not necessary to cross the state border, which means that the internal trafficking in persons is also criminalized, thereto.

Parallel with the modification of the phenomenal forms of the crime related to the trafficking in human beings and its determinants, and as a consequence of already cumulated experiences and the aspiration for permanent comprehension of the best ways for suppression of this type of organized crime, the legislative solutions of the countries in the world are changing, as well⁵.

⁴ The Republic of Macedonia, on December, 12, 2000 signed the United Nations Convention against Transnational Organized Crime with additional Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children and the Protocol Against the Smuggling of Migrants by Land, Sea and Air - United Nations Convention against Transnational Organized Crime with supplementing Protocols (comments, contributions, explanations and recommendations), Ministry of Justice.

⁵ Statement of Mohamed Y. Mattar, a comparative Analysis of the Anti-Trafficking Legislation in Foreign Countries: towards a comprehensive and effective legal response to combating trafficking, 25 June 2003.

Beside the permanent tendency for unification of values, standards, norms and mechanisms for the purpose of providing the most effective way of addressing the issue, the criminal legislation varies significantly from state to state.

Some legislations foresee sanctions only for the trafficking in human beings for the purpose of prostitution⁶, while some of the States Parties to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, almost entirely accepting the definition of the trafficking in persons thereof, have more broadly determined the notion of trafficking in human beings in their legislation⁷.

In contrast to the legislations of certain countries where the notion trafficking in human beings foresees only the trafficking which encompasses crossing state border, there are legislations where it has not been explicitly stressed whether the issue is the internal (within the boundaries of one state) or international trafficking in human beings (by crossing the state border).⁸

If the crime is committed against a child or juvenile person, the punishment of the offender is foreseen either as an aggravating circumstances within the same article or as a distinct article, i.e. distinct crime within the criminal code.⁹

When the crime is committed by a member of an organised group, gang or other association, in most of the cases this is considered as an aggravating circumstance and triggers more severe punishment.¹⁰

The legal substance of the crime trafficking in human beings, in some criminal codes, requires acquiring material or other type of gain.¹¹

⁶ The Criminal Code of Germany in Article 180-b of the Chapter named Criminal offences against sexual self-determination foresees a fine or a punishment of imprisonment not higher than 5 years, for the one who “will influence on another person, abusing the negative position of the other person to start or to continue with prostitution”. Likewise, the person that “influence on another person, with knowledge of its helpless position originated from the stay in other country, to give sexual services to third persons” shall be punished, as well, (<http://www.legislationline.org/>)

So the Czech Criminal Code, Article 204 punishes with a penalty of up to 3 years of imprisonment the one that “recruits, induces or forces other person to prostitute or makes a profit from such prostitution.” Article 246 of the same Code punishes anyone who “induce, recruit or transport a woman abroad for the purpose of giving sexual services ...”.

⁷ So, in the Republic of Moldova, with the amendments of January 2003, Article 165 named as Trafficking in Human Beings encompasses recruitment, transportation, transfer, shelter and reception of a person for the purpose of commercial or non-commercial sexual exploitation, forced labor or serving, slavery or forms similar to slavery, removal of human organs or tissues for transplant and (what makes this provision different) of using a person in armed conflict or criminal activities. Likewise, Article 149 of the Criminal Code of Ukraine... for the purpose of sexual exploitation, use in the porno business, use in armed conflict and engagement in criminal activities, forced labor, adoption for commercial purposes...”

(<http://www.abanet.org/ceeli/publications/conceptpapers/humantrafficking/moldova.html>)

The Criminal Code of Colombia, Article 219 thereof, criminalizes the sex tourism, too. Namely, it punishes the one that manages, organizes or promotes tourist activities which encompass sexual (ab)use of juveniles.

⁸ The Criminal Code of Netherlands, Article 250a thereof,...”him or her that recruits, receives or kidnaps other person for the purpose of... in other country.”

According to the Criminal Code of the Russian Federation the transfer of the victim across the state border or illegal withhold of that person abroad, is considered as an aggravated circumstance and the prescribed penalty is imprisonment of 3 to 5 years instead of the foreseen punishment of imprisonment up to 5 years.

⁹ Article 173 from the Criminal Code of Estonia prescribes a punishment of imprisonment of 1 to 5 years for buying and selling children (distinct article).

According to Article 149, Chapter 3 from the Criminal Code of Ukraine (criminal offences against Freedom, Morality and Dignity of the Person), paragraph 2 defines more severe sanctions if the act referred to in paragraph 1 is committed against juvenile (instead of imprisonment of 3 to 8 years, imprisonment of 5-12 years).

¹⁰ Thus, the Criminal Code of Slovakia and the Criminal Code of the Czech Republicthe one that commits the crime as a member of an organized group....

¹¹ The Criminal Code of Albania of January 2001 (Article 110-a) prescribes that trafficking, with the purpose of material profit or any other profit, is an offence punishable with imprisonment of 5 to 15 years. According to the Criminal Code of Austria, acquisition of material profit is an additional circumstance that influences the severity of the punishment.

Most of the legislations foresee use of force as methods of committing the crime, serious threat or deceit. However, therewith the diversity of the options which exist in different countries is not exhausted not even closely.

There are few countries that foresee sanctions also for the person who uses sexual services of trafficked person.

4. Brief historical review of the issue of defining the trafficking in human beings and mediation in prostitution through the legal provisions in the Republic of Macedonia

The criminal offence of Trade in White Slavery may be found even in the Criminal Code of The Kingdom of Yugoslavia¹² from 1929, and in the Criminal Code of the Socialist Federative Republic of Yugoslavia from 1951.¹³ This crime encompasses all acts that mean, to take away, hand over, and assist some person to be handed over or sold for the purpose of sexual promiscuity. Accordingly, both female and male persons, i.e. adult or juvenile persons may appear as a victim.

With the amendments to the Criminal Code of 1959, the criminal offence of "White slavery trade" was transformed into the criminal offence of "Mediation in prostitution", including the activities of: recruitment, instigation, and exciting, enticing female persons into prostitution or whatsoever participation in handing over a female person to another person for the purpose of prostitution. At the same time, the procurement of a juvenile person or commission of the act by use of force, threat or deceit was criminalized.

Such provision that permeates further, essentially not changed until the adoption of the Criminal Code of 1996, sanctions the procurement of prostitution for certain benefit as well as trafficking in female persons for the purpose of prostitution.

Therewith, in accordance with the legal solutions, the scope of the topic of trafficking in white slavery is restricted solely to "female" persons.

Article 191 of the Criminal Code of 1996, which has not been amended until present, sanctions the person that "recruits, instigates, excites or entices another to prostitution, or a person who whatsoever participates in handing over a person to another one for the purpose of prostitution"¹⁴. Hereby, the legislator corrects the mistake, and determines that any person (not only female) may be object of the crime.

¹² The same has been implemented on the territory of the Republic of Macedonia.

¹³ Lj Arnaudovski and T. Stojanovski, *Trgovija so luge - kriminalitet*, Skopje, 2002.

¹⁴ While the first part of paragraph one of Article 191 is completely clear and covers the instigation of persons to prostitution, in a broader meaning of the word, the second part.... or whatsoever participates in handing over a person to another one..., initiate the issue of the difference with the elements of the crime Trafficking in Human Beings, prescribed in Article 418-a. Namely, some national experts have an opinion that "Participation in the procurement of the person to another person for prostitution is a form of trafficking in human beings (Vlado Kambovski, PhD, Penal Law, special part, pp.218.), but, at the same time they consider that "this part of the provision is constituted in a very superficial and generalized manner, thus it creates a possibility either for too broad or too narrow interpretation" (Nikola Tupancevski, LLB, Trafficking in Human Beings in the comparative criminal law and in the criminal law of the Republic of Macedonia, *Macedonian Review on Criminal Law and Criminology*, p.113).

The second paragraph of this article sanctions the person who enables another to use sexual services because of profit.

The third paragraph of this article prescribes more severe punishment for a person who because of profit, by using force or by serious threat to use force, forces or by deceit induces another to give sexual services¹⁵.

The crime is considered under qualified circumstances, if it is committed against a juvenile, a child, in cases of family violence, or the commission of the crime is organized.

The introduction of Article 418 in the Chapter on Criminal offences against Humanity and International Law is a step forward that Macedonian legislation made by this Code. Namely, this Article named "Founding a slavish relationship and transport of persons in slavery", which has not been amended until present, is an integral part of Macedonian criminal law, and sanctions the offender who by violating the rules of international law places another in slavery or in some similar relationship, or keeps him under such relationship, buys him, sells him, hands him over to another, or mediates in the buying, selling or handing over of such a person, or instigates another to sell his freedom or the freedom of a person he is keeping or caring for.

At the same time, anyone who transports persons under a slavery or similar relationship from one country to another shall be punished.

If the crime is committed against a juvenile person, the punishment is more severe.

For the purpose of more effective dealing with the traffickers in human beings, and at the same time for the purpose of harmonization of the national legislation with the ratified United Nations Convention against Transnational Organized Crime and the two supplementing Protocols, the amendments to the Criminal Code of 2002 introduce new Article 418-a named "Trafficking in Human Beings". This Article punishes anyone who recruits, transports, transfers, buys, sells, harbours or receives persons for the purpose of exploitation through prostitution or other forms of sexual exploitation, forced labour or servitude, slavery or a similar relationship to slavery, or inadmissible transplantation of human body parts by using force, serious threat or other forms of coercion, by kidnapping, by deceit and abuse of their own position or a position of weakness of another person, or by giving or receiving money and other benefits in order to obtain consent of the person that has control over other person.

The provision on sanctioning the withholding or destroying another person's identification document for the purpose of committing the crime of trafficking in human beings is introduced for the first time.

At the same time, this article prescribes punishment for anyone that uses or procures the sexual services from a person for whom he/she knows as being a victim of trafficking in human beings.

A more severe punishment is prescribed if the crime is committed against children or juvenile persons and if the commission of the crime is organized.

¹⁵ One gets an impression that in a situation when we have use of force (force or by serious threat to use force) as a method of recruitment of persons for exploitation through prostitution, which represents one of the most common forms on the territory of the Republic of Macedonia, the same means satisfying the legal substance two criminal offences - the criminal offence under Article 418-a, paragraph 1 (an act of committing: recruit), and the criminal offence under Article 191, paragraph 3. Subsuming of one human act under the description of the legal substance of two criminal offences activates the institute of "illusory concurrence".

It must be noticed that Article 418-a, paragraph 1 presents a complete adoption of the text of Article 3 from the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.¹⁶ The same has been amended with the enforcement of the new Law amending the Criminal Code in 2004. Namely, Article 418-a of the Criminal Code of the Republic of Macedonia, at present states:

- (1) The one who by force, serious threat misleads or uses other forms of coercion, by kidnapping, by deceit and abuse of his/her position¹⁷ or a state of pregnancy, weakness, physical or mental incapability of another person, or by giving or receiving money or other benefits in order to obtain consent of the person who has control over other person¹⁸, recruits, transports, transfers, buys, sells, harbours or receives persons for the purpose¹⁹ of exploitation through prostitution or other forms of sexual exploitation, forced labour or servitude, slavery, forced marriages, forced fertilization, unlawful adoption or a similar relationship, or illicit transplantation of human body parts shall be sentenced with imprisonment of at least four years.**
- (2) The one who recruits, transports, transfers, buys and sells, harbours or receives children or juveniles for the purpose of exploitation shall be sentenced with at least eight years of imprisonment.**
- (3) The one who withholds or destroys another person's identity card, passport or other identification document for the purpose of committing the crimes referred to in paragraphs (1) and (2) of this Article, shall be sentenced with imprisonment of at least four years.**
- (4) The one who uses or procures sexual services of a person with the knowledge that the person is a victim of trafficking in human beings, shall be sentenced with imprisonment of six months to five years.**
- (5) If the crime referred to in paragraph (4) is committed against a child or a juvenile, the offender shall be sentenced with imprisonment of minimum eight years.**
- (6) If the crime referred to in paragraph (1) is committed by a legal entity, this shall be sentenced with a fine.**
- (7) The items and means of transport used in committing the crime shall be confiscated.**

¹⁶ While on one hand the complexity of the act, i.e. the wide spectrum of acts encompassed therein, provides for reduction of the possibility certain negative behaviour from the heterogeneous practice to remain uncovered, on the other hand, the complexity of the act leads to of clear defying the relationship between different activities that compose the same act.

¹⁷ Both, the “force”, which consists of physical activity for the purpose of overcoming the expected or unexpected resistance by the victim, and the “threat” that means making some wrong in prospect, whose accomplishment lies in the power of the perpetrator and depends on the issue whether the victim will react according to the will of the perpetrator, are means for extortion of certain behaviour of the victim. Namely, both activities, although they mean fulfilment of the legal substance of the crime under Article 139 of the CC “Coercion”, in the criminal offence of Trafficking in Human Beings represent only mean for accomplishment of some of the preliminary stated aims. The issue that arises here, partly in aesthetic, and partly in practical nature, is the need for existence of the words - to mislead-. Considering that the fraud, in fact is misleading or maintaining mislead by false presentation or covering the facts, even more, there is no need for repeating the issues.

¹⁸ Hereby, both female and male persons may appear as a passive subject. i.e. an adult as well as juvenile person, child. Regarding the indicators on the risk of involving young persons at the age of secondary school into trafficking in human beings, see, “Assessment of the positions and knowledge among secondary school population on the phenomenon of hidden prostitution and trafficking in human beings”, HOPS, Skopje, 2004, p.34.

¹⁹ The intent of the perpetrator is the second cumulative condition that must exist together with some of the abovementioned ways of commission of crime. Namely, the intent of the perpetrator contains conscience that the person is trafficked for the purpose of...

The amendment²⁰ brought more severe punishment of the perpetrators of this crime, as well as elimination of the provisions on sanctioning the organizer of the crime. The latter is now regulated with Article 418c of the CC, which criminalizes organizing a group, gang or other association for the purpose of commission of the above mentioned crime, as well as belonging to the group, inducing or supporting the commission of the crime.

An interesting supplement is paragraph 3 which foresees an exemption from punishment for any member of the group who will disclose the group.

The legislator, most likely starting from the stance that the issue of trafficking in human beings for the purpose of sexual exploitation will not be reduced unless measures against those who create the need for such market are undertaken, too, in paragraph 4 of Article 418-a prescribes punishment for anyone who use sexual services of a person with the knowledge that the person is a victim of trafficking

Consequently, sanctioning anyone who omits to report a criminal offence in relation to trafficking in human beings according to Article 364 of the CC, and sanctioning anyone who uses services from the victims of trafficking, by change in the human behaviour, and especially to the male’s beneficiaries of the services from sexual exploitation, might contribute toward achieving more effective results in the fight against trafficking in human.

The introduction of the criminal offence of Smuggling of Migrants under Article 418b presents a novelty as well. It states as follows:

- (1) The one who by force or serious threat that will attack the life or body, by kidnapping, by deceit, out of greed, by misuse of his/her official position and the position of weakness (powerless) of somebody else illegally transfers migrants through the state border, as well as one that produces, purchases or owns fake passport with such intention, shall be sentenced with imprisonment of at least four years²¹**

- (2) The one who recruits, transports, transfers, buys and sells, harbours or receives migrants shall be punished with imprisonment of one to five years²².**

²⁰ See “Trafficking in People -Temis”, Skopje, 2004 on the shortages of Article 418 of the Criminal Code 2002.

²¹ What immediately comes to attention is the similarity with Article 418-a of the CC, in the part on the way of commission of the crime (with both criminal offences there is use of force, serious threat, kidnapping, deceit, abuse of the position of weakness of other person and abuse of its own position). For the purpose of distinction between these two articles see: Migration connected with trafficking in women and prostitution, 25 April 2003, **Report**, Committee on Equal Opportunities for Women and Men, Rapporteur: Ms Zwerver, Netherlands, SOC ;

‘Trafficking’ and ‘Smuggling’ of Human Beings in Europe: Protection of Individual Rights or States’ Interests <http://webjcli.ncl.ac.uk/2001/issue5/obok5.html>
<http://www.interpol.int/Public/THB/PeopleSmuggling/Default.asp>

At the same time, act of committing the crime under Article 418-b, paragraph 1 of the CC, that consists of illegal transfer of migrants across the state border is one of the acts of committing encompassed with Article 418-a, paragraph 1 (little bit narrower aspect since the term “migrants” may be subsumed under the term “Persons”)

The basic distinction between these two criminal offences consists of the intent of the perpetrator. Namely, while with the smuggling of migrants the intent of the perpetrator encompasses only the illegal transfer across the state border, and here its intent finishes, with the trafficking in human beings, the perpetrator carries out the transfer for the purpose of exploitation, founding slavery relationship, forced serving, etc.

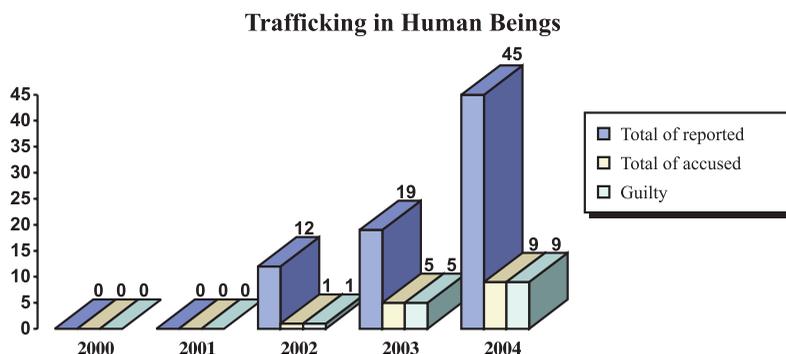
²² Of particular significance for the above mentioned issue is Article 402 of the CC, too, “Illegal Crossing the State Border”. The difference between this provision and the provision of Article 418-b, paragraph 2, in relation to the issue of transfer across the state border, besides the fact that in the former case it is committed as an occupation (which is not necessarily a case in the second), is the fact that the person under Article 402 that is transferred, contains one additional feature under Article 418-b (migrant). Precisely that feature, in cases of repeated transfer of migrants across the state border (as an occupation), puts both legal substances in relation of speciality, and thus activates the rules for illusory concurrence set by the criminal theory. The person will be held liable under the provision of Article 418-b of the CC.

- (3) If during the commission of the crimes stipulated in the paragraphs 1 and 2 the life or the health of a migrant is endangered, or the migrant is treated especially humiliating or cruelly, or he/she is prevented to enjoy the rights he/she has according to the international law, the perpetrator shall be sentenced with imprisonment of at least eight years.
- (4) If the crime referred to in paragraphs 1 and 2 is committed against a juvenile person, the perpetrator shall be sentenced with imprisonment of at least eight years.
- (5) The items and means of transport used in committing the crime shall be confiscated.

According to the above mentioned it may be concluded that in the Republic of Macedonia there is an affluent legislation regarding the criminalization of criminal offences in relation to trafficking in human beings. Nevertheless, the question that arises here is whether all these provisions have become operational in the practice of the national courts, whether they clearly differentiate from each other, i.e. whether there are clear and firm legal descriptions of the legal substances and what are the problems that the competent bodies are facing in the qualification of certain act under certain norm.

5. Trafficking in Human Beings

According to the data from State Statistical Office, the total number of reported, accused and convicted persons for the criminal offence of Trafficking in Human Beings on the territory of the Republic of Macedonia from 2002, from the time of incrimination, until 2004 recorded rapid increase²³.



In 2005, the total of 12 observed cases in relation to the criminal offence of Trafficking in Human Beings had to do with sexual exploitation. The data that, not in one case there was a situation of founding forced

²³ At the same time, the gap between the reported and convicted person increases. According to some authors, such situation, characteristic for the total crime in the Republic of Macedonia as well, is due to two assumptions: either the number of the reported persons increases because of the negligent conduct of the police, which processes the cases without sufficient evidence and submits criminal charges recklessly, or the criminal charges are not further processed by the public prosecutor, and if processed are being delayed.

Vlado Kambovski, *Kazneno pravo-opst del*, Skopje 2004, p.247; same in Vlado Kambovski, *Organiziran Kriminal*, Skopje, 2005, p.138.

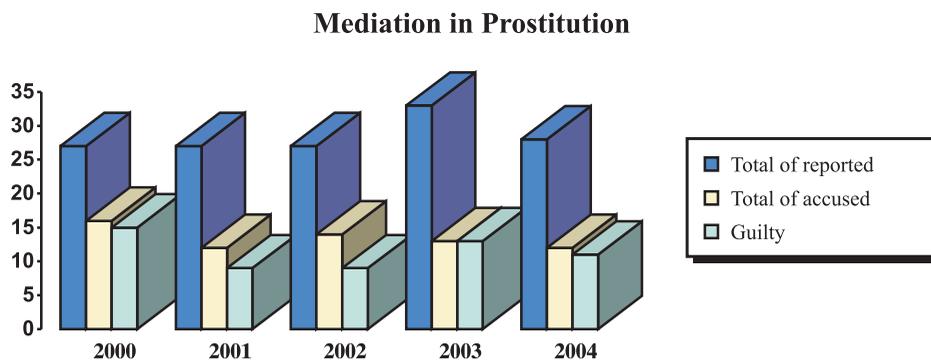
marriage, is interesting, although, according to the old-fashioned views in certain rural parts in Macedonia and according to the information in the newspapers, it may be expected that the dark figure of such form of trafficking is not to be neglected.

In the Republic of Macedonia there are no court cases in relation to trafficking in human beings for the purpose of force labour, forced fertilization, illegal adoption or similar relationship, or illicit transplantation of parts of human body²⁴

Article 418-a, paragraph 3 prescribes penalties for the person who will withhold or destroy identity card, passport or other identification documentation for the purpose of committing the criminal offence. In the Republic of Macedonia, no criminal charge²⁵ under Article 418-a, paragraph 3 have been raised since 2002 onwards.

6. Mediation in Prostitution and Trafficking in Human Beings

The data on the situation with the number of reported, accused and convicted persons for the crime of Mediation in Prostitution in the period between 2000 and 2004 in the Republic of Macedonia, point out the consistency in the trends of this phenomenon. Small oscillations exist in relation to the number of reported persons in 2003, when small increase was noticeable, as well as regarding the total number of convicted persons in 2001 and 2002. At the same time, in the course of these two years, as opposed to other years, an increase of the gap between the defendant and convicted persons may be ascertained.



In 2005, until the end of September, 14 cases in relation to the crime of Mediation in Prostitution have been observed before the Basic Courts in the Republic of Macedonia. In the course of the comparative analysis of the subjective and objective features of the criminal offences for which under Article 418-a and 191 indictment has been brought or a verdict has been reached, an impression got is that the distinction between these two criminal offences is not very clearly determined in the practice. Namely, the activities which in one case are subsumed under the criminal offence of Trafficking in Human Beings, in other case are encompassed with the criminal offence of Mediation in Prostitution.

Reasons for such treatment of this issue might be sought in several directions. Primarily, the totally logical tendency of the indictment to get oriented toward "what can be proved" and not toward what the criminal

²⁴ Illicit transplantation of parts of human body is a distinct criminal offence criminalized in Article 210 of the CC.

²⁵ According to the data from the State Statistical Office (inclusive of 2004).

event brings with it must be taken into consideration. Furthermore, the amendments in this area from 2002 and 2004 are of particular significance, as well as the speed of adaptation of the practice toward those amendments.

If we add the issue of statutory time limit of the laws in the Republic of Macedonia, i.e. if we consider that the events, in a significant number of cases that before the national basic court experience the court outcome today, have happened prior to 2002, i.e. before the criminal offence of "Trafficking in Human Being" was prescribed, it seems that things are getting complicated.²⁶

Namely, considering that the criminal code in effect at the time of committing the crime is applicable for the related cases, those activities committed before 2002, which if committed today would be subsumed under the legal substance of the criminal offence of Trafficking in Human Beings, now are subsumed under the crime of "Mediation in Prostitution" for the reason that the crime of "Trafficking in Human Beings" did not exist then.

7. Smuggling of Migrants and Trafficking in Human Beings

Based on the modest data from total of 6 observed cases in the field of Smuggling of Migrants, it may be concluded that all indictments refer to paragraph 2 of Article 418b of the CC.

Namely, the issue is about transport of migrants (nationals of Albania, Turkey and Peru) for reward between 400 and 7500 denars²⁷ for the purpose of illegal crossing of the Macedonian-Greece state border.

Small number of cases in relation to the criminal offence of Smuggling of Migrants, which first of all, is due to the fact that this criminal offence has been relatively recently introduced within the CC, is insufficient ground for drawing any conclusions²⁸. Still, the following example shows that the court practice already faces certain problems regarding the respective topic:

In the case observed before the Basic Court Tetovo (Tet 006), according to the reached verdict, two persons were acquitted from the indictment under Article 418-b, paragraph 2 (act of committing: harbouring migrants). The criminal offence (it is perpetual criminal offence) commenced in April 2002 and the illegal situation lasted until November, 2004. Following article 30 of the CC, according to which, the crime was committed at the time when the perpetrator acted or was obliged to act, regardless of when the consequence occurred, as well as Article 3 of the CC that stipulates that the law that was applicable at the time when a crime was committed shall be applied upon the person who has committed the crime and if the law has changed once or several times after the crime was committed, the law which is more lenient towards the offender shall be applied, the Court considered that because the incrimination of the crime Smuggling of Migrants was carried out with the amendments to the law in April, 2004, which means that at the time when a crime was committed, the same was not prescribed as so, thus the defendant may not be held liable for that criminal offence.

In the case of perpetual criminal offences (such is the criminal offence of Smuggling Migrants, act of committing: harboring migrants), as a time of commission of the crime is considered the time of duration of

²⁶ Dragan Tumanovski, *Trgovija so luge*, *Sudska revija* 2002, br.4, s. 33.

²⁷ From 6 to 125 euros.

²⁸ Regarding the activities of the MOI officials in relation to the issue of smuggling of migrants see www.mvr.gov.mk.

the illegal situation, i.e. as a time of commission is considered the time as far as the perpetrator maintained or did not remove the illegal situation²⁹.

If otherwise, an absurd outcome would appear, thus, in situations similar to the previous, the illegal situation lasts and no repercussions might be undertaken against the perpetrator.

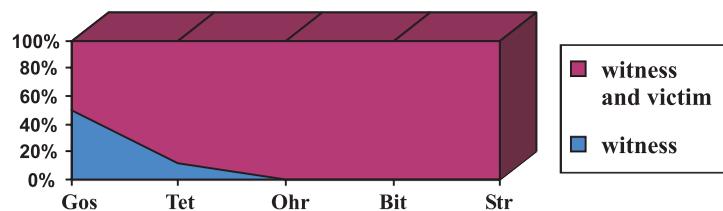
²⁹ Vlado Kambovski, Continued criminal offences and criminal offences of the situation, Penal Law- general part, Skopje, 2004, p.454.

3

Rights of the Victim

Depending whether the victim of the criminal offence of Trafficking in Human Beings or Mediation in Prostitution in the proceedings before the court, at a main hearing, appears solely as a witness, damaged person or cumulatively, as a witness and damaged, his/her position in the proceedings is determined, i.e. the scope and type of activities that he/she may undertake in the proceeding before the court, i.e. the rights, thereto according to the provisions of the LCP³⁰, entitled to the victim.

In 73% of the cases, the victim has propounded legal property claim, while in 27% of the cases they appear only as a witness in the proceedings³¹.



Right to Compensation

The victim of the crime Trafficking in Human Beings, as "a person whose certain private or property right is violated or endangered with a crime"³², by submitting a proposal for accomplishing legal property claim i.e. compensation of damage³³, gets a position of a party³⁴ to the proceedings in the criminal procedure. Thus, the victim which appears as damaged person in the proceedings, although not a holder of the basic functions in the criminal procedure, i.e. is not party to the proceedings, has very important role and possibility to influence the outcome of the trial³⁵.

³⁰ (Official Gazette of the Republic of Macedonia, No. 15/97;44/02;74/04) hereinafter LCP.

³¹ Taking into consideration the fact that we are dealing with still unfinished cases, it is realistic to expect that the percentage of cases where a property claim is announced will increase.

³² Article 139, paragraph 5 of the LCP.

³³ The property claim may be in relation to both, compensation of damage and returning articles or annulment of certain legal issue. See Chapter VI.

³⁴ Vanko Pavlovski, Pozition of damaged person in criminal proceedings, Court Journal, 1996, No 5, p. 30

³⁵ Ivanko Stojanov, Damaged person as secondary subject in criminal proceedings, Macedonian journal of criminal law and criminology, 1996, p. 51.

The fact that at the same time the damaged person appears also as a witness in the proceedings, does not significantly change the position of the victim as a party to the proceedings. The exception is, for example, the provision of Article 55, paragraph 3 of the LCP, according to which, the right of the damaged to view the documents and items that serve as evidence might be restricted until the same is examined as a witness³⁶.

Nevertheless, when the victim is only a witness in the proceedings, and not a damaged person as well, the situation is little bit different. Namely, a person is summoned as a witness if it is likely that he/she may give information on the criminal offence, the perpetrator or other important circumstances. The person is obliged to respond to the court’s summon and to put forward his/her testimony in person.

Therefore, while the participation of the victim in the proceedings is voluntary and depends only on his/her will to participate in the proceedings, the participation of the witness is compulsory and depends on the free assessment of the court for the need of examination of the witness.

However, the latter only in case when the victim still reside on the territory of the Republic of Macedonia. If the victim has been already returned to the domicile country, his/her appearance before the Macedonian court depends on victim’s free will, according to the bilateral agreements concluded between Macedonia and the country of origin of the victim.

In total of 15 decided cases in relation to the criminal offences of Mediation in Prostitution and Trafficking in Human Beings, in the period between January and September 2005³⁷, not even one legal property claim on of non-pecuniary damage has been carried out. In several cases observed by the Coalition, bringing a complementary decision in relation to the property claim for compensation of damage is pending.

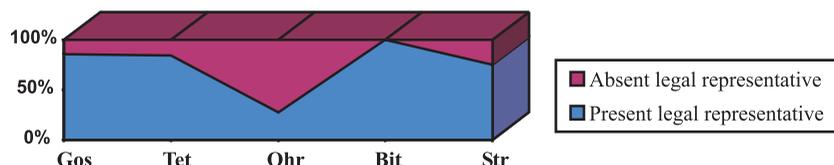
In the Republic of Macedonia, a compensation of damage in sum of 98.023 denars was awarded only in two cases by the end of September 2005.

Right to a legal representative

The victim may accomplish its right as a damaged person in the proceedings through a legal representative. Legal representative is a person authorized to undertake actions in the proceedings in the name and on behalf of the victim.

In all observed cases in relation to Trafficking in Human Beings and Mediation in Prostitution where the victim appears as damaged person in the proceedings, the same is represented by a legal representative³⁸.

The legal representative of the damaged did not appear in the proceedings before the court in 24% out of the total number of hearings.



³⁶ The Law determines the order of hearing unless the damaged appears as a witness in the proceedings, too. Namely, the hearing will be carried out immediately after the hearing of the defendant.

³⁷ So far, in the Republic of Macedonia, a decision on compensation of immaterial damage for the victims of Trafficking in human beings in the cases before basic courts has not been brought.

³⁸ No institutionalized way of providing legal assistance exists in the Republic of Macedonia. In all case related to Trafficking in Human Beings, the victims (only foreign citizens) were represented by persons hired by the International Organization for Migration (IOM).

In several observed cases before the Basic Court Tetovo (Tet 005) in relation to the criminal offence under Article 418-a, at the first court hearing, the legal representative of the damaged person was obliged by the judge to bring authorization from the victim for the next hearing, which was scheduled in three days. Due to the impossibility of the legal representative to obtain the authorization in such short notice, despite of the fact that the court established that there was an authorization from the victim in the investigation, the legal representative did not have active role in the proceedings. The verdict on the case was brought at the same hearing, and considering that proposal on accomplishing property claim was not filed (the victim is absent), the victim is deprived from the right to compensation of damage.

When the victim appears solely as a witness in the proceedings, she/he has no right to a legal representative.

Right of the victim to be present

The victim as damaged in the proceedings, according to Article 273, paragraph 1 of the LCP, is summoned to the main hearing. Therewith, considering the fact that in all observed cases, the victim is summoned to the main hearing after return in the domicile country, the summon is delivered according to the provisions of the LCP on providing international legal assistance and execution of international agreements in criminal matters.

Within the framework of the following 26 observed cases (out of total of 32)³⁹ in relation to the criminal offences Mediation in Prostitution and Trafficking in Human Beings, only in 17 cases (out of total of 54 victims⁴⁰) the presence of the victims/witnesses in the proceedings was provided with assistance of the SECI Centre⁴¹. Thus, in 54 % of them the victims are from Moldova, 8 % from Republic of Albania, 8 % from Serbia and Montenegro, 15 % from Romania and 15 % from Republic of Bulgaria. In 8 situations, due to the lack of conditions for holding main hearing, the judge brought a decision on hearing the damaged/victim/witness out of the main hearing.

Information regarding the rights

If the victim did not submit a proposal for realization of legal property claim in the criminal proceedings until the indictment is brought, the court informs the same that such proposal may be made until the completion of the main hearing.

The victim that is summoned as a witness in the proceeding, prior to testifying, shall be warned that he/she is obliged to speak the truth and must not conceal anything, and hereby he/she will be warned that giving false statements is crime. In the proceedings before our courts, the victim witness is always warned.

³⁹ 6 cases refer to the criminal act of Smuggling of Migrants.

⁴⁰ All are female victims.

⁴¹ The SECI Centre (Southeast European Cooperative Initiative) has played a vital role in the process of securing the presence of the witnesses-victims of trafficking in human beings in criminal proceedings in the Republic of Macedonia. The Centre is an independent diplomatic mission with status of international legal person registered in Bucharest, Romania, which operates on the basis of the Agreement on cooperation and prevention in suppression of cross-border crime. In 2004, the Sector for international police cooperation within the Department for Organized Crime of the Ministry of Internal Affairs (MOI) received 20 requests for locating 48 witnesses-victims of trafficking in Human Beings or Forced Prostitution (10 from Basic Court Gostivar; 6 from Basic Court Tetovo; 2 from Basic Court Ohrid and one from each Basic Court Skopje and Struga). As a result of the operation of the SECI Centre in Bucharest, 15 of the requested witnesses have been located (11 of them consent to testify).

The victim -witness, must also be informed that he/she is not obliged to give answers to certain questions, if there is a possibility that thereby the witness will expose himself/herself or close relative to a serious disgrace, significant material damage or criminal prosecution.

Out of total of 32 observed cases before all basic courts in the Republic of Macedonia in relation to trafficking in human beings, in 9⁴² of them, the witness has not been informed on that right, although Article 223, paragraph 2 prescribes such obligation⁴³. 75% of the cases where the victim has not informed are related to a witness victim of trafficking in human beings.

The victim will be informed on the right to interpretation provided that he/she does not understand or speak the language in which the proceeding is conducted.

Right to suggest new evidence

The victim is entitled to the right to suggest presentation of new evidence and to introduce new facts 26⁴⁴ until the completion of the main hearing.

According to the analysis of data from observed cases, in more than three-fourths of the cases, the legal representative of the victim did not suggest presentation of new evidence at the main hearing.

In a case observed before the Basic Court Gostivar (Gos 007) in relation to criminal offence of Mediation in Prostitution, the legal representative of the damaged, by submitting written proposal for legal property claim requested the court to determine psychiatric expertise for moral damages the same day, due to the secured presence of the victim. Due to the obvious impossibility to organize the above said, the proposal of the legal representative has been rejected.

In a case observed before the Basic Court Tetovo (Tet 001) in relation to criminal offence under Article 418-a, the legal representative of the damaged in his attempt to participate in the proceedings by suggesting presentation of evidence, has been crudely interrupted by the defence lawyer of the defendant, explaining that the representative has a right only to announce a legal property claim, but not to participate in the proceedings. The legal representative withdrew, while the Presiding judge continued the process of presentation of evidence⁴⁵.

Right to examine witnesses, expert witnesses and defendant

The victim/damaged in the proceedings, upon a permission of the President of the judicial counsel, may pose questions to the witnesses and expert witnesses directly. This right is used in one-third of the observed cases.⁴⁶

⁴² In one of the cases observed before the Basic Court Tetovo, in the minutes of the hearing, it is noted that the witness has been informed on the rights under Article 23 of the LCP, without hereby being in fact informed.

⁴³ Out of total of 8 cases where the witness was not informed on the right not to answer certain questions, in 6 cases, the witnesses were victims in the proceedings.

⁴⁴ Article 314, paragraph 5 of the LCP.

⁴⁵ Thus, the damaged in the particular situation has been deprived from the right to suggest new evidence.

⁴⁶ Generally, the legal representative of the damaged in the proceedings examines the witness victim. Only in one of the observed cases, questions were also posed to the defendant in relation to his material condition for the purpose of defining the claim for compensation of damage.

Right to elaborate the legal property claim

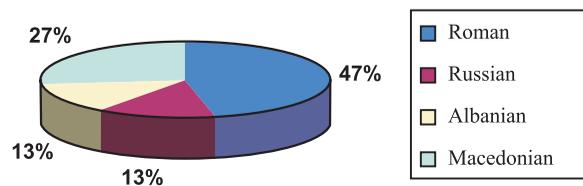
The damaged has a right, following the completion of the presentation of evidence, not only to elaborate the legal property claim, but also to take a stance and to analyze the presented evidence upon which both depend, the criminal liability of the defendant and the chances of the legal property claim.

In the cases observed by the Coalition, the legal representative of the damaged-victim submits the legal property claim mostly in written. Only in three cases, the legal property claim was orally elaborated in the closing speech at the hearing.

Right to interpretation

The victim, irrespective of whether she/he appears as a witness or damaged in the proceedings, has a right to receive free interpretation assistance, provided that she/he does not speak or understand the language in which the proceeding is conducted⁴⁷.

Language used in the proceedings by the victim



Although the issue of adequate interpretation into the language of the victim, which is a foreign citizen in most of the cases, is mentioned as one of the biggest problems facing the judiciary, especially in the domain of trafficking in human beings, still, according to our analysis, it may be noticed that the translation during the hearing of the victim was satisfactory, in general. Only in one case, the translation provided for the examination of the witness-victim was of bad quality.

In two cases, the victim - foreign citizen, stated that she understands the Macedonian language and uses it at the main hearing⁴⁸.

Right to protection

Introduction of Article 223-a into the Law on Criminal Procedure provides the victim with a possibility to deny disclosure of personal data (name and surname, name of the father, occupation, place of residence, age and the relationship with the defendant) if there is a possibility that by giving a statement, the witness will expose himself/herself or another person close thereto to a serious life threat, danger to his health or physical integrity.

Additionally, the witness who denies disclosing the above mentioned data, if the existence of danger is justified, will be provided protection through inclusion in witness protection programme within 24 hours.⁴⁹

Besides inclusion in the Programme for witness protection, according to the national legislation, activities related to the special manner of examination of witnesses might be undertaken. The activities refer to the examination of witnesses only in the presence of the public prosecutor and an investigative judge, i.e. the Presiding judge, in premises that guarantee the protection of his/her identity, unless the Counsel de-

⁴⁷ Article 7, paragraph 2 of the LCP.

⁴⁸ In two observed cases before the Basic Court Bitola and the Basic Court Gostivar, the victim is Macedonian national.

⁴⁹ See Chapter on witness protection.

cides to conduct the examination through the court or by use of other technical equipment of communication and other adequate means for communication⁵⁰ with the witness consent.

The special manner of witness examination through the court in premises different from the courtroom has not been applied to any of the observed cases, so far.

In the period between the adoption of the LALCP⁵¹, September 2005, within the framework of all the observed cases, examination of witness through video conference has been applied only to one case.

Right to a trial where the public is excluded

Taking into consideration the sensitiveness of the cases in relation to Trafficking in Human Beings, and above all, starting from the need to avoid the secondary victimization of the victim, the issue of exclusion of the public from the trial, during the entire hearing or solely during the testimony of the victim, deserves special attention.

Article 280 of the LCP of the Republic of Macedonia foresees, *inter alia*, a possibility to exclude the public from the trial in order to protect the morality and the personal and private life of the witness or the damaged as well as for the purpose of protection of the interests of the juveniles.

According to data from the observed cases, only in three cases a decision on exclusion of public from the trial has been brought. In the first case, such decision was related to the protection of the interests of a juvenile victim, in the second, upon a proposal by the parties, i.e. of the defense lawyers of the defendants, the public was excluded from the trial during the testimony of the damaged victim in the proceedings, and in the third case, the public was excluded during the entire hearing in order to protect the morality and the personal and private life of the damaged witness.

Worth of attention are two situations when the defence lawyers of the defendants in the proceedings requested exclusion of the security personnel that have accompanied the victim, giving explanation that they might influence the testimony of the damaged-witness. In the first case, the President of the judicial Counsel rejecting the proposal on exclusion of the public from the trial (the main hearing is public), asked the security personnel to step back one line behind the victim's chair. In the second case, the decision for exclusion of public was not brought, and the security personnel of the victim⁵² were asked to leave the courtroom.

Removal of the persons from the courtroom, in which presence the victim feels more secure and who enjoy her trust is against the best practices for the witness protection.

Only in one case, the observers from the Coalition were denied access in the office of the judge where the trial took place, with explanation that the case will be delayed.

Possibility to examine the witness without presence of the defendant

In exceptional cases, the judicial Counsel may decide temporarily to remove the defendant from the courtroom if the victim-witness denies to give the testimony in his/her presence or the circumstances point out

⁵⁰ Article 270, parag. 3 from the LCP

⁵¹ Law Amending the Law on Criminal Procedure (Official Gazette of the Republic of Macedonia, No.74/04) from 22.10.2004, hereinafter LALCP

⁵² Two representatives from the Ministry of Interior and one authorized person from Romania.

that the witness will not speak the truth in the presence of the defendant.⁵³

In the framework of observed cases, the victim-witness did not deny to give the testimony in the presence of the defendant in any of the cases, nor the Counsel decided to remove the defendant from the courtroom.

Treatment of a victim in a non-compassionate manner and with respect

The manner of examination of the victim-witness at a main hearing may be of essential significance for the course of the proceedings and simultaneously, for the determination of the crime, qualification of the crime, as well as for the liability of the perpetrator. The procedure of taking the witness's testimony in the proceedings is very sensitive matter, especially if the witness belongs to a group of vulnerable witnesses⁵⁴. Starting from certain psycho-physical features of the female⁵⁵ witness,⁵⁶ the aggression and the violence to which she was exposed during the exploitation, intimidation accompanying the crime, as well as due to the personal characteristics, education and intellectual level of the victim, it is indispensable that all subjects in the proceedings⁵⁷ act adequately⁵⁸. Namely, not only the treatment of victim with respect is unavoidable imperative for a community whose priority is respect for the basic human rights, but also, sometimes such approach is a precondition for recovery of the victim and reanimation of their ability to return into normal life, and at the same time reflects onto the victim's will to participate in a court procedure.⁵⁹

Conclusion:

The LCP provides adequate framework for security and protection of the rights of the victim in the proceedings, regardless of whether she/he appears as a witness or damaged. Nonetheless, inconsistency in the implementation of the legal provisions (especially those from LALCP) in relation to: protection and special manner of questioning of the witness in the proceedings, deciding upon legal property claim within the criminal proceedings, informing the witness on her/his rights, and above all, providing proactive role for the victim in the proceedings against perpetrators of criminal offences in relation to trafficking in human beings, weakens the position of the victim during the court process.

Recommendations:

There is a need for development of mechanism based on a law or bylaws, which will provide prompt access to adequate legal aid to all victims (and not only to victims-foreign nationals) in the proceedings against the perpetrators of criminal offences.

⁵³ According to Article 247 from the German Law on Criminal Procedure, exclusion of the defendant during the testimony of the witness is permitted when: there are concerns that the witness will not speak the truth, there is a serious burden on the wellbeing of a witness younger than 16 years, and there is an extreme danger of serious impact on the health of the witness, OSCE/ODIHR, National referral mechanisms.

⁵⁴ According to some authors, the following are included in the category of vulnerable witnesses: witnesses with development defects, witnesses with physical handicap, witnesses with mental defects and witnesses suffering from fear and stress

⁵⁵ More or less stressed sensibility, fast and clever observer of the emotional and sensual part of the event, the passions have decisive impact to the psychical life and to the reactions.... Matovski, Kazneno procesno pravo, opst del, 2003, Skopje

⁵⁶ In all of the observed cases the victims of the Trafficking in Human Beings were female persons.

⁵⁷ Agim Miftari, Profesionalnata etika vo sudstvoto, obvinitelstvoto i advokaturata i nivnite megusebni relacii, Sudiska revija, 2002, br. 3, str. 22

⁵⁸ Oliver Bacanovic, Policijata i zrtvata, Stip, 1998

⁵⁹ Priracnik za obuka "Razvoj na Model za obuka na sudii i JO vo oblasta na borba protiv trgovija so luge"-2003.

4

*The Defendant***8. Defendant's profile**

Considering the fact that the criminal offences of Trafficking in Human Beings, Mediation in Prostitution and Smuggling of Migrants are performed by both female and male persons of different age group and different backgrounds, education, environment, or persons acting individually or in small groups, as well as those that are part of well organized, rather complex internationally organized network, it is unrealistic to expect that a unique profile of the said criminal offences perpetrators could be established.

Nevertheless, the data processing on defendants in the cases observed before basic courts can indicate roughly the features most frequently possessed by potential perpetrators of the above crimes on the territory of Macedonia.

Sex structure

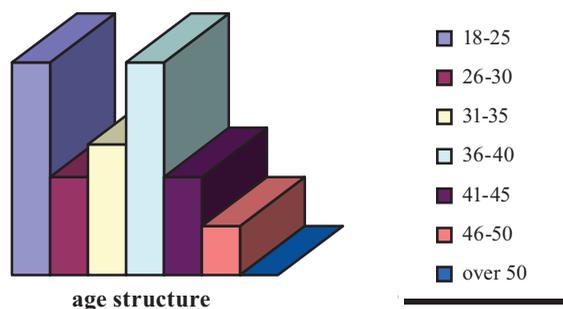
The share of females in the population of the perpetrators of crimes with regard to trafficking in human beings in Macedonia is missing. Namely, there was no case observed by the Coalition in which criminal charges had been raised against a female (although in their testimonies the victims/witnesses frequently mention participation of female persons⁶⁰ in a form of assistance to the perpetrator of the criminal offences).

Age structure

The age structure of defendants ranges between 18 and 48. The age groups from 18 to 25 and 36 to 40 dominate with highest number of accused persons. Through it would be reasonable to expect decline in the number of potential executors of criminal offences after the age of 40 (group with lowest number of persons), there is a surprising data that the number of persons who have reached the age between 25 and

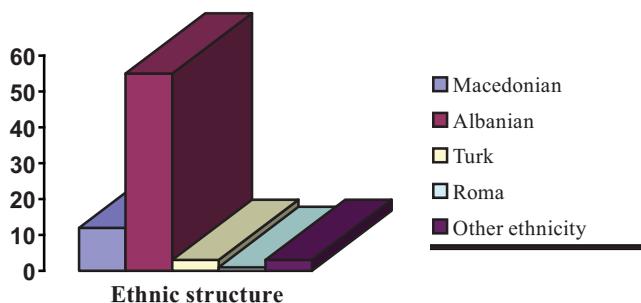
⁶⁰ In cases observed before the Basic Court of Gostivar (Gos 001 and Gos 005), apart from the defendant, there was a female person in the criminal event, who accepted the victims and informed them that high amounts of money had been paid for them and it were to be repaid, i.e. worked off. The mentioned female person collects money from clients and manages the delivery of sexual services in the nightclub.

35, when people go through a phase of full maturity and maximum energy and ability for living and working activity, declines by as much as more than a half compared to the above groups (in terms of number of persons).



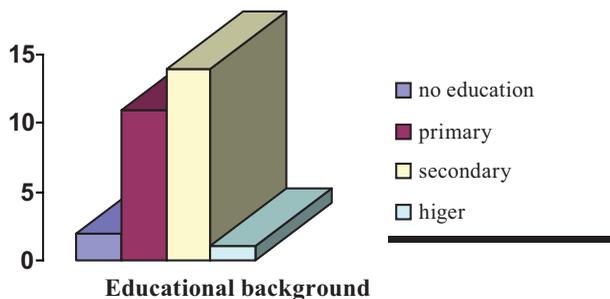
Ethnic structure

The defendants of Albanian ethnicity dominate with as high share as 74% in the total number of defendant. Except in one case, in which all defendants are of Macedonian ethnicity, all other cases observed within the same range of crime events, Macedonians appear as accomplices to persons of Albanian ethnicity.



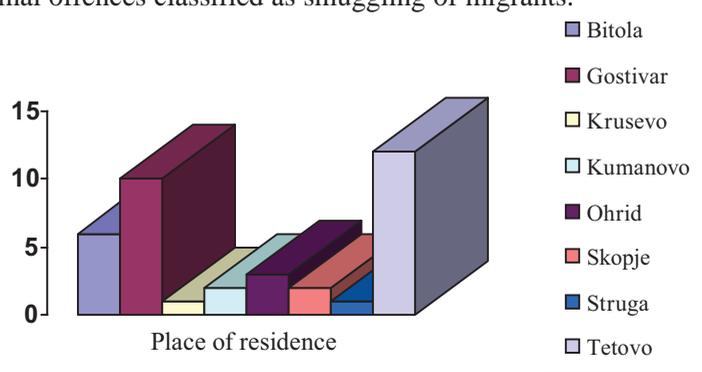
Educational background

Persons with secondary school level completed prevail among the defendants. The share of persons with no education and persons with completed higher education in the total number of defendant in the frames of observed cases is of minor scale, while the number of defendants with primary education level occupies the second top position, placed immediately after the group of persons with secondary education.



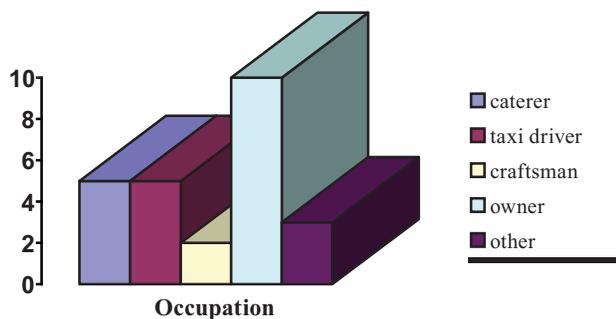
Place of residence

The well known information that the focal areas of trafficking in human beings activities in Macedonia are the areas of Tetovo and Gostivar is further supported by the notion that most of the defendant persons originate from (reside in) these very areas. The number of defendants with residence in Bitola is also high, but compared to the cities of Gostivar and Tetovo, which are the most frequent residence places of defendants for mediation in prostitution and trafficking in human beings, persons residing in Bitola are defendant mainly for criminal offences classified as smuggling of migrants.



Profession

In majority of cases, persons defendant in relation to trafficking in human beings involve defendant who are nightclub and café owners.



Recidivism

The recidivism as a reflexion of the inefficiency of the special preventive effect of penalty also retains high rate in criminal offences related to trafficking in human beings. Namely, in 39% of the cases, the defendant persons were formerly convicted (often for the same or same type of acts).

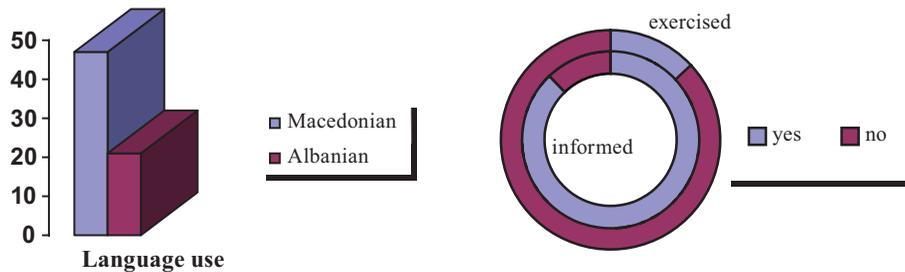


Only in 4% of the circumstances in cases related to trafficking in human beings, the defendant appears in a role of accessory to a crime.

9. The right of the defendant in the proceedings before the court

Although the focus of this research has not directed towards the position of the defendant in the proceedings before the court in cases involving trafficking in human beings, nor to the assessment of the level of observation of the rights guaranteed thereto under the national and international documents, there is a need to comment briefly certain circumstances that have been recorded in the course of the observation process.

Namely, in 31% of the circumstances, **interpretation** for the defendant who cannot speak and understand Macedonian (mostly from Albanian into Macedonian) has been requested and granted.



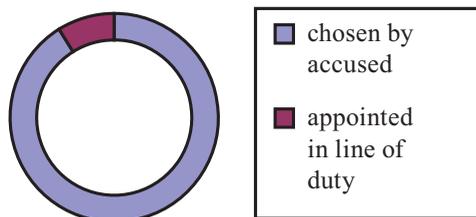
With regard to the defendant being informed of the right of remaining silent, we may conclude that this obligation has been respected in most of the proceedings before the basic courts. Exceptions are circumstances in which the defendant has not been directly informed of his/her rights, but this being noted directly in the minutes by the judge. Unfortunately, the only situation where the above described practice was objected resulted in unwanted consequences.

Namely, a case observed before the Basic Court in Tetovo (Tet 008), related to crime referred to in Article 418-a of the Criminal Code, Trafficking in Human Beings, the judge dictated minutes that the defendant exercised the right to a defence lawyer, the right not to base defence on the right to remain silent, as well as that the defendant understood the indictment, without prior oral question addressed thereto. Upon this, the defence lawyer raised objections insisting that a note be inserted in the minutes stating that the defendant did not declared (the above) exclusively!

At the question asked by the judge whether the defendant understood the indictment and whether he was in a proper health condition to make statement on the main hearing, the defendant replied that the grounds of indictment were not clear to him and that he was an ill man, currently under treatment! The trial was postponed for 25 days, during which the ability of defendant to make statement was to be assessed (established). On the next hearing, attended by a psychiatrist as well, the trial was postponed for further 33 days, due to the absence of the defendant and his defence lawyer. The next time, postponement for additional 78 days was due to the absence of the psychiatrist, who had been orderly summoned, but did not appear at the main hearing.

Defendants seldom exercise the right to remain silent.

The right of defendant persons **to be present at the trial** is observed in cases involving trafficking in human beings. Namely, out of the total number of 83 defendant persons, only two persons are tried in absentia. In both cases, persons involved ran away.



Defendant persons choose, mostly, their **defence lawyer** by themselves⁶¹. In few cases in which the defence lawyer was assigned in official capacity, he/she was soon replaced by another one, chosen by the defendant⁶².

Conclusion:

Statistical data processing concerning defendant persons in cases observed before the basic courts, suggests that the potential perpetrators has the following features: person of male sex, with secondary school level completed, belonging to the age group between 18 and 25 or between 36 and 40, of Albanian ethnicity, formerly convicted, owner of a nightclub.

⁶¹ Nikola Matovski, *The Role of Defense lawyer in Criminal Procedure*, Makedonska knjiga, 1981, Skopje.

⁶² Only in one case, the defendant defended himself in the court proceedings.

5

Witness Protection

The witnesses and especially the witnesses-victims of Trafficking in Human Beings have essential significance in the successful prosecution and punishment of the perpetrators of criminal offences of Trafficking in Human Beings.

Considering that the witnesses/victims are usually exposed to a risk of intimidation and threats as revenge by the traffickers in human beings, providing special protection measures is necessity in order to secure the statement of the witness given in the police procedure or investigation will be stated at the main hearing, prevention of repeated victimisation, and above all, for the purpose of physical protection of the witness before, in the course of, and following the completion of the proceedings.

Nonetheless, in the selection of measures for protection of the person in possession of information significant for the criminal proceedings, and whose life, health, freedom or property are exposed to danger, and in the selection of mechanisms and manners of their implementation, in the legislation and in the practice of competent institutions, the attention should be placed on the balance between the right of the witness to protection and the right of the defendant to a public trial and examination of the witness⁶³ which charges him⁶⁴.

The bodies competent for suppression and sanctioning of the growing organized crime, including trafficking in human beings, more and more face the problem of denial to testify or modifying the testimony under fear from revenge. In most of the cases, the testimony of the witness/victim⁶⁵ related to the crime of trafficking in human beings is a key evidence of the prosecution, upon which the success of the proceedings against traffickers in human beings depends⁶⁶.

⁶³ G. Kalajdziev, Pravo na obvinetiot da mu se obezbedi prisustvo i soslusuvawe na svedocite vo negova polza, Godisnik na pravniot fakultet vo Skopje, 1996/98, tom 38, str. 571.

⁶⁴ According to Article 6 (3) of the European Convention on Human Rights, the defendant has right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. In principle, all evidence of the prosecution should be presented in the presence of the defendant in a public debate and with access to the arguments of the other party.

According to the above mentioned, an impression may appear that giving testimony in a criminal case by the witness with hidden identity-witness under special protective measures is violation of the provisions of ECHR. Amnesty International objects the use of statements by anonymous witnesses -(Pravicno sudenje-prirucnik, 22.2.2. Anonimni svedoci, page 148.).

⁶⁵ A person may be witness although not a victim of trafficking in human beings and vice versa, a person may be a victim and not to testify in the proceedings before the court. In some cases these two categories overlap.

⁶⁶ "Willingness of the victim to refer the case to the police and to act as a witness in the proceedings is essential for the investigation and prosecution of the traffickers in human beings"- Conclusion of the meeting held in Slovenia, March, 2003, "Special measures for protection of the victims of trafficking in human beings that appear as witnesses in the proceedings"- Stability Pact- South-eastern Europe.

In the framework of international activity for creation of preventive and repressive mechanisms for efficient suppression of organised crime, including trafficking in human beings, enormous number of documents, Conventions (with supplementing Protocols) Declarations, Recommendations, and Decisions have been adopted⁶⁷.

The national legislations, as a response to the challenges confronting the international phenomenon called organized crime in the domain of protection of persons that appear as witnesses in the proceedings, foresee various provisions either in the Laws for Criminal Procedure⁶⁸ (in the countries of civil law), or as separate Acts⁶⁹ (in the countries of Anglo-Saxon law), which present ground for developing the practice of the courts, as well as in the frameworks of separate laws.

In the former case, in general, the provisions are related to the protection of the identity and anonymity during the investigation and main hearing before the court in criminal proceedings, while the separate laws regulate the conditions for inclusion of the victim in special programmes for protection⁷⁰.

⁶⁷ Article 24 (Witness Protection) of the United Nations Convention against Transnational Organized Crime prescribes obligation to each State Party to take appropriate measure within its means to provide effective protection from potential retaliation or intimidation for witnesses in criminal proceedings who give testimony, as well as for their relatives and other persons close to them, as appropriate. At the same time, the Convention binds the State Parties to consider entering into agreements or arrangements with other States for the relocation of persons referred to in the above mentioned text. The provisions of Article 25 for the Convention determine the obligation of each State Party to undertake appropriate measures within its means to provide assistance and protection to victims of offences covered by the Convention, in particular in cases of threat of retaliation or intimidation.

Article 6 par. 1 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime binds each State Party, in appropriate cases and to the extent possible under its domestic law, to protect the privacy and identity of victims of trafficking in persons, including, inter alia, by making legal proceedings relating to such trafficking confidential. Article 6, paragraph 5 regulates the obligation of each State Party to provide for the physical safety of victims of trafficking in persons while they are within its territory.

⁶⁸ The Portuguese legislation (Act adopted on 14 of July 1999) regulates the adoption of measures for witness protection in the criminal proceedings when their life or physical integrity, freedom or property are endangered for the purpose of their participation in the process of providing evidence on facts which are subject of the investigation. At the same time, this Law provides for protection of persons which are considered as vulnerable category even when the danger previously described does not exist (too young or too old person, with health problems, or when the testimony is against a person from the witness's family, or against someone in relation to whom the witness is in subordinated position).

The Law on Protection of Witnesses under Threat and Vulnerable Witnesses of **Bosnia and Herzegovina** was adopted in March, 2003.

This Law encompasses two categories of persons: witnesses whose security is endangered (or the security of their families) through threats and other forms of intimidation in relation to their participation in the criminal proceedings, and vulnerable witnesses who are physically and psychically traumatized by the events encompassed with the criminal offence/s, or suffer from such mental state that makes them exceptionally vulnerable, and children and juveniles.

⁶⁹ Pursuant to Part 24 of the 1999 Act of England and Wales, the testimony via video link may be given in two situations: When the victim is out of the country and when the victim in the proceedings is child.

In New Zealand, the Legislator makes interventions in direction of providing sufficient provisions for regulating the anonymity of the witnesses in the proceedings twice. First time in 1986, primarily to protect undercover agents, and latter in 1997, when the measures for protection broadened to other “types” of witnesses, as well. By these Acts, clear and precise framework for protection of the identity of witnesses has been developed.

The court may issue orders and give directions for protection of the anonymity of the witness for: exclusion of public, placing canvas between the witness and defendant, giving testimony via video link.

⁷⁰ The following are foreseen as criteria for classification of the victim-witness as admissible for inclusion in the program for witness protection: degree of risk, type of the crime, participation in the procedure have to be on a voluntary basis, the victim-witness to be in a position to give valid statement and to repeat it before the court, necessity of the testimony for the proceedings, appropriateness of the victim, cost of the program.

10. National legislation in the field of witness protection

According to the provisions of the Law on Criminal Procedure of the Republic of Macedonia, a person who is likely to give statement for the crime and perpetrator, and for other important circumstances, is summoned as a witness.

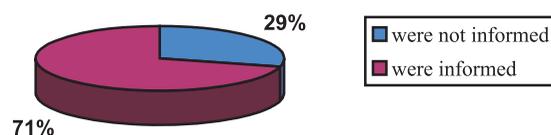
Anyone summoned as a witness is obliged to testify⁷¹. There are exceptions from this rule, in situations when certain person should not be examined as a witness and when under special circumstances certain persons are released from the duty to testify. The first case refers to a person who by making statement would violate his/her duty of keeping an official or military secret, or to a defence lawyer for what he has been entrusted with by the defendant.

The following persons who may, but are not obliged to testify are included in the second case:

- Wedlock and out of wedlock spouse of the defendant;
- Blood relatives of the defendant of first line, relatives of further line to the third degree as well as in-laws to the second degree
- The adopted child or adoptive parent of the defendant;
- Religious confessor to whom the defendant or other persons has confessed;
- A lawyer, physician, social worker, psychologist or other person for facts which they have learned executing their duty in relation to their duty to keep it as a classified secret while executing their professional duties.

Likewise, the person is not obliged to answer particular questions if he is likely to expose himself or his close relatives to severe disgrace, significant material damage or criminal prosecution (although the duty to testify remains).

Right of the victim not to answer certain questions



Out of total of 32 observed cases in relation to trafficking in human beings before all basic courts in the Republic of Macedonia, in 9⁷² of them, the witness was not instructed on the right not to answer particular questions if he is likely to expose himself or his relative to severe disgrace, significant material damage or criminal prosecution, although Article 223, paragraph 2 prescribes such obligation⁷³.

Until the adoption of the Law Amending the Law on Criminal Procedure in 2004, there was no provision that provides for exemption from the duty to testify or from answering particular questions for a person who by giving statement might be in danger of intimidation, threat or danger to life, health or physical integrity. Although, according to the logic of the matters, if a person is released from answering particular

⁷¹ If the witness is on the territory of the Republic of Macedonia

⁷² In one case before the Basic Court Tetovo, it was only **noted** in the minutes that the witness was instructed on the right under Article 223 of the LCP, without in fact instructing the witness.

⁷³ Out of total of nine cases where the witness was not informed on the right not to answer particular questions, in 6 cases the witnesses were victims of trafficking in human beings.

questions in order not to expose himself/herself to material damage irrespective of the significance of the damage, even more he should be released from answering in a situation when his life is put in question.

The introduction of Article 223-a into the LCP, i.e. providing the victim with the possibility to deny disclosure of personal data (name and surname, name of the father, occupation, residence, age and relation to the defendant)⁷⁴ if there is a likelihood that by giving the statement or answering particular questions would expose himself or another person close to him to a serious life threat, danger to his health or physical integrity, is a step forward in enabling the protection of witnesses, including the witnesses/victims in cases of trafficking in human beings as particularly vulnerable category.

The witness who denies disclosure of the above mentioned data will be provided protection through inclusion in the program for witness protection within 24 hours, if established that the existence of danger is justified. (Article 270-b).

This would mean that the provisions for carrying out special manner of examination and participation in the proceedings did not apply to the referred witness (Article 270-a)⁷⁵, which is illogical especially if the difficulties accompanying the inclusion in the program for witness protection are taken into consideration, as well as the cost of the program.

In the course of 9 month observation of cases in relation to human trafficking before all basic courts in the Republic of Macedonia, no case of refusal to disclose data by the witness in the proceedings has been noted⁷⁶, which points to the conclusion that either the serious danger to the life, health or physical integrity of the witness did not exist (which would be very strange considering the sensitiveness of the topic of observation, the high level of violence accompanying the trafficking in human beings, as well as the high risk assessment of the witnesses that decide to testify in the proceedings before the court⁷⁷), or the witness is not informed on the right to deny the disclosure of personal data (although, considering the fact that in 70% of the cases the witness/victim is represented by a legal representative, it may be assumed that the witness was informed on that right).

There is no provision in the LCP which explicitly imposes an obligation that the witness has to be informed about the right not to disclose the above mentioned data.⁷⁸

The term other technical equipment for communication means telephone and video conference⁷⁹. Namely, the witness or the expert witness may be examined in this manner if they are on the territory of other State. During the examination, beside the provisions from the LCP, the provisions from the Second Additional Protocol to the European Convention on International Legal Assistance in Criminal Matters would apply, as well.

⁷⁴ The situations when the witness denies to disclose data on other close person to her (in most cases, a person that helped her to escape from the person that trafficked her) in order to avoid eventual danger to that person (thus, not data referred to in Article 223, paragraph 3) has happened in cases related to trafficking in human beings. There are no provisions in the national legislation that would protect the identity of that person unless he/she appears as a witness. The decision of the judge not to insist on disclosure of data on such person-collaborator of the victim may be acclaimed as an appropriate reaction in concrete cases.

⁷⁵ Activities are related to examination of the witness only in presence of the public prosecutor and investigating judge, i.e the presiding judge, at a place that guarantee protection of the witness's identity, unless, in concordance with the witness, decided otherwise, to carry out the examination through the court or by use of other technical equipment for communication and other suitable means for communication.

⁷⁶ Only in one case the victim/witness denies to disclose data on the place of residence in the domicile country, but, such situation is not foreseen under Article.223-a. The proceeding continued without requesting reply, thereto.

⁷⁷ See “Need of Witness Protection in the Republic of Macedonia “

⁷⁸ According to Article 5 of Part 1 of the Law on Protection of Witnesses Under Threat and Vulnerable Witnesses of Bosnia and Herzegovina, the court, public prosecutor and other actors in the proceedings *ex officio* instruct the witness who might be under threat or vulnerable witness on the measures for protection that are available according to the provisions of the Law.

⁷⁹ According to Article 295-a of the LCP introduced with the amendments from 2004.

The assessment on the extent to which our basic courts in their practice use the legal authorizations prescribed under the LALCP, and the speed in which they manage to implement and revive them might be accomplished through the following indicators. Namely, in the period between adoption of the LALCP and July 2005, in the framework of all observed cases under Article 418-a and b: "Trafficking in Human Beings" and "Smuggling of Migrants", as well as "Mediation in Prostitution", examination of a witness or expert witness via video conference⁸⁰ has been carried out only in one case.

On 28 April 2005, before the Basic Court Tetovo, in a case in relation to the criminal offence of "Mediation in Prostitution" under Article 191 of the LCP, for the first time in the Republic of Macedonia, the examination of witness via video conference has been carried out. The equipment that provides efficient audio and visual connection to the victim who remained in court premises in her domicile country, has been set up in a way that the judicial Counsel together with the public prosecutor, legal representative of the victim and the defence lawyers of the defendant were able to have visual insight in the statement given by the victim/witness, while the defendant and the public were in position only to hear the statement.⁸¹

At the same time, the special manner of examination of the witness through the court in a separate room different from the courtroom has not been used in any of the observed cases.

The provision contained in Article 312 of the LCP which, in exceptional cases allows the judicial Counsel to decide to remove the defendant from the courtroom if the witness denies to give a statement in his/her presence, or if the circumstances point out that the witness will not speak the truth, similarly, has not been applied in any of the cases observed by the Coalition.

The Republic of Macedonia has adopted the Law on Witness Protection in May, 2005. It will be applied as of January, 2006.

11. The need for witnesses protection in The Republic of Macedonia

We can only assume the frequency of intimidation of witnesses in proceedings before the courts in the Republic of Macedonia, i.e. to what extent the threats for vengeance represent realistic possibilities and how frequently such threats are executed.

In any case, certain behaviours of some witnesses in the course of proceedings lead to the conclusion, directly or indirectly, that the intimidation does exist.

⁸⁰ At a trial in Prizren (Kosovo), the judge, the public prosecutor and the minimum necessary personnel examined the witness in a separate room, read the minutes of the examination of the witness and then returned in the separate room for the purpose of answering additional questions put by the defence. In such a manner, the anonymity of the witness in relation to the defence was provided.

In another case, the witness who was placed in a separate room was enabled to follow the trial and to answer the questions through microphone. The problem with the second case is that the judge can not follow the behaviour of the witness during giving his/her testimony. "Zastita svedoka u sistemu krivicnog pravosudza" -Izvestaj na OBSE Misijata na Kosovo.

⁸¹ The first video conference ever carried out in the Republic of Macedonia, which provides for hearing of victim/witness in the proceeding before the Basic Court Tetovo was enabled with the joint efforts of the SECI Centre, MOI of the Republic of Macedonia, MOI of the Republic of Moldova, the Public Prosecutor's Office of the Republic of Macedonia, the Ministry of Justice, the Basic Court Tetovo and FBI.

In the case observed before the Basic Court Skopje I, concerning the criminal offence "trafficking in human beings" as referred to in Article 418a, the five damaged parties, foreign female citizens, were not present at the hearing, because they had been returned to their countries, with the assistance of the Ministry of Internal Affairs, as they had complained that they were going to cut their veins unless they were returned. Their statements made before the investigative judge were read before the court.

In the case observed before the Basic Court in Gostivar, for the criminal offence "Mediation in Prostitution" as referred to in Article 191 paragraph 1 of the Criminal Code, the witness/victim⁸² at the main hearing denied entirely her statement recorded in the minutes before the investigative judge. She testified that the defendant was completely innocent and that it was not correct that she had been forced to prostitute herself. She also declared that she could not recall what exactly she had stated before the investigative judge. She recognized as her own the statement made several months after the statement before the investigative judge, which certified with notary, whereby she had stated that the defendant was not guilty.

The defence lawyer of the defendant claimed that the witness had made another statement before the investigative judge, while the judge and the public prosecutor denied the existence of such statement. Upon request by the Public Prosecutor, a written notification was submitted by the investigative judge, confirming that the witness had made a statement only once and the statement made 4 months later was submitted, but not admitted by the investigative judge, under explanation that the victim/witness had been examined.

...As the witness denied in full her statement made before the investigative judge, an impression was created that she was too frightened and did not want to testify against the defendant. While making the statement, she was confused...Note by the observers attending the hearing.

Security within the court building

The responsibility for security of the court building and persons inside the building rests with the court police, established in 1996.

The court police are managed by the President of the court, who is obliged to prepare a weekly plan for providing security during the hearings, with an assessment of the need for presence in trials, either permanently or temporarily, or the need for prior search of all participants in the proceedings when entering the court.⁸³

Persons deprived from liberty, detained pending trial, or convicted are delivered to the court police in the court by the competent bodies and vice versa.

All basic courts in Macedonia have metal detectors at the entry door of the building⁸⁴. The control at the entry of the court building in the courts before which cases related to trafficking in human beings have been observed is at satisfactory level.

In the case related to Article 418 of the Criminal Code observed before the Basic Court of Tetovo⁸⁵ (Tet 007), two out of ten defendants were not allowed to enter by the court security. In order to avoid repetitions of this situation at the next hearing, all defendants received summons.

⁸² The witness (the damaged party) is a foreign citizen with a seven years old child. The father of the child, Albanian, citizen of the Republic of Macedonia whom she had met in the nightclub of the defendant and with whom she had lived out of wedlock for almost four years, was killed in 1999.

⁸³ Article 270 of the Court's Rules of Procedure (Court Police).

⁸⁴ According to Judicial Reform Index for Macedonia November 2003, it is a common practice that the court police lets the citizens pass around the detector or fails to react upon the sound of the equipment. Our finding refers only to those courts where cases in relation to trafficking in human beings have been observed.

In the course of the eight months observation, no incidents connected with the issue of adequate security of court building and persons inside were recorded. Security guards are always present at trials concerning cases that involve detained defendant.

In all 17 cases in which the victims were present, where eight times at the main hearings and nine times outside the main hearings, the security was at an appropriate level. Namely, apart from the court security⁸⁶, representatives of the Ministry of Internal Affairs, security from the country of victim's origin was present in most of the cases.⁸⁷

There was only one incident recorded, when the observers from the Coalition were threatened by a participant in the proceedings, requesting that they withdraw from the respective case observation.

Space limitations

The majority of basic courts in Macedonia lack separate room in which the witness would be staying without confronting the defendant before the start of the trial. However, the spatial limitation should not be taken as grounds for the failure to undertake all possible measures for minimization of secondary victimization of the victim.

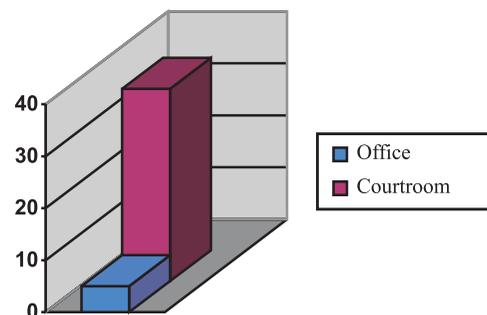
In the Basic Court of Gostivar (Gos 001), in the case observed in relation to the criminal offence under Article 418-a of the Criminal Code, the victim/witness was accommodated in the premises of the court police until the start of the main hearing.

The practice recorded in some of the courts to hold sessions in the Judge's office and, if it is deemed that proper conditions for the hearing exist, the participants to be moved to a courtroom, should be avoided, especially in cases in which the victim is present.

In 12 % of the trials, activities were conducted in the Judge's office.

Working conditions in the courtrooms of the basic courts observed range between very bad and excellent.

In rare, but still existing cases, the courtroom in which criminal offences involving trafficking in human beings are judged is very small and narrow, with no sufficient space for all participants in the proceedings.



As a result from the above, there are occasions in which it is impossible not only to comply with the arrangement of seats specified in the law for the positions of the defendant and his/her defence lawyer, public prosecutor, damaged party or his/her legal representative, witnesses and experts, but there are situations where the defendant seats next to the representatives of the public or participants in the proceedings are not physically separated among themselves.

⁸⁵ In the Basic Court of Tetovo, the measures for court building security have been significantly strained.

⁸⁶ An exception was a hearing of a case before the Basic Court in Bitola, where representative of the court police was not present in the courtroom, from which the public had been excluded.

⁸⁷ Only in one case where the victim was present, presence of a social worker was provided.

According to Article 303-a, parties should seat opposite the president of the council, so that the defendant and his/her defence lawyer on his/her left side, and public prosecutor or authorized plaintiff, damaged party or his/her legal representative on his/her right side, while witnesses and experts are examined at a place positioned on the right side of the president of the council, turned to face toward the defendant and the prosecutor, but this provision is not observed in the practice of our basic courts. Namely, even where conditions for the courtroom reorganization exist, this has not been done.

There are some situations in which, in spite of the availability of a computer in the courtroom, the use of a mechanical typewriter impedes the monitoring, i.e. what has been happening during the trial hearing.

Conclusions:

In more than quarter of the cases, the witness at the main hearing was not informed about the right not to answer certain questions if there is a probability that, by this, he/she or his/her close relative would be exposed to serious embarrassment, material damage or criminal prosecution, although such obligation is stipulated in Article 223 paragraph 2 of the Law on Criminal Procedure. In 75% of the cases, the examined witnesses in proceedings were victims.

In none of the cases related to trafficking in human beings the witness denied to disclose personal data (in accordance with the provision of Article 223-a of the Law on Criminal Procedure), which has been foreseen for situations in which there is a probability that the statement or answering a question could expose the witness or another person close to him/her to a serious danger for his/her life, health or physical integrity. In addition to this, there was no case where the witness denied making statement in the presence of the defendant, thus using the provision contained in Article 312 of the Law on Criminal Procedure, according to which the defendant may be removed from the courtroom in such situation.

Witness or expert hearing via video conference has been carried out only in one case in the Republic of Macedonia.

The special manner of witness hearing through the court in premises other than the courtroom (regulated by the provision of Article 270-a of the Law on Criminal Procedure) has not been applied in cases observed so far.

The control at the entry to the court building in the basic courts before which cases involving trafficking in human beings have been observed is at a satisfactory level. It should be also noted that, in all cases in which the victim's presence at the main hearing has been secured, adequate physical protection was provided by the members of the Ministry of Internal Affairs, by security from the country of the victim's origin or by the court police.

Spatial possibilities of courts are limited and they appear as a factor contributing to an increased probability for a secondary victimization of the victim of trafficking in human beings. Small courtrooms do not enable enforcement of the amendments to the Law on Criminal Procedure in Article 303-a, according to which the arrangement of the seats of the participants in the proceedings differs from the one in the past.

Recommendations:

Consistent implementation of the provision from Article 223 of the LCP is indispensable. According to this provision, the witness will be instructed that he/she is not obliged to answer particular questions if it is likely that by doing so he/she would expose himself/herself or his/her relative to a serious embarrassment, material damage or criminal prosecution.

The witness should be informed on the right to deny disclosure of personal data (name and surname, name of the father, occupation, residence, age and relation to the defendant) if by doing so he/she would expose himself or another person close to him to a serious life threat, danger to his health or physical integrity.

If the witness denies to disclose the said data and if it has been determined that the danger exists, there should be a possibility for application of the provisions on special manner of examination of the witness in the proceedings and not only application of the provision on inclusion in the program for witness protection. The assessment on the level of danger and manner of protection should be carried out according to the concrete situation.

It is necessary to improve the special manner of examination of witnesses and their participation in the proceeding in a more precise legal manner, provided that circumstances under Article 270-a exist. Thereby, more rapid and economic protection of the victims of trafficking in human beings-witnesses in the proceedings will be provided, and especially in the period before the Law on Witness Protection enters into force and until it becomes fully operational.

To provide adequate space for trial, especially in the sensitive, such as the cases related to trafficking in human beings, is a necessity in order to prevent secondary victimization of the victims, as well as for the purpose of providing conditions for obtaining statements in the proceedings against the perpetrators of this type of criminal offences.

Development of Handbook on the rights of the witnesses in the proceedings⁸⁸ may contribute toward promotion of the rights of all persons summoned as witnesses in the cases before basic courts. Such a promotion leads toward knowledge and thus towards willingness of the citizens (including the victims of trafficking in human beings as well) for appearance and participation in the proceedings before the court.

⁸⁸ <http://www.usdoj.gov/usao/tnw/brochures/vwhandbook/vwhandbook.html>)Victim and Witness handbook

6

Compensation to victims

Reforms of penal legislation directed at protecting the interests of the victim⁸⁹, including, the access of the victim to the system of penal justice and its efficient enforcement, restitution, compensation, social aid and protection against secondary victimization, were fostered by numerous international instruments⁹⁰. In the European Union Member States, the liability for compensation of damage caused by the perpetration of criminal offence rests primarily with the defendant. Under the civil proceedings, the victim is authorized, by means of private action, to file a claim for compensation of pecuniary damage and non-pecuniary damage. In this context, and for the purpose of simplifying and accelerating the process of compensation, some of the Member States have adopted provisions according to which the victim/damaged party may claim compensation of damage in the criminal proceedings⁹¹. It is common that granting of the claim is related to the fulfilment of certain conditions.⁹²

It often happens that the victim is not able to exercise its right to a compensation for suffered damage, because the perpetrator of the criminal offence is unknown, or there is no sufficient evidence to submit criminal charges against someone or the perpetrator of the criminal offence is not able to pay the compensation. Based on this, some of the Member States, in such circumstances, stipulate the possibility for the State to compensate the victim⁹³. In some countries, eligibility of compensation is conditioned by the ex-

⁸⁹ Kambovski Vlado, *Svrtuvanje na kaznenoto pravo kon zrtvata na deloto, Kazneno pravna reforma pred predizvicite na XXI vek*, Skopje, 2002, p.198.

Refocusing of Penal Law towards the Victim of the Act, Penal Legal Reform Confronting the Challenges of XXI Century, Skopje, 2002, pp.198.

⁹⁰ European Convention on Compensation of Victims of Oppressive Criminal offences, **in its Article 2** stipulates the liability of the state, in circumstances where it is not possible to obtain compensation from other sources, to compensate financially the victims that have suffered serious bodily injury or deterioration of health as a consequence from an oppressive criminal offences, including persons close to victims that have died from such acts. The compensation will be paid even in circumstances under which the perpetrator cannot be prosecuted or penalized. The **Directive on Compensation of Victims of Criminal offences** of the European Commission obliges all Member States to design a national system, by 1 July 2005, to guarantee fair and adequate compensation to victims of oppressive criminal offences. The Directive also requires that the compensation to victims provided efficiently, regardless of the place, i.e. the state where the act has been perpetrated, by means of establishment of a system for cooperation among national entities that will be implemented as of 1 January 2006.

⁹¹ In **Austria and Belgium**, claims for compensation to victims of crimes are filed with the criminal court under the criminal proceedings, except where the case may be settled only before the civil court (Austria) or, only in special cases, where the claim is submitted before civil courts (Belgium).

⁹² Many legislations have the clause „unless the adjudication of the claim for compensation leads to excessive prolongation of the proceedings”.

⁹³ Victims in **England and Wales** cannot file claim for compensation in the frames of the criminal proceedings, but this is actually not necessary. Namely, the criminal courts are obliged (under the Powers of Criminal Courts (Sentencing) Act 2000) to order payment of compensation by the defendant in all cases where bodily injury, loss or damage resulted from the criminal offence. Courts are obliged to state the reasons in all cases in which they do not order compensation to the victim in the proceedings.

istence of additional circumstances, such as: the type of the criminal offence⁹⁴ in question, the level of the compensation claimed, etc.⁹⁵.

12. Compensation of damage for victims in the Republic of Macedonia

In the Republic of Macedonia it is possible to compensate to the victim of trafficking in human beings through application of the provision on confiscation of property and/or material benefits obtained from the crime from the perpetrator of the criminal offence and returning it to the damaged party, i.e. the victim in the criminal proceedings.

In spite of the clearly established position of both the international community and national legislation⁹⁶ with regard to the duty of the state to compensate the victim, in case the perpetrator of the criminal offence is not able to do so, there is no public fund in Macedonia for victims compensation, nor there are provisions on establishing an obligation for the court to determine compensation.

Namely, together with the decision which establishes that criminal offence has been committed, the court will order confiscation of proceeds from crime.⁹⁷ In this context, proceeds from crime may consist of money, movable or immovable objects of value, as well as any other property, possession or assets, pecuniary or non-pecuniary rights.⁹⁸ In case their confiscation is not possible, another property (adequate to the gained proceeds from crime⁹⁹) will be confiscated from the offender.

The confiscated gain is returned to the damaged party, and in case there is no damaged party, it becomes a property of the state. It is impossible not to note the privileged status (rights and obligations) of the state. Namely, in circumstances where the perpetrator is not able to compensate the victim, the state does not correct the imbalance of the principle of fairness, while in circumstances where the damaged party is unknown, the resources enter the Budget of the Republic of Macedonia.

In only one out of 15 judged cases in relation to criminal offences "Mediation in prostitution", and "Trafficking in human beings", in the period between January and September 2005, the court, by passing the verdict by which the defendant was found guilty, ordered confiscation of proceeds from crime "Mediation in prostitution".

⁹⁴ According to the 1993 Criminal Justice Act of **Ireland**, the court may decide in favour of compensation to the victim by the defendant with the pronouncement of the verdict, for any criminal offence.

⁹⁵ See Kanevcev M. *Viktimologija-Ucenje za zrtvata*, Godisnik na fakultetot za bezbednost, 2000/2001, p. 97.

⁹⁶ According to Article 168 of the Law on Obligations, the state is liable for damage caused by a oppressive criminal offence where the perpetrator is unknown (has not been identified). The state is also liable to compensate the damage caused by oppressive criminal offences where the perpetrator is known, but is an indigent person.

⁹⁷ Liljana Ingilizova-Ristova, *Konvecija na Obedinetite nacia protiv transnacionalniot organiziran kriminal i kaznata-konfiskacija na imotot*, *Sudiska revija*, 2002, no. 4, p. 47.

⁹⁸ Article 98 (paragraph 1) of the Criminal Code.

⁹⁹ The same Article (paragraphs 2 and 3) regulates confiscation from third parties to which the material benefits from crime have been transferred without appropriate compensation, in case they did not know, but could have known or should have known that it was gained from a crime or regardless of whether they should have known or could have known if objects which were declared as cultural heritage and natural rarities have been involved, as well as those to which the damaged party is personally attached.

The compensation to the victim is obtained upon filing a legal property claim. The legal property claim (request for compensation) in the criminal proceedings is submitted to the body to which criminal charges are filed or to the court before which the proceedings are pending, not later than the completion of the main hearing before the first instance court. The legal property claim may concern compensation of damage, return of articles or annulment of a given legal matter.

The legal property claims are dealt with by the criminal court. Namely, together with the verdict by which the defendant is found guilty, the court decides with regard to legal property claims, as a whole or partially. If evidence presented in criminal proceedings does not represent sufficient grounds for full or partial adjudication on legal property claim, and for additional securing of evidence there will be a danger of unjustified prolongation of criminal proceedings, the court will adjudicate only the basis, or the basis and the amount of legal property claim in part, while regarding the amount of the legal property claim or its remainder, additional judgement will be passed.

If the amount of the legal property claim cannot be determined by mean of other evidence or presentation of such evidence would result in significant prolongation of the proceedings, the court will, by additional judgement, decide on the amount of the legal property claim or its part, determining a fair compensation.¹⁰⁰

Prior to the adoption of the Law Amending the Law on Criminal Procedure, the court had a possibility under the criminal procedure, with the judgment by which the defendant was found guilty, to decide the legal property claim in full **or only in part**, and instruct the damaged party to initiate a civil legal action¹⁰¹ for the rest.

With the introduction of the obligation of the court to deal with legal property claims in criminal proceedings, within which it will also decide about confiscation of material benefits obtained from the crime, the problems of determining the value of confiscated proceeds from crime and the amount of legal property claim have been overcome (decision on confiscation being taken prior to the establishment of actual damage). In addition to this, the unfavorable condition in which the damaged party is found has been avoided¹⁰² as in this way he/she appeared as a plaintiff in civil proceedings which often lasted too long.¹⁰³

Legal property claims in cases of trafficking in human beings most frequently refer to compensation of pecuniary damage (compensation of damage in event of bodily injury or health disorder)¹⁰⁴ and non-pecuniary damage¹⁰⁵ (compensation for the suffered bodily pains, for the suffered spiritual anguish due to reduced life activity, outrage to reputation, honor, violation freedoms or rights of the person, as well as for experienced fear)¹⁰⁶.

Without any intention to undervalue the magnitude of problems encountered in the course of estimation of pecuniary damage, it should be noted that problems are much more complex in the segment of non-pecuniary damage determination, due to the lack of practice in the field of trafficking in human beings.

¹⁰⁰ Article 101 of the LALCP.

¹⁰¹ In Republic of Macedonia there hasn't been any civil case in which the compensation of the victims has been given.

¹⁰² N. Mrvik, Nadomest na steta vo krivicnata postapka-megu reparacija i retribucija, *Bezbednost-Revija na kriminalistika, kriminologija i krivicno pravo*, 1994, no.2, p.273.

¹⁰³ Zavrsen izvestaj na Koalicjata "Site za pravico sudenje" –sudenje vo razumen rok.

¹⁰⁴ Article 184 of the Law on Obligations.

¹⁰⁵ The most frequent grounds for the claims for compensation of non-pecuniary damage to victims of trafficking in human beings in cases pending before our courts include: spiritual anguish suffered in relation to the outrage to honour and reputation, restricted freedom of movement, legally relevant fear experienced, bodily pain suffered.

¹⁰⁶ Article 189 of the Law on Obligations.

Namely, as a result of continuous brutal physical and psychological mistreatment by traffickers in human beings¹⁰⁷, victims are often subject to injuries, repressions, insomnia, anxiety and post-trauma shock¹⁰⁸. The coercion to have sexual relations with high number of clients increases the probability of their being infected with sexually communicable diseases. There are frequent events of their being subjected to abortion, which certainly has impact on their reproduction organs' condition. Poor hygienic conditions and malnutrition are other factors making impacts on the overall health status of the victim.

In a case observed before the Basic Court in Tetovo, in relation to Article 418a of the Criminal Code, the victim, after her entry in Macedonia, was locked and coerced to deliver sexual services, beaten up and fed only with bread and water, for two days. In an attempt to escape, she was caught by the defendant, severely beaten up and left naked in the woods for two hours.

After the attempted suicide by slashing her wrists, she was saved by medical intervention of a private doctor's office in the surrounding villages.

In another case observed before the Basic Court in Tetovo, in relation to Article 418a of the Criminal Code, the victim, as a result of brutal force used by the defendant, she needed an intervention of a dentist. Having become pregnant, she was subjected to an abortion in a private doctor's office.

There are three expert teams in the Transit Centre in Macedonia, its membership, among others, includes psychologist, providing psycho-social assistance to victims. Thus, the first assessment of the condition of the victim is made by trained persons in the Centre. However, the problem is that the opinion of these experts has not been treated as evidence in criminal proceedings so far¹⁰⁹.

In the only case where it was ordered to obtain a Report (medical documentation) for the damaged/witness in the proceeding from the IOM, observed before the Basic Court Tetovo (Tet 001) in relation to Article 418-a of the CC, in spite of the intervention by the Court, the evidence was finally provided at the third hearing.

The expertise, is in most of the cases ordered much later during the court process (provided that this is possible as the victim is most frequently deported to her domicile country), and cannot reflect the initial psychological state of the victim, which could be of high relevance in terms of determining the level of the damage.

In the case observed before the Basic Court in Tetovo (Tet 004), in relation to Article 418a of the Criminal Code, the victim/damaged party stated before the investigative judge that she joined the criminal prosecution and announced in advance a legal property claim, without having specified the level and the grounds of the claim. The legal representative of the damaged person specified the legal property claim at the main hearing, establishing the following grounds for compensation of non-pecuniary damage: spiritual anguish suffered in rela-

¹⁰⁷ According to the data contained in the Report of IOM 2004 (Changing patterns and trends of trafficking in persons in the Balkan region) on the trends of percentages of victims that have reported physical abuse in the transit centre in Skopje, it may be concluded that the use of violence towards victims of trafficking in human beings notes constant increase. Namely, 31% of the total number of victims have been physically mistreated in 2001, 57% in 2002, and 67% in 2003.

¹⁰⁸ The “KelN Index of Risks” lists: type of the event, separation in a trauma condition, response of institutions, fear of death in a trauma condition, duration of trauma and bodily wounds or closed relation with the perpetrator. - Training Manual within the framework of the comprehensive training, exchange and cooperation program of the Task Force under the Stability Pact in relation to combat against trafficking in human beings.

¹⁰⁹ During the specialized training in relation to trafficking in human beings and illegal migration, organized for the judges of the basic courts in Macedonia on 24 and 25 June 2005 by the IOM, discussions on this topic led to the conclusion that the anamnesis of these professionals could and should be treated as “adequate” evidence. In the same context is the recommendation by Prof. Dr. Gjorgji Hadzi Angelkovski, a psychiatrist, presented during the training course organized for the observers of the Coalition in the domain of observation of cases in the area of trafficking in human beings. Namely, the opinions of the personnel coming in direct contact with the victim upon their admission in the transit centre constitute appropriate grounds for expert finding and formulating an opinion by the expert in the proceedings before the court.

tion to outrage to honor and reputation, restricted freedom of movement, legally relevant fear experienced, and bodily pain suffered. It was also proposed that the level of compensation is determined on the basis of psychiatrist opinion or on the basis of a Rulebook of insurance companies.

Expert was summoned at the hearing, psychologist from the Centre for Social Matters from Tetovo, but he was only requested to present an opinion on the ability of the damaged party to testify.

The suggestion of the defense lawyer of the defendant to subject her to an additional psychiatrist expertise (she has been already examined at the previous hearing), was denied as groundless.

In judgment by which the defendants are found guilty, in relation to legal property claim, the damaged party is advised to initiate civil action, because "the criminal offence took place in a period when the amendments to the Law on Criminal Procedure were not in force, and thus the provisions of the former Law on Criminal Procedure applied as more favorable for the perpetrators".

Different to the material criminal law where the applicable law is the law in force at the time when the criminal offence was perpetrated, the procedural law is the law in force at the time when the criminal offence was judged.¹¹⁰

If the law is amended in the period between the moment of the trial until its completion, the provisions of the law that are softer for the perpetrator will not apply (as it is the case with the material criminal law), but "the latter law will apply as a matter of obligation", through regular criminal proceedings (investigation, initiation of indictment, main hearing and pronouncement of judgment, proceedings in relation to regular legal remedies¹¹¹.

Based on the above, it seems that the criminal legal theory is inconsistent with Article 597 of transitional and final provisions of the Law on Criminal Procedure¹¹², according to which criminal proceedings that have not been finalized on the basis of the provisions of the "old" Law on Criminal Procedure will be completed on the basis of the provisions of the newly adopted law in case those are more favorable for the perpetrator¹¹³.

The unreadiness of judges to take a position with regard to the issue of compensation of non-pecuniary damage to victims of trafficking in human beings has resulted with disastrous outcome, according to which in a total of 15 decided cases in relation to criminal offences qualified as "mediation in prostitution" and "trafficking in human beings", in the period from January to September 2005, not a single decision was made granting compensation. The claims range between 100.000,00 denars and 2.000.000,00 denars.

A decision on compensation of pecuniary damage to victims of trafficking in human beings and forced prostitution, by the end of July 2005, was made only in two cases. The claim's value is 98.023 denars (1606 Euros).

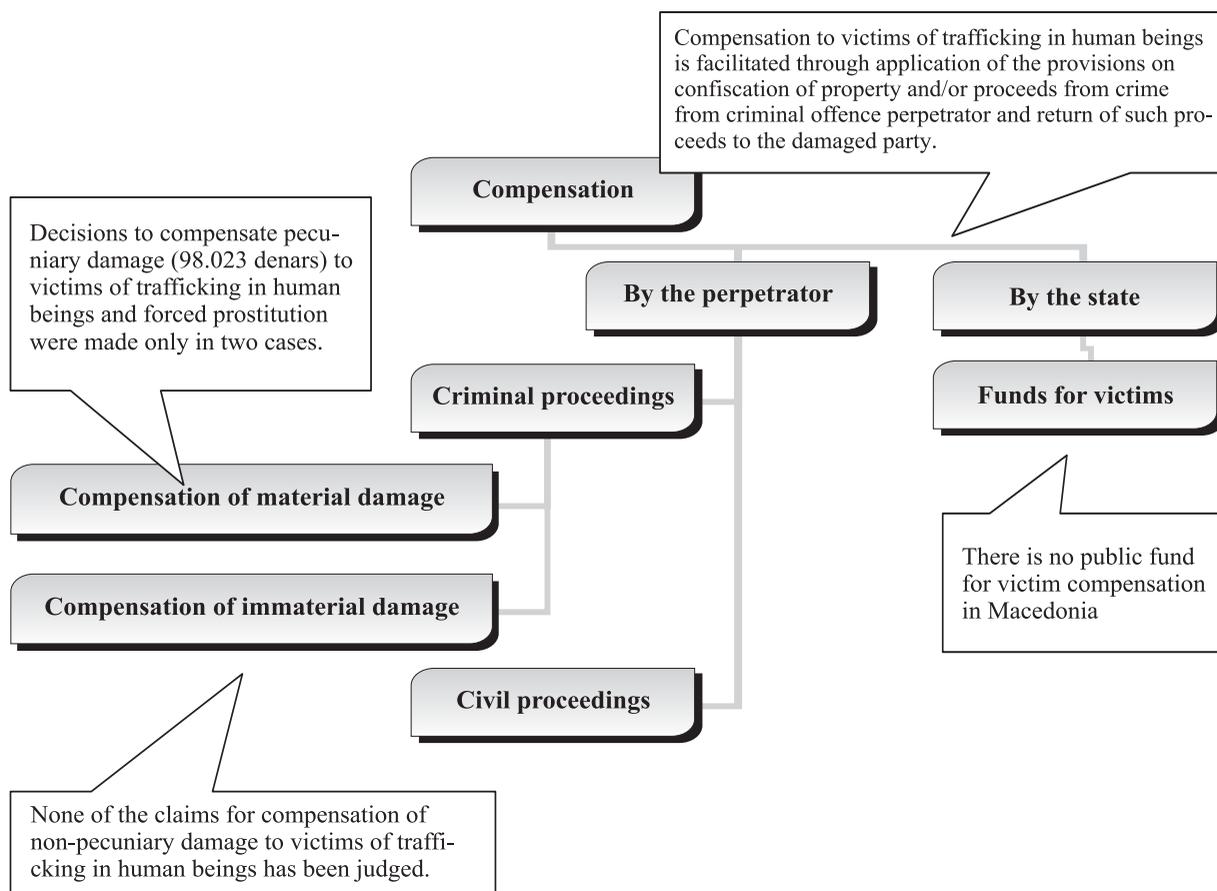
In the case observed before the Basic Court in Tetovo (Tet 006), in relation to Article 418a of the Criminal Code, with the adoption of judgment, by which one of the defendant was found guilty, the court ordered compensation of costs in an amount of 98.023.00 to be paid. This was the first case where positive decision upon this type of claim was made.

¹¹⁰ Nikola Matovski, Vazenje so oglede na vremeto, Kazneno procesno pravo-opst del, 2003, p. 85.

¹¹¹ Kambovski, , Kazneno pravo, Opst del, Skopje 2004.

¹¹² According to the revised text, provision that is not in the Law on Criminal Procedure, including the two novelties.

¹¹³ This formulation of Article 597 of the Law on Criminal Procedure, without precise specification of circumstances under which application of "the law which is more lenient for the perpetrator" will be allowed, was severely criticized by the participants in the consultation of the Association for Criminal Law and Criminology of Macedonia on: criminal legal policy in the Republic of Macedonia (21-23 September 2005).



For the purpose of protecting legal property claim, provisional security measures with regard to legal property claim resulting from the perpetration of the criminal offence may be ordered in criminal proceedings.

Namely, according to the new Article 203-a of the Law on Criminal Procedure, the investigative judge or the council may, by way of decision, order provisional security measure in connection with¹¹⁴ of property or proceeds from crime.¹¹⁵

In the context of the above, the property or the proceeds that are subject to security measures are placed under the supervision of the court.

So far, in none of the cases observed by the Coalition security measure provision was applied with regard to property or proceeds from crime, which is more than surprising, especially given the fact that trafficking in human beings is one of the most profitable forms of organized crime and criminals use all possible ways to hide their property (e.g. by transferring property to persons close to them, etc.). And, taking into account the fact that the victim cannot be compensated otherwise, except from the property of the perpetrator, there is more than obvious need for provisional property security.

¹¹⁴ Provisional security measures regarding property or proceeds also means temporary freezing, seizure, detainment of funds, bank accounts and financial transactions or proceeds from crime.

¹¹⁵ ... When conditions for confiscation of property or proceeds from crime are fulfilled, the court shall, in line of duty, order provisional security measures on the basis of Article 489 of the Law on Criminal Procedure.

Conclusions:

The basic courts in Macedonia, in spite of the widely established legal possibilities for compensation for victims of trafficking in human beings, have not yet established and developed practice of enabling compensation of pecuniary and non-pecuniary damage caused by the criminal offence. By introducing the compulsory obligation for the court, along with the verdict by which the defendant is found guilty, to decide with regard to legal property claim in criminal proceedings, either immediately or by passing additional decision, the legislator has created conditions for enforcement of a more prompt compensation for victims of trafficking in human beings. Unfortunately, these provisions have not been applied in the practice of domestic courts. So far, no decision for compensation of non-pecuniary damage to victims of trafficking in human beings or forced prostitution has been passed so far in the Republic of Macedonia.

Provisions on confiscation of property or proceeds from crime gained through the perpetration of criminal act, as well as provisions on provisional security measures regarding property or proceeds from crime are rarely enforced in domestic courts' practice.

Recommendations:

Taking into consideration the fact that the victim of trafficking in human beings, due to the non-existence of public funds for compensation, cannot be compensated otherwise except from the property of the perpetrator, there is a more than obvious need for a more frequent enforcement of provisions of the Criminal Code on confiscation of property or proceeds from crime, as well as provisions on provisional security measures regarding property or proceeds from crime. Confiscation of criminal proceeds can have stronger deterrence effect than the punishment with imprisonment, which in Macedonia, due to the mild policy of courts when determining sentences, in most of the cases is below the special legal minimum.

To respect the provisions of the Law on Criminal Procedure which refer to legal property claims is an imperative in terms of protection of the interest of the victim, i.e. strengthening the victim's position in the proceedings before the court.

The opinion (expertise) of experts in charge with provision of psychological assistance to victims immediately after their admission in the Transit Centre must be used as evidence in proceedings. Especially in circumstances where no other expertise of the psychological condition of the victim has been done prior to their repatriation to domicile countries, the use of this kind of expert opinion is a desirable solution in terms of the establishment of the grounds and the level of the fair compensation for victims of trafficking in human beings.

7

Length of the Proceedings

In criminal proceeding, the court is obliged to undertake all necessary measures in order to prevent the delay of proceedings and incapacitate the abuse of the rights pertaining to persons that participate in the proceedings.

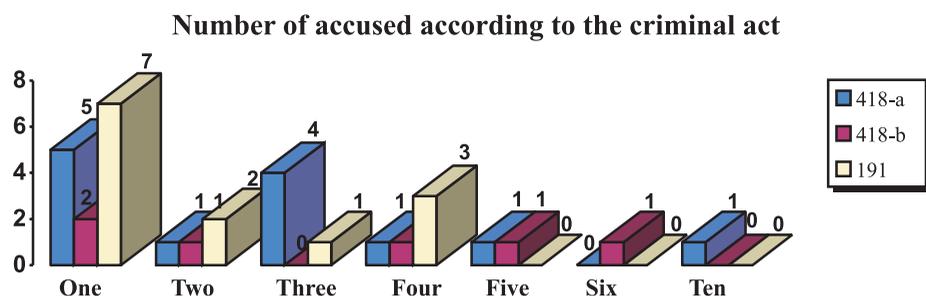
Rapid and effective procedure should protect the right of defendant to a proper quality and effective defence, on one side, but it should also prevent any loss of evidence against him/her, especially if we consider the fact one of the most powerful instruments in the fight against traffickers in human beings is still the statement of the victim, and securing the presence of the victim is often accompanied with big difficulties. At the same time, the delay of proceedings leads to reduction of victim's chances for fair compensation for the suffered pecuniary and non-pecuniary damage.

Huge number of factors, individually and cumulatively, impact the length of the proceedings in the cases related to trafficking in human beings, starting from the complexity of the case (number of charges, number of defendants, witnesses and securing their effective presence in the court), conduct of the defendant, conduct of the parties in the dispute i.e. (ab)use of the rights guaranteed by the law, the fact whether the defendant is detained or not, the conduct of the judge and judicial administration, and the technical equipment of the courts.

13. Complexity of the case

It has been established, according to the data gathered through the observation of the criminal cases in the said field, that within the framework of one case several persons appear as defendant solely for one criminal offence¹¹⁶, in most of the cases.

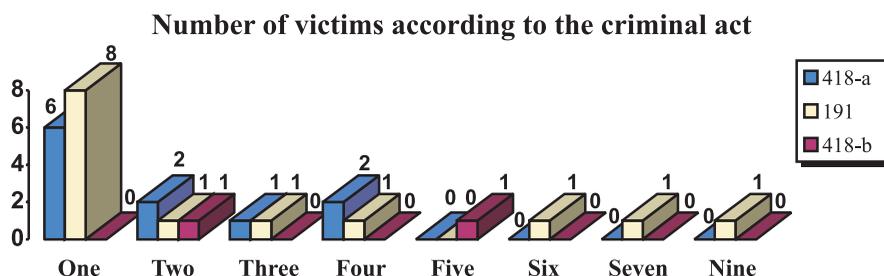
¹¹⁶ In 24% of the cases, the indictments are for two criminal offences (Smuggling of Migrants with Falsifying Documents (2), Trafficking in Human Beings and Mediation in Prostitution (2), Trafficking in Human Beings and Smuggling of Migrants (1), Trafficking in Human Beings and Falsifying Documents (1), Mediation in Prostitution and Abuse of Official Duty (1)).



However, the number of cases where several persons appear as defendants, compared with the cases against one defendant is far less, which leads to the conclusion that the factor "number of defendants", does not always play crucial role during the proceedings. Certainly, there are exemptions from this:

In a case observed before the Basic Court Tetovo (Tet 007) in relation to the criminal offence of Trafficking in Human Beings, 10 persons were defendants. During the first observed hearing, 7 of the defendants were present, for two of them there was no evidence of proper serving of summons, while one person was properly summoned but failed to attend. At the next hearing, four out of the ten defendants failed to appear before the court. The situation had not been changed at the third hearing of this case (one person absconded), and the court brought a decision for apprehension of the two defendants. Finally, at the next hearing, the presence of 9 out of the 10 persons was secured (one person was still in hiding), but, this time the reason for postponement was the absence of one of the defendants in a case where the defence was compulsory.

Regarding the number of victims, in 52% out of the total cases, victim in the proceedings is one person.

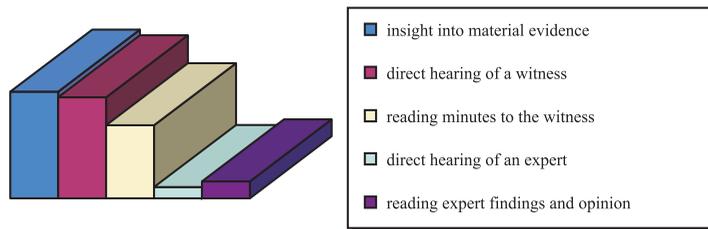


Establishing the facts of the case, which encompass the criminal event and the characteristics of the person put on trial, as well as legal activity that means finding a legal provision that has to be applied on the established factual situation during the trial of any criminal case are the most important activities of the court.

Correct establishment of facts is accomplished by presentation and assessment of evidence. The scope of the work of the court and other organs in the proceedings, as well as the efficiency of the proceedings depends on the object of the proof¹¹⁷, on the type and number of evidence¹¹⁸ as well as the manner of their presentation.

¹¹⁷ According to Article.314, paragraph 2 of the LCP, the process of proof encompasses all facts the court considers to be valid for proper administration of justice. Such general manner of regulating the object of proof, above all, is result of the impossibility to set up general rules for all different situations in practice, as well as of the need to enable the court to filtrate the less important facts from those more important in order to avoid the danger of unnecessary delay of proceedings.

¹¹⁸ The LCP does not enumerate the separate means of evidence, but contains provisions, thereto, the court grounds the verdict only on facts and evidence which are presented at the main hearing, and at the same time, it is obliged conscientiously to evaluate each evidence separately and in connection to other evidence and on the grounds of such an evaluation to derive a conclusion whether a certain fact is proved (Article 339).



The analysis of the observed cases shows that besides insight into the material evidence, the most frequent activity at the main hearing is direct hearing of a witness, as well as reading the statement of the witness from the minutes. While the activity of reading the expert finding and opinion was undertaken only in three cases, the direct hearing of an expert was undertaken as a manner of presentation of evidence only in two cases.

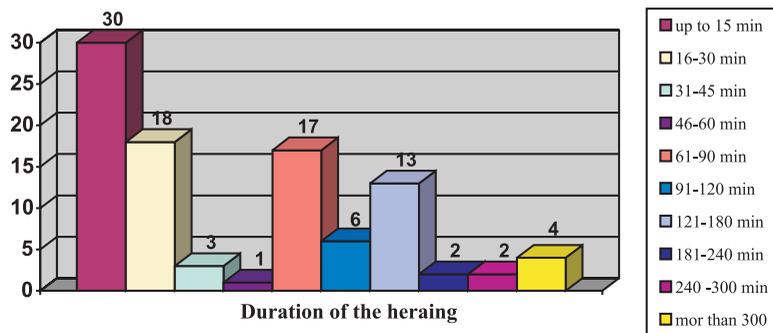
Too big diversity of material evidence in the cases related to trafficking in human beings does not allow their precise classification. Besides the evidence on the identity and location of the defendant or victim, such as, excerpt from the criminal record, photocopies of personal documents and car registration card, report from the Sector for international police cooperation NCB INTERPOL-Skopje, report from the Sector for internal affairs, telegram from Airport Petrovec, requests for issued permit for temporary residence, request for admission in the Transit Centre, other often applied manner of presentation of evidence is reading the minutes on undertaken procedural activities, such as: minutes on recognizing items and persons, minutes on handing over seized items, minutes on receiving criminal referral from the damaged, minutes on search of an apartment, of home, minutes on confrontation with the defendant. The above enumerated evidence does not exhaust all possible solutions in the practice.

Conclusions:

More than half of the total number of observed cases is concerned with one defendant in the proceedings before the court and one victim of the crimes related to trafficking in human beings. At the same time, in 75% of the cases, the indictment refers only to one criminal offence.

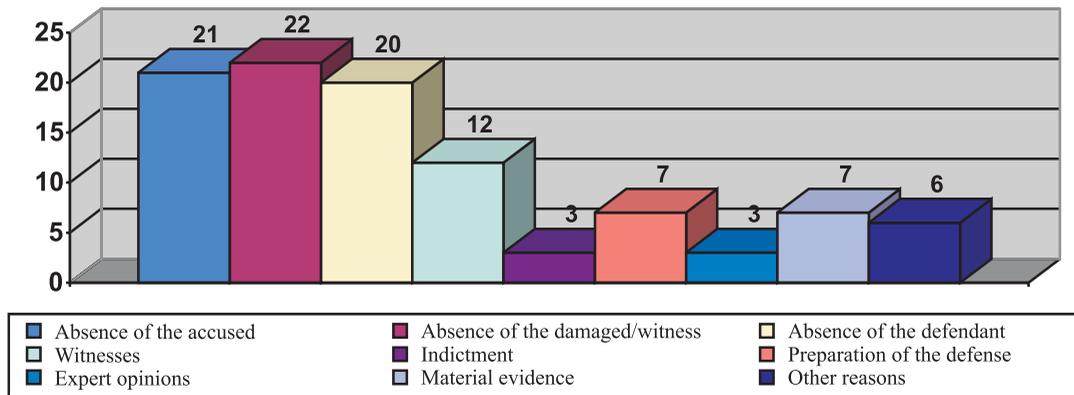
14. Reasons for the postponements of the hearings

Duration of the hearings is an appropriate indicator for determining the frequency of postponements of court hearings. As noticeable from the table shown below, the hearings lasted less than 15 minutes in most



of the cases. That leads to the conclusion that the hearings are often postponed directly, without opening the main hearing at all.

In the observed cases in relation to trafficking in human beings, the following were encountered as reasons for postponement of main hearing¹¹⁹ in our practice:



Presence

Securing the presence of the relevant actors in the proceedings impacts the quality and length of the court process, and thus, the level of implementation of the international and national standard of a trial in a reasonable time.

The extent to which the presence i.e. absence of the defendant, public prosecutor, witnesses, damaged party or expert witness at the main hearing reflects on the delay of the procedure may be established if the number of postponements of the main hearing is correlated with the presence of each of the above mentioned persons, respectively.

1. The defendant and measures for securing his presence

Absence of the defendant/s is a reason for postponement of the hearing in 21% of the cases.

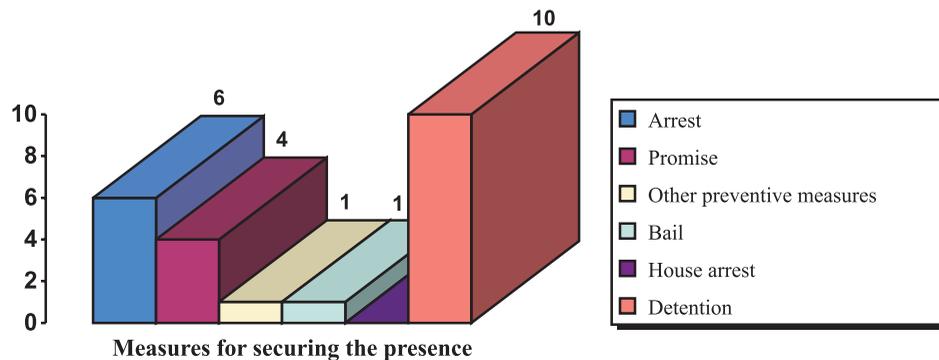
The new amendments to the LCP in the part on the measures for securing the presence of the defendant and successful conduct of the criminal procedure, besides the existing measures: court summons, apprehension, promise by the defendant that he/she will not leave the residence, bail and detention, which underwent certain changes, "**other preventive measures**" have been introduced for the purpose of securing the presence of the defendant, as well as the measure of **house arrest**.

The following are considered as other preventive measures: ban on leaving the temporary or permanent residence, obligation of the defendant to report occasionally to certain official person or authorized state organ, temporary seizure of a travel or other kind of document for crossing the state border, or ban on its issuance and temporary seizure of driving license, or ban on its issuance.

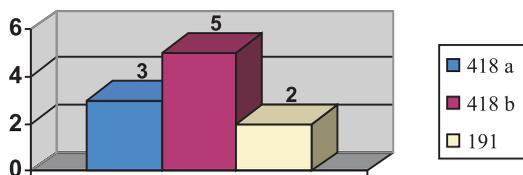
¹¹⁹ Jovan Proevski, Milan Krckovski, Odlaganje i prekinuvanje na glavniot pretres, Zakon za krivicna postapka-objasnuvanja, komentari, sudska praktika i obrasci za prakticna primena, Akademik, Skopje, 1997, p.291.

Taking into consideration the fact that certain coercive measures significantly restrict the freedom of the citizens and collide with the principle of presumption of innocence of the defendant, means that in a situation when one person will be acquitted, than even the smallest restrictions represent violation of the guaranteed rights and freedoms of the citizen, and at the same time considering the necessity not to allow obstruction of the proceedings and avoidance of criminal repression by certain persons, imposes the need to strike a proper balance between satisfying the individual interests and the interests of the community to be protected from crime.

The frequency and the type of measures applied for securing the presence of the defendant in cases related to trafficking in human beings, may be established from the following data:



Measure of pre-trial detention according to the criminal act



Namely, in the framework of 32 observed cases, the measure of pre-trial detention¹²⁰ represents the strictest form of procedural coercion¹²¹ and it is ordered only in case when certain more lenient measures cannot protect the interests of the criminal proceedings. It has been imposed on 10 persons (12%)¹²² out of the total of 83 defendants¹²³.

According to Article 183 of the LCP, the duration of the pre-trial detention must be restricted to the shortest necessary time¹²⁴, and all the organs that participate in criminal procedure have to act in most urgent manner¹²⁵.

According to Article 183 of the LCP, the duration of the pre-trial detention must be restricted to the shortest necessary time¹²⁴, and all the organs that participate in criminal procedure have to act in most urgent manner¹²⁵.

In a case observed before the Basic Court Struga (Str 001), for the crime of Trafficking in Human Beings, where the defendant has been in pre-trial detention since 14.12.2004, the hearing held on 9.03.2005 has been postponed for 44 days based on the explanation by the judge that there had been lack of free term to schedule the next hearing.

¹²⁰ Stojanov I., Osnovi za opredeluvawe na pritvor vo Makedonskata krivicna postapka, Godisnik na fakultetot za bezbednost, 2000/2001, p.38.

¹²¹ K. de Rover, Pritvor, Vo sluzba za zastita, Covekovi prava i humanitarno pravo za policiskite i bezbednosnite sili, MKCM, p.237.

¹²² This number, thereto did not include 6 migrants who were ordered pre-trial detention and found guilty for the criminal offence of Falsifying Document, which was tried together with the crime of Smuggling Migrants. It is an interesting data that in bigger number of cases, the smuggled migrants were detained, as opposed to the smugglers.

¹²³ Six defendants out of total of 83 are already in prison.

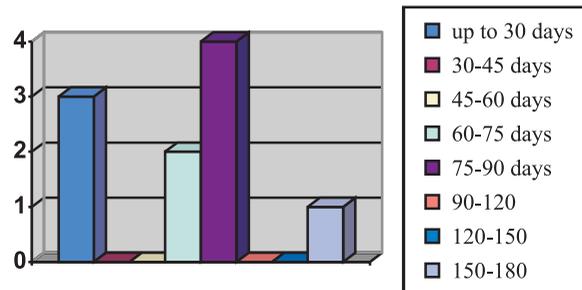
¹²⁴ Nikola Matovski, Traenje na pritvorot, Sistemot na kaznena postapka vo Republika Makedonija, Godisnik na pravniot fakultet vo Skopje, 199/2001 volume 39, book 2, p.221.

¹²⁵ Pavel Manev, Zabeleski i predlozi vo vrska so pritvorot, Makedonska revija za kazneno pravo i kriminologija, 1995, p. 97; Cvetan Cvetkovski, Ustavni možnosti i granici na zakonskoto propisuvanje na pritvorot I na drugite merki za obezbeduvawe na prisustvo na obvinetiot, Makedonska revija za kzneno pravo i kriminologija, 1995, p. 49.

The data analysis showed that in most of the cases, the length of the pre-trial detention is between 75 and 90 days.¹²⁶

In three cases, the measure of pre-trial custody lasted up to 30 days. In two cases, according to Article 175, paragraph 3, the said measure was replaced with more lenient measure, i.e. with a release on bail and promise by the defendant that he would not leave the temporary or permanent residence.

Time frame of the pre-trial detention



In six cases¹²⁷ against nine defendants (11% out of the total number of defendants), who, although regularly summoned did not appear at the main hearing and did not justify their absence, an order for apprehension was issued.

In a case observed before the Basic Court Tetovo (Tet 008) in relation to the crime of Trafficking in Human Beings, a report from OVR Tetovo was submitted to the judge notifying that, the defendant against whom an order for arrest had been issued, could not be found. However, the defendant appeared at the hearing, and his defence lawyer submitted a medical note certifying that the defendant had been in hospital in Ohrid for the purpose of rehabilitation and that was the reason why he did not appear at the previous hearing. However, the judge did not send the order for compelling attendance of the second defendant in the same case, who was serving a sentence in the prison Idrizovo Skopje, assuming that the said hearing would be postponed and in order not to create additional costs. Finally, the hearing was postponed due to the absence of the second defendant.

Promise from the defendant that he will not leave the temporary or permanent residence with a remark that a pre-trial detention will be ordered in case of violation of the undertaken obligation, was requested from four defendants.

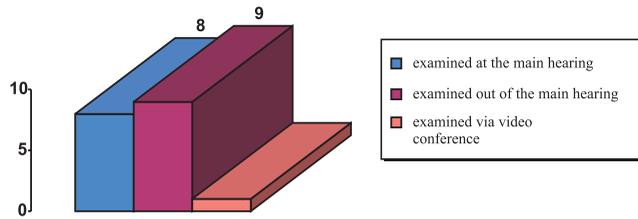
2. Absence of the victim

Absence of the victim/witness/damaged party is often a reason (22%) for delay of the procedure¹²⁸.

¹²⁶ In 1992, the average duration of the pre-trial detention from the day of detention till the day of beginning of the trial in England was 11 weeks, G. Klajxiev, Pravo na pritvorenoto lice na brzo sudenje, Bezbednost, 1994 br.1 p.55

¹²⁷ After two unsuccessful attempts to secure the presence of all nine defendants in a case before the Basic Court Tetovo, an order for arrest of three of the defendants was issued for the next hearing.

¹²⁸ Taking into account the particular significance of the evidence given by the victims of trafficking in human beings for the outcome of the criminal proceedings, and considering primarily the fact that in general, with few exceptions, the victims are foreign citizens, often returned to their countries of origin (according to the data from IOM, the percentage of victims of trafficking in human beings who did not have valid documents with them, thus illegally residing in Macedonia in the period since 2000 up to present is between 53% and 88%), regulating the issue of delivery of summons for the witnesses, i.e. securing the presence of the victim/witness, is worth of attention. In order to provide thorough cooperation in the field of justice and facilitating the mutual legal turnover, the Republic of Macedonia, besides the ratified Convention has concluded several bilateral agreements on providing legal assistance in criminal matters. So, by the **Agreement between the Macedonian Govern-**



main hearing, and due to the enormous difficulties regarding securing of the presence of the victims/witnesses. For the next hearing, the judge brought a decision on witness/victim/damaged party examination out of the main hearing.

In a case (Gos 001) observed before the Basic Court Gostivar in relation to Article 418-a of the CC, the presence of only one of four victims in the proceedings was secured. Since the trial was postponed due to the absence of the defendant, who had not been properly summoned, the judge ordered examination of the victim from Bulgaria out of the main hearing.

In a case (Ohr 002) observed before the Basic Court Ohrid for a crime under Article 418-a of the CC, only one victim participated at the hearing. Since the hearing was postponed upon a request of the defence lawyers for the purpose of preparation of the defence regarding defining the indictment by the public prosecutor, the judge ordered examination of the witness out of the main hearing.

In accordance with Article 322 of the LCP, if the arrival of the witness or expert witness at the trial is significantly burdened or impossible, and his/her statement is considered important for the proceedings, the judicial Counsel may order the witnesses to be examined out of the trial.

Application of this provision in situations when the arrival of the victims/witnesses is accompanied with big financial costs, additional mistreatment of the victim, initiation of the system of international cooperation¹³⁰, at least until the moment of enacting legal grounds for providing the presence of the victim during the proceedings¹³¹, is logical and necessary solution.

ment and the Republic of Croatia on Legal assistance in Civil and Criminal Cases, the State Parties are obliged to ..”deliver and hand over letters, exchange information on the issues of legislation and criminal record and also to undertake certain investigative measures, delivery of material evidence, examination of defendants, witnesses, parties, expert witnesses, performing court inspection, expertises and other”... According to Article 28 of the **Agreement on Legal Assistance in Civil and Criminal Cases between the Republic of Macedonia and Republic of Turkey**, if the court organ of the requesting party evaluates that the presence of a victim is necessary, it shall note that in the request for delivering court summon. The failure of the victim to appear is not subject of fine or other penalty. The provisions which prescribe that the summon for the witness may not contain threat with coercive measure in case of failure to appear before the court, are contained in all bilateral agreements concluded in the said field.

¹²⁹ It refers to victims-foreign nationals.

¹³⁰ Bilateral agreements that are significant for addressing the issue of trafficking in human beings and that the Republic of Macedonia has concluded with the various countries may be divided into several categories, such as agreements on: legal assistance in criminal (and civil) cases, extradition, return i.e. repatriation of persons whose entry or/and stay is contrary to the existing regulations, mutual execution of court judgments in criminal cases, cooperation in the fight against terrorism, illegal drug trafficking and organized crime, cooperation between the Ministry of Interior of the Republic of Macedonia and the Ministries of Interior of other states, etc.

¹³¹ Providing legal stay for the victims of trafficking in human beings in the countries where they had been trafficked is of particular significance for two reasons: first, for the purpose of providing proper quality protection to the victim and her rights, and second, for the purpose of providing an effective mean for criminal prosecution and punishment of the perpetrators of criminal offences in relation to trafficking in human beings. Status of the foreign female citizens (movement and stay) in the Republic of Macedonia is regulated by the Law on Movements and Residence of Foreigners¹³¹, as well as by the Rulebook for conducting of the affairs of the Ministry of the Interior¹³¹. There are no provisions that explicitly refer to the victims of trafficking in human beings in the Law or in the Rulebook, that will allow for different treatment of the victims of trafficking in human beings from the treatment of any foreigner in the Republic of Macedonia.

Reading the statement of the victim/witness given before investigating judge is carried out in significantly higher number of cases than the hearing of victim at the main hearing¹³².

The reasons behind the decision to read the previously given statement of the victim/witness, and not to hear the witnesses directly are various:

In a case (Gos 001) observed before the Basic Court Gostivar in relation to Article 418-a of the CC, the council brought a decision on refusing the proposal of the defence lawyer for direct hearing of the victim¹³³ following the received report from the MOI that one of the four witnesses/victims was located but did not agree to testify.

In a case (Tet 002) observed before the Basic Court Tetovo in relation to Article 191 of CC, the damaged/witness in the proceedings was not accessible to the state organs. All participants in the proceedings upon a question of the President of the Council, whether the victim should be present, answered that it was not necessary.

In a case (Tet 005) observed before the Basic Court Tetovo in relation to Article 418-a of the CC, the deputy public prosecutor suggested the damaged party/victim to be brought for the purpose of confronting with the defendants. The reason was huge deviation between the statement of the defendants and the statement of the damaged party entered in the minutes during the investigation. The court rejected the proposal with an explanation that the victim had been accommodated in the Transit Centre¹³⁴ for more than five months, and that during that time the confrontation might have taken place.

3. Public Prosecution

Out of total of 102 observed hearings, the public prosecutor or his deputy did not appear at four hearings¹³⁵. The reasons for their absence are not known.

In the case observed before the Basic Court Gostivar (Gos 002), at the first hearing, the deputy public prosecutor participated in the proceedings via telephone. Namely, since the victim, damaged party/witness in the proceedings was not present at the observed hearing, the deputy public prosecutor, "via telephone", did not agree with the proposal to read the statement of the damaged and requested to provide her presence at the next hearing.

At the second observed hearing, which due to non-secured presence of the damaged party in the proceedings was directly postponed, the President of the Council noted that deputy public prosecutor remained on the proposal for direct hearing of the damaged, although he was not present in the courtroom again.

¹³² At the main hearing, in spite of the judge's decision that the statement of the damaged/witness will be read, it happens the decision not to be carried out.

¹³³ Pursuant to the LCP, any person, either national or foreign citizen that reside on the territory of the Republic of Macedonia, is obliged to testify i.e. to respond to the court summon and to give its statement (unless otherwise prescribed by the law). The situation is different when the person who does not reside on the territory of the Republic of Macedonia is at stake. Namely, according to all concluded bilateral agreements on mutual legal assistance in criminal (and civil) cases, the absence of the witness is not subject of a fine or other punishment, and the court summon must not contain threat with coercive measures in case of non-appearance before the court.

¹³⁴ After the opening of the Transit Centre (the first of this type in the region) by the Government of the Republic of Macedonia, the victims of trafficking in human beings are brought in the Centre by the police after identification and establishment of the status of victim. On 07.03.2001, the Instructions for the manner of conducting the affairs of the Transit Centre was adopted by the Ministry of Interior, and the first admission of persons was carried out on 04.04.2001. The Centre is within the framework of the MOI- Sector for Border Affairs- Section for Illegal Migration. Total of 682 persons have been accommodated in the Centre since its foundation in June, 2005. For more details on the structure of the Transit Centre for foreigners and its role see “Praktikum za borba protiv trgovija so luge i nelegalna migracija”, Megunarodna Organizacija za Migracii, Misija vo Skopje, 2005, p.36.

¹³⁵ In two cases.

On the next hearing, which was directly postponed for the same reasons as the former, the deputy public prosecutor did not appear again in the office of the president of the council.

At the last hearing, the main hearing started without presence of the deputy public prosecutor, who following the phone call of the judge appeared ten minutes later. He was briefly informed that the hearing of defendant had started.

In accordance with Article 291 of the LCP¹³⁶, presence of the public prosecutor or its deputy is compulsory. Conducting the main hearing without a person whose presence is compulsory¹³⁷ is a substantial violation of the criminal procedure.

4. The Lay judges

Absence of the lay judges, according to our analysis, was a reason for postponement of the hearing only in one case.

According to Article 283 of the LCP, the lay judges are obliged to be present permanently during the trial. The presiding judge is obliged to certify whether the judicial Council is composed according to the law and if there are reasons for which the members of the Council must be excluded. Following the opening of the hearing, the President of the Council announces the subject of the main hearing and court composition.

It is very disturbing that in some courts the practice is the judge to determine in his office whether the reasons for holding the main hearing are satisfied and if the circumstances allow, the parties who are present in the proceedings will be transferred to the courtroom. Not underestimating the problem of insufficient space in many of the courts in the Republic of Macedonia¹³⁸, in this situation, other two problems and their accompanying consequences must be shown.

Namely, in the above mentioned cases, the lay judges are often not present in the judge's offices during the trial, and at the same time, considering the size of the offices in courts, many persons are concentrated at one place, which creates poor working conditions, and the victim/damaged party is put in unpleasant situation to be very close to the defendant or even worst, to the defendants in the proceedings.

In a case observed before the Basic Court Struga in relation to crime of Trafficking in Human Beings under Article 418, paragraph 2, during the hearing of the second witness, the President of the Council stated that the second professional judge had a trial and will have to leave the courtroom, and he suggested to continue any way in order not to impede the trial. In spite of objections by the deputy public prosecutor who stated that it was an absolute violation of the provisions of the LCP, the second professional judge from a five-man council left the courtroom 45 minutes before completion of the hearing. Later on, one of the lay judges left the courtroom as well, but the trial was not interrupted, thus in very short time the court composition contained three instead of five members.

In the same case, at the next hearing, the President of the Council started the main hearing noting in the minutes that the legal conditions for holding a main hearing were satisfied and that the deputy public prosecutor

¹³⁶ The main hearing which has been scheduled on the basis of indictment will be postponed if the public prosecutor or its deputy fails to appear at the trial.

¹³⁷ Article 355 of the LCP.

¹³⁸ Final Report of the Coalition „All For Fair Trials”, from July 2003 to July, 2004, p.72.

may began with its final speech, and this while one lay judge was absent. Since the deputy public prosecutor stated two proposals in relation to establishing the identity of the damaged party, after pause of 15 minutes, the court brought a decision on postponement of the main hearing due to the absence of judicial counsel members.

In a case (Gos 001) observed before the Basic Court Gostivar in relation to Article 418-a of the CC, the lay judges were not present in the judge’s office where the trial took place. The case was postponed.

In a case (Tet 004) observed before the Basic Court Tetovo in relation to Article 418-a of the CC, the third lay judge arrived at the trial at 11.00, although the trial started at 10.00.

In a case (Tet 008) observed before the Basic Court Tetovo in relation to Article 418-a of the CC, the main hearing started with incomplete judicial counsel. The second professional judge joined the proceedings latter.

5. Witnesses¹³⁹

Absence of the witnesses appears as one of the reasons for adjournment of hearings in 5 cases. In three of these cases the judge ordered forceful apprehension in accordance with Article 229 of the LCP.

In 7 cases, the reason for scheduling new hearing was summoning and hearing new witnesses suggested by both parties.

Indictment

A request for translation of the indictment as a reason for postponement appeared in two situations, while the need for defining the indictment following the new established situation at the hearing regarding the identity of the defendant and the damaged party was a reason for postponement only in one of the observed cases.

In the case (Tet 001) observed before the Basic Court Tetovo, the defence lawyer of one of the defendants objected that the defendant did not receive the indictment translated into Albanian language. Following the inspection of the papers in the case, the President of the Council, since he established that there was no evidence that the said defendant received the indictment (as the other two defendants did), postponed the main hearing and issued an order to deliver an indictment translated into Albanian language to the defendant.¹⁴⁰

In the case (Tet 002) observed before the Basic Court Tetovo, the defence lawyer of the defendant suggested translation into Albanian language of the indictment together with all written evidence from the investigation, since the defendant could not understand the Macedonian language sufficiently, nor its Cyrillic letter. Upon the question of the judge whether the defendant agreed with the proposal of the defence lawyer, he stated that only indictment could be translated and not all other papers explaining that in the investigation he stated in the minutes that he knew the Macedonian language well and used it.

The judge brought a decision rejecting the proposal of the defence lawyer of the defendant with an explanation that the indictment went into force and they could request interpretation earlier. Additional reason for such decision is that the defendant used Macedonian language in the investigation.

¹³⁹ This does not refer to witnesses -victims of trafficking in human beings, i.e. the damaged party in the proceedings, their presence is elaborated separately in the part „Presence of the victim”.

¹⁴⁰ According to the latest amendments to the LCP (Article 8, paragraph 4) the indictment is delivered to the defendant, who does not understand the language in which the proceeding is conducted translated into a language that he uses in the proceedings.

im: Upon a persistent claim of the defence lawyer, later, informally, the judge agreed with the defence lawyer to order translation of the indictment if the defence lawyer did not submit objection to the indictment. Therefore, as a reason for postponement of the trial, as agreed with the defence lawyer, in the minutes it was noted that the he had scheduled inspection of crime scene for other trial.

According to the 2004 amendments (Article 8, paragraph 4 of the LCP), a translation of the indictment into a language he used in the proceedings will be delivered to the defendant who does not understand the language in which the proceedings is conducted.

It seems that the translation of the applications that are delivered to the citizens who speak language other than the Macedonian language does not represent a problem in the proceedings before the basic courts where the cases related to trafficking in human beings were observed.

Preparation of the defence

Preparation of the concluding remarks of the defence, as well as preparation of the defence regarding more precisely defined indictment represents a reason for postponement of the hearing in 7% out of the total number of cases observed by the Coalition.

Expert testimony

With the introduction of paragraph 5 into Article 234 of the LCP, according to which, the court upon the previously received opinion from the expert determines the term for completion of expertise, the legislator made an attempt for establishing bigger control on the time for completion of the expertise, and thus avoiding the unnecessary delay of the procedure.

Within the framework of the issue of trafficking in human beings, the expertise appeared as reason for postponement of the hearing in 3 cases¹⁴¹.

In the case observed in January 2005 before the Basic Court Ohrid (Ohr 001), in relation to the crime under Article 191 of the CC, Mediation in Prostitution, the order for neuro-psychiatric expertise was issued on 12.01.2005 with a deadline of 2 months. The term was not respected by the expert witness. Therefore, the main hearing that was already postponed for 69 days, was again postponed for 55 days.

When determining the terms for completion of the expertise, attention must be paid to the issue of non-exceeding the requirement of 60 days in order to avoid re-starting of the proceedings.¹⁴²

In the case observed before the Basic Court Tetovo (tet 008), in relation to criminal offence under Article 418-of the CC, the judge adjourned the trial until the arrival of the neuro-psychiatrist from the Health Centre Tetovo in order to assess the ability of one of the defendants to give statement. At the same time, the judge noted in the minutes that, in his opinion, the behaviour of the defendant at the trial is simulation, but he adjourns the trial in order to protect the right to defence and to provide for fair trial. Due to the impossibility of the defence lawyers to wait the arrival of the neuro-psychiatrist, the hearing was postponed. The next hearing where the neuro-

¹⁴¹ Pavel Manev, Nekolku kazneno pravni aspekti na nevropsihijatriskite vestacenja, Makedonska revija za kazneno pravo I kriminologija, 1998, no. 1, p. 218.

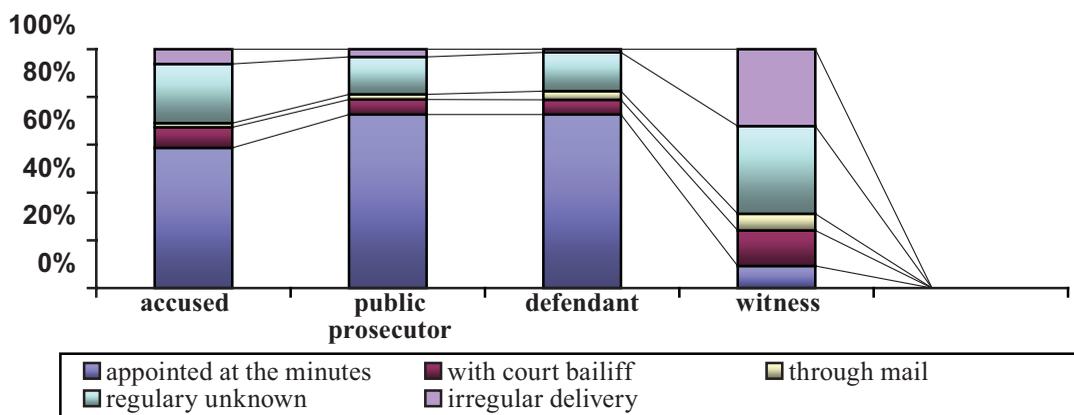
¹⁴² Snezana Tasi, Funkcijata i znaceweto na psihijatriskata ekspertiza, Makedonska revija za kazneno pravo i kriminologijata, 1998, no. 1, p. 230.

psychiatrist was present was postponed due to the absence of one of the defendants¹⁴³. After one more postponement due to the impossibility for the one of the defence lawyers to be present at the hearing, the next postponement was due to the absence of the expert witness, although regularly summoned.

Delivery of summons

The issue of delivery of summons, for longer time, has been central to the attention of institutions and individuals acting in the framework of the judiciary. Very often, the failure to properly serve the summons was underlined as one of the leading factors for delay of the procedures before the courtie¹⁴⁴.

According to the analysis of the Coalition, only in 7,5% from the total number of cases (all summoned defendants, witnesses, defence lawyers and prosecutors) the issue was about improper summoning . Out of this number, in more than half of the situations, the issue was about service of summon to the witness in the proceedings.



Conclusion:

In 1/3 out of the total number of observed hearings, due to unsatisfied conditions for the main hearing to be hold, it was directly postponed. The absence of the damaged party/witness, defendant and its defence lawyer is the most frequent reason for postponement.

The measure of pre-trial detention, is mostly (50% of cases) ordered in cases related to the criminal offence of Smuggling of Migrants.

In spite of variety of options available to the court for the purpose of securing the presence of the defendant in the proceedings, the tendency in the practice to apply the measures of pre-trial detention and apprehension very frequently is obvious. Although, the other preventive measures for securing the presence of the defendant have been introduced for more than one year, it seems that they did not really find their place in our basic courts.

¹⁴³ The hearing is not recorded in the minutes. The judge stated that the minutes will be created later.

¹⁴⁴ Vangel Gagacev, Dostavuvanjeto na sudskite pismena spored vazeckite propisi, Biljana Cakmakova, Komparativen pregled na dostavuvanjeto na sudskite pismena vo svetot, Stojance Ribarev, Problemi i nedostatoci pri dostavata vo sudovite vo Republika Makedonija, Mirjana Velickovska, Postensките propisi i nivnata primena pri vracuvawe na sudskite pismena, Materijali od sovetuvaweto za dostavnata sluzba vo sudstvoto vo Republika Makedonija, Sudiska revija, 1999, no. 3, p.129-177.

Presence of the victims/witnesses in the proceedings before the basic courts was provided in 31% of the cases. Therefore, in more than half of the situations, the hearing of victims was carried out of the main hearing.

The assumption that the hearing will be postponed due to the absence of the parties in the proceedings is the most frequent reason the trial to be held in the office of the judge.

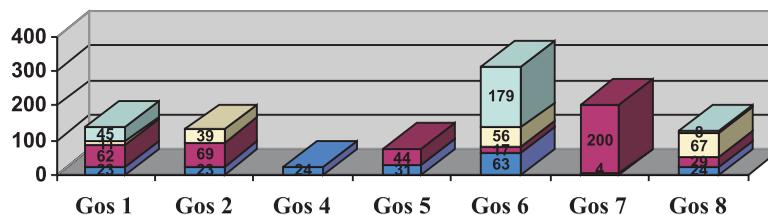
Improper court composition is violation of the right of any person to be tried before competent, impartial and by law established court.

In spite of indisputable impact of the summons service on the duration of the proceedings, still, it may be concluded that it is not a decisive factor.¹⁴⁵

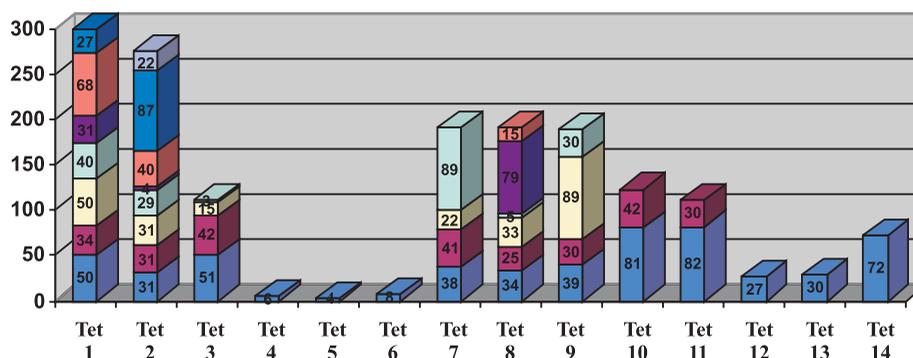
15. Time limits

In order to establish the average time for which the hearings in cases related to trafficking in human beings have been postponed, an analysis of the duration of the time period between the hearings of all cases observed by the observers of the Coalition was carried out.

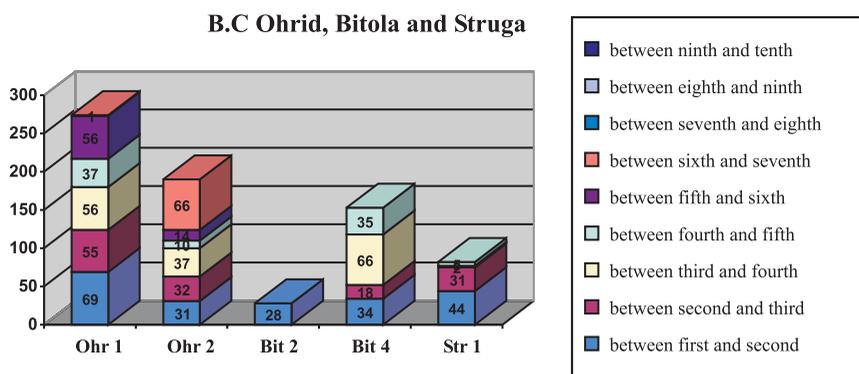
The time period between two hearings, B.C. Gostivar



B.C. Tetovo

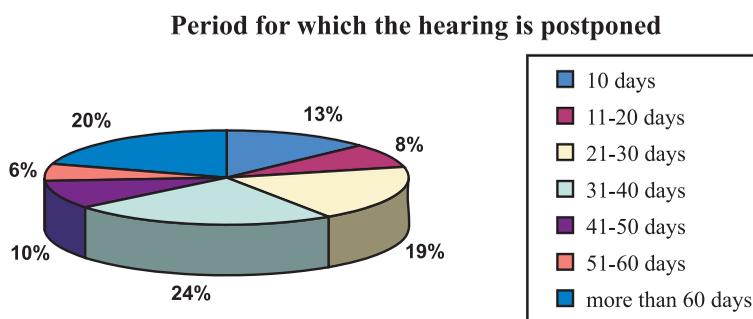


¹⁴⁵ Similar are the results from the observation of civil cases within the framework of the project of the Coalition “All For Fair Trials”: “Countrywide observation of the implementation of international fair trial standards in domestic courts and assessment of the functioning of the judiciary in the Republic of Macedonia”-Final Report, Skopje, September 2004.



The data from these three tables shows a view of the time (in days) between two observed hearings¹⁴⁶ according to the Basic courts where the cases in the said field of interest were observed.

The analysis showed that hearings are mostly postponed for a period between 31 and 40 days.



The amendment to Article 297 (paragraph 5) of the LCP, prescribing that if the postponement lasted for more than 60 days (in contrast to the former legal solution of 30 days) the trial must start from the beginning, aims at avoiding the unnecessary delay of the trial caused with re-starting of the main hearing.¹⁴⁷

Although it seems, at first glance, that the solution is not directed towards reducing the duration of the proceedings, still according to the experience from the practice of the domestic courts the cases must start from the beginning due to the frequent impossibility to schedule the next hearing in "reasonable time" (inter alia, due to some courts being overloaded with cases).

On the other hand, the data that 60% of the cases are postponed for a period longer than 30 days, indicates the conclusion that maybe exactly the amendment to Article 297, paragraph 5 (from 30 to 60 days) provides for the judges more relaxed conduct in relation to the re-scheduling of the main hearing.

In 20% of the cases, the postponement of the hearing was for a period longer than 60 days.

¹⁴⁶ “Between first and second, second and third” refers to the observed hearing and not to a next hearing in the framework of the case.

¹⁴⁷ According to the results from the Final Report of the Coalition, 12% out of the total hearings were postponed for a period longer than 30 days, which causes re-starting the hearing from the beginning.

Conclusion:

More than half of the cases in the framework of the issue of trafficking in human beings are postponed for a period longer than 30 days (mostly from 31 to 40 days).

Therefore, 20% out of the total cases are considered postponed for a period longer than 60 days. Thus, the cases must start from the beginning pursuant to Article 297 (paragraph 5) of the LCP, which leads to unnecessary delay of the procedure.

Total duration of the proceedings

Mutual effect of large number of factors in the cases related to trafficking in human beings determines the length i.e. the duration of the proceeding. The assessment whether all measures to reduce the duration of the proceedings to the indispensable time have been undertaken, i.e. whether the court takes care that all participants in the proceedings make efforts to avoid the unnecessary delays, is very difficult to determine¹⁴⁸. If we add the lack of empirical data, either on national or international level, on the basis of which certain average time of duration of the cases in the said field could be determined, it seems even more difficult to get knowledge on the issue whether, in the Republic of Macedonia, the procedure against the perpetrators of criminal offence in the field of trafficking in human beings is conducted in a reasonable time or not.¹⁴⁹

Analysis of all judged cases in the period from January till the end of September 2005 shows that the average time from the initiation of the indictment before the basic courts until bringing the verdict (or in some cases till the last hearing in the case)¹⁵⁰ is 305 days.

Unfortunately, in spite of the fact that the data presents an average value of the length of all-judged-cases, still, it does not show the real picture of the duration of the court process in the cases related to trafficking in human beings. Namely, hypothetically, all current observed cases are completed on the last scheduled date and if we derive average value for the duration of the cases (common sum of completed and uncompleted cases), their duration will be 373 days¹⁵¹ (68 days more)¹⁵².

If we calculate the average duration of the judged cases which started in the second half of 2004 and in 2005, their duration will be 145 days. This can be explained with the conclusion that new cases that appear before basic courts are completed in a shorter period in relation to those that are "dragged" for several years.

¹⁴⁸ The USA Supreme Court in drawing a conclusion regarding the issue whether in one concrete situation the right to a prompt trial established with the provisions on speeding the procedure (The Speedy Trial Act), was respected or not, oriented itself according to four criteria: length of the postponement, the reason for the postponement, quoting the right to a prompt trial by the defendant as well as the damage he suffered. Gordana Lazetic Buzarovska, Znacenje na pravoto na brzo sudenje vo SAD, Godisnik na pravniot fakultet vo Skopje, 1996/98, issue 38, p.397

¹⁴⁹ G Lazetik-Buzarovska, Nacini za zabrzuvanje na krivicnata postapka vo Evropskite zakonodavstva, Makedonska revija za kazneno pravo i kriminologija, 1998, no. 1 p 86

¹⁵⁰ Because of the practice to deliver the verdicts in writing to the participants of the proceedings without being pronounced, in more than half of the cases, the Coalition does not have information on the exact date of the judgment was adopted.

¹⁵¹ The result is quite unrealistic, but it should at least indicate the length, in best case, i.e. the duration of the cases in relation to trafficking in human beings.

¹⁵² According to some authors, as an optimal time for completion of one case before the court of first instance (from the initiation of the indictment until bringing the verdict) in the criminal procedure, the period between 9 and 12 months is considered, Zekir Selimi, Vremetraenjeteto na krivicnata postapka za standardni krivicni predmeti, Sudiska revija, 1998, no. 4, p. 139

Conclusion:

The speed within which the newer court cases in relation to trafficking in human beings come to their conclusion is much bigger than the cases filed before the second half of 2004. This leads to the conclusion that the effectiveness of the courts in punishment of the perpetrators of criminal offences of Trafficking in Human Beings, Mediation in Prostitution and Smuggling of Migrants has increased in 2005¹⁵³.

Recommendations:

1. Considering the high rate of hearing postponements due to the absence of the defendant and at the same time the big number of measures available to the court for securing the presence of the defendant and successful management of the criminal procedure, efforts for more frequent application of the said measures in practice of our courts are desirable. In situations where ordering the measure of pre-trial detention is not necessary, more frequent application of the "other preventive measures" introduced with the amendments to the LCP, could lead towards reduction of the duration of the proceedings.
2. The courts have to undertake all available measures for reducing the time period within which the hearings in relation to trafficking in human beings are re-scheduled. Special attention should be placed on the requirement for not exceeding the term of 60 days, otherwise the proceeding before the court must start from the beginning.
3. Considering the sensibility of the nature of the criminal offences in the field of Trafficking in Human Beings, an effort must be made to hold the trials in courtrooms and not in the judges' offices which lack conditions for normal holding of the main hearing.
4. Application of Article 322 of the LCP, according to which, the council may order the witness, whose arrival at the main hearing is accompanied with significant difficulty or impossible, and whose testimony is important for the proceeding, to be examined out of the main hearing in situations when securing the attendance of the victims/witnesses is accompanied with high financial costs, additional mistreatment of the victim, initiation of the system of international cooperation, at least until the moment of providing of legal basis for securing the stay of the victim during the proceedings, would represent logical and necessary solution.

¹⁵³ Maybe the answer for the reasons of the said might be searched in the increased success in securing the victims of trafficking in human beings through the function of the SECI Centre.

8

Penal policy of the Republic of Macedonia in relation to the criminal offences of Trafficking in Human Beings, Mediation in Prostitution and Smuggling of Migrants

The situation and movement of the crime in every country determines the penal policy i.e. determines the means and methods applied for efficient protection of human rights and freedoms, as well as other social values and goods.

According to the CC, the fundamental goal of the criminal sanctions (Article 2) is the protection of human freedoms and rights and other basic values, while the special aims¹⁵⁴ of the punishment besides justice, encompass (Article 32) prevention of the perpetrators to commit criminal offences and their correction, as well as deterrent influence on others not to perform criminal offences.

The legislation of the Republic of Macedonia, like the most of the legislations in the world, accepts the system of relatively determined penalties i.e. besides determining the type of punishments; the law determines the smallest and the biggest sanction (general legal minimum and maximum). At the same time, for each prescribed criminal offence, the law determines the range of sanctions (special legal minimum and maximum).

Thus, the legislator establishes a valuable orientation i.e. range of sanctions in which the court should remain in determining the concrete punishment for identified perpetrator of a concrete criminal offence.

Following the penal policy of most of the European countries, and simultaneously respecting Article 2 of the United Nations Convention against Transnational Organized Crime, according to which, the smallest prescribed sanction of imprisonment for "Serious crimes" should be a minimum of at least four years. Starting from the movement and development of the phenomenon of trafficking in human beings in the Republic of Macedonia, our legislator established sanction of imprisonment of at least four years for the general form of the criminal offence of Trafficking in Human Beings (Article 418-a, paragraph 1). While, if the victim is child or juvenile, the punishment is imprisonment of at least eight years.

A person who uses or procures the sexual services of a person with the knowledge that the person is a victim of trafficking in human beings, shall be punished with imprisonment between 6 months and 5 years

¹⁵⁴ The aim of the alternative measures, the security measures and educational measures is stipulated in Article 48, Article 60 and Article 73 of the CC.

The special legal minimum for the criminal offence of Smuggling Migrants (Art. 418-b, paragraph 2) is one year, while the special legal maximum is five years. The sentence is more severe if the victim is child or juvenile person, or the life and health of the migrant is endangered, or the victim has been treated especially humiliating or cruelly.

Regarding the crime of Mediation in Prostitution (Art. 191) the special legal minimum is six months for the basic form of the crime (paragraph 1), while the special legal maximum is five years. The same sentence is prescribed for a person who because of profit, by using force or by serious threat to use force, forces or by deceit makes another to give sexual services.

The general rules to mete out punishment are stipulated in Article 39 of the CC. Namely, the court shall mete out the punishment to the offender within the limits prescribed by law, having in mind the criminal liability of the offender, the weight of the crime and the aims of the punishment.

Regarding the circumstances relevant to mete out the punishment¹⁵⁵, primarily the circumstances in relation to the committed criminal offence, the court shall take into consideration: the manner in which the crime has been committed (in most of the cases, the crime of Trafficking in Human Beings includes especially humiliating treatment¹⁵⁶ of the victim, cruel mistreatment, i.e. causing bodily injures¹⁵⁷ in case of disobedience, rape by the perpetrator/s), the personality of the victim (usually the victims are young women with poor material background, low level of education, without knowledge of the language of the country where they had been brought, they are not in possession of documents and they are under intimidation from the punishment due to the illegal stay, all of these contributes to the increase of their vulnerability), the caused consequence (physical¹⁵⁸, psychological), the intensity and duration of the crime (these crimes in most of the cases are permanent criminal offences, the victims are 24 hours kept in the premises (night bars, restaurants) without right to leave them, or with controlled leaving of the premises when sexual services are provided).

Regarding the circumstances related to the personality of the perpetrator, they are or might be connected to his occupation (the biggest number of the defendants are owners of the night bars, with primary or secondary education), previous punishments (39% are recidivists), the level of lucidity and the level of criminal responsibility (all persons¹⁵⁹ are lucid and the crime is premeditated), behaviour of the perpetrator after the crime and in the proceedings before the court (the perpetrators deny the crime in most of the cases, protest that they did not know the victim or declare the victim as their girlfriend or lover)¹⁶⁰.

¹⁵⁵ G. Marjanovic, *Odmeruvanje na kaznata, Makedonsko krivicno pravo, Opst del, Skopje, 1998, p. 294*

¹⁵⁶ ..leaving the victim alone and naked in the wood couple of hours..

¹⁵⁷ ..punching with chairs, breaking beer bottles from victim's head, breaking teeth..

¹⁵⁸ In a case observed before the Basic Court Ohrid, the victim/witness in the proceedings underwent four medical surgeries of ovaries which resulted in extracting one ovary. The victim in the court case observed before the Basic Court Tetovo in her attempt to escape was caught by the perpetrator and beaten up. In an unsuccessful suicidal attempt, the victim had cut her veins, but her life was saved with medical intervention by private medical practice from the surrounding villages.

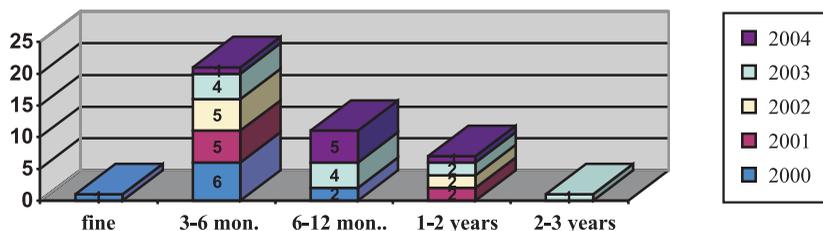
¹⁵⁹ See Chapter IV Profile of the Defendant

¹⁶⁰ Our law binds the court when meting out the punishment to take into consideration all circumstances that have influence upon decreasing or increasing the punishment (mitigating or aggravating circumstances), and especially: the level of criminal responsibility, the motives for the perpetrated crime, the extent of jeopardy or damage to the protected goods, the circumstances under which the crime was committed, the contribution of the victim in the perpetration of the crime, the previous life of the offender, his personal circumstances and his behaviour after the perpetrated crime, as well as other circumstances that concern the personality of the offender (Article 39, paragraph 2).

16. Judicial meting out the punishment

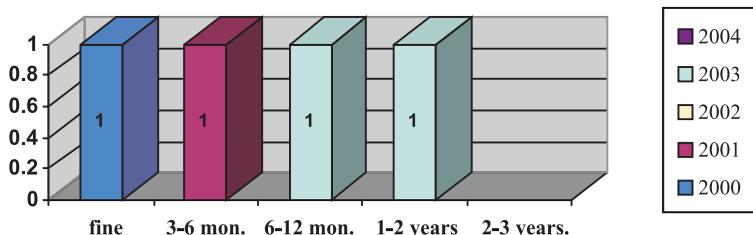
The extent of the severity of our courts in meting out the punishment the punishment might be indicated by the data on the height and type of sentence imposed in the period between 2000 and 2004 for the criminal offence of Mediation in Prostitution (Article 191),, as well as in the period between 2002 and 2004 for the criminal offence of Trafficking in Human Beings (Article 418-a)¹⁶¹.

Art.191, para. 1,3,4, sentence of imprisonment from 6 months to 5 years



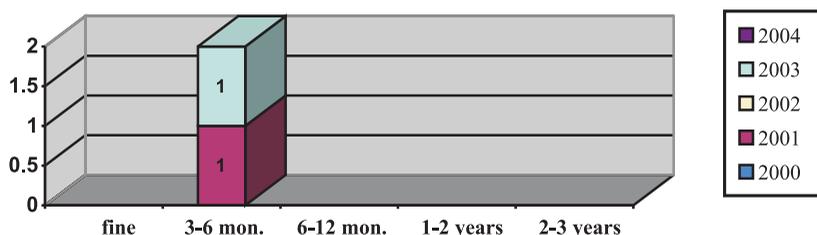
Namely, in 54% out of the total number of judged cases in relation to Mediation in Prostitution, Article 1, 3 and 4, the sentence of imprisonment¹⁶² goes under the special legal minimum (under 6 months).

Art.191, para. 2



Regarding Article 191, paragraph 2, according to which, the perpetrator of the crime shall be sentenced with a fine or a sentence of imprisonment up to one year, the data show that only in one of four cases the maximum penalty of one year imprisonment was imposed.

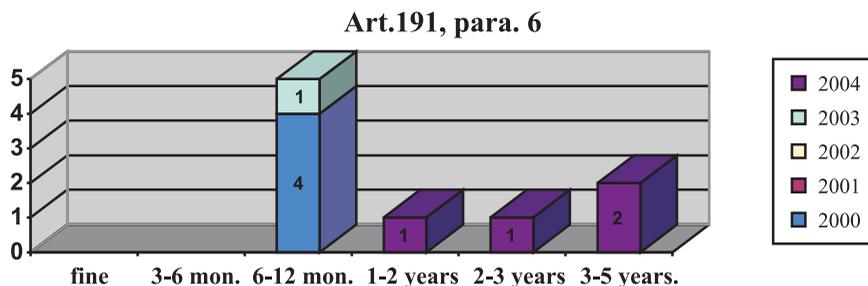
Art.191, para. 5



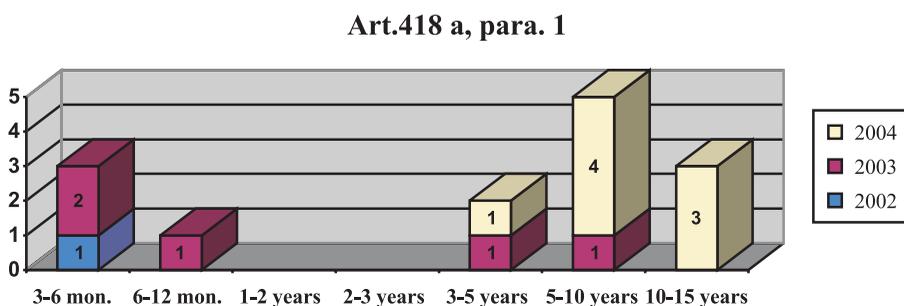
¹⁶¹ Only one effective punishment of imprisonment has been pronounced for the crime of Founding a slave relationship and transportation of persons in slavery (paragraph 1), and this between 3-6 months (although the prescribed punishment is imprisonment between 1-10 years).

¹⁶² Effective punishment of imprisonment.

For the crime under Article 191, paragraph 5, the prescribed punishment is imprisonment between one and five years. Both imposed sentences are imprisonment up to six months.



More than half of the sentences of imprisonment imposed for the criminal offence under Article 191, paragraph 6 are below the special legal minimum (the prescribed punishment is between one and ten years).



Regarding the sentences of imprisonment for the criminal offence of Trafficking in Human Beings (under paragraph 1)¹⁶³, stricter sentences might be noticed in 2004. Although in 29% of the situations the sentences are again below the special legal minimum.

The analyses show that in half of all the imposed effective sentences of imprisonment for the crimes of Trafficking in Human Beings and Mediation in Prostitution, the punishment is below the special legal minimum.

The authorization of the court to mitigate the punishment is an instrument to be used by the court in exceptional cases. If otherwise, the general rule of the legal meting the punishment out will be abandoned.

Although the law does not explicitly determine the circumstances under which the mitigation of the punishment may be applied, i.e. does not determine what are the especially mitigating circumstances that might lead to imposing of sentence under the special legal minimum, still the court in meting the punishment out must appreciate the stance that such circumstances are exceptional. Determining the distinction between the "especially extenuating circumstances"¹⁶⁴ and "ordinary" extenuating circumstances is indispensable for the purpose of establishing the difference between the more lenient punishment within the legally prescribed frameworks for each criminal offence and sentences below the legally prescribed minimum for certain criminal offence.

The data that in the half of the cases the court practice in relation to the criminal offences of Trafficking in Human Beings established that there are especially extenuating circumstances (logically derived from the severity of the sentences of imprisonment), derogates the meaning of the word "especially".

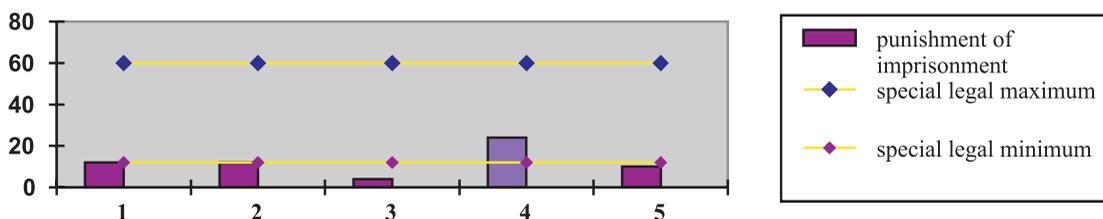
¹⁶³ Between 2002 and 2004, all verdicts are in relation to Art. 418-a, parag. 1. Only in one situation the case was in relation to paragraph 5 of the said article. The case is judged in 2004.

¹⁶⁴ Article 40, paragraph 2 of the LCP.

The conclusion drawn from the above mentioned is that there is a gap between the court practice and the penal policy of the Republic of Macedonia expressed through the provisions of the CC on the severity of the sentences for the criminal offences in relation to Trafficking in Human Beings, i.e. the court are especially lenient in meting the punishments out in the field of trafficking in human beings.

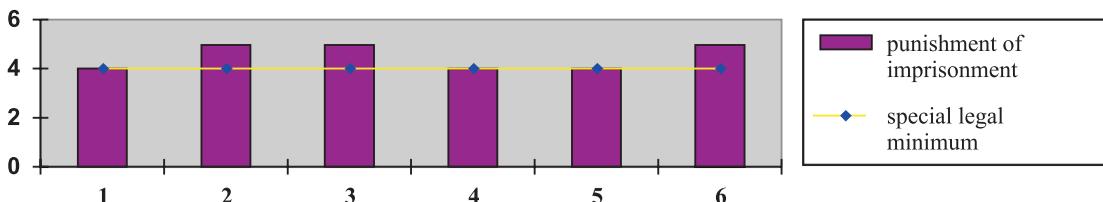
The severity of the sentences of imprisonment in all judged cases that are observed by the Coalition have been registered since January 2005.

Smuggling of Migrants, Art. 418-b, para. 2



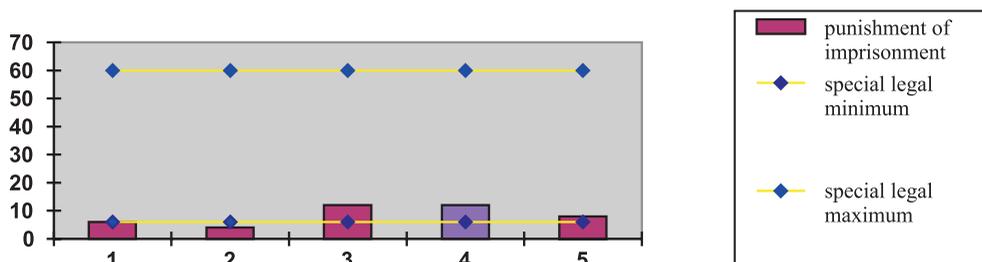
In relation to the crime of Smuggling of Migrants (paragraph 2) effective punishment of imprisonment have been imposed against four persons (one suspended), lasting either less than one year (mitigated punishment) or it is on the border of the special legal minimum. Three persons are acquitted from the indictment.

Trafficking in Human Beings Art. 418-a, para.1



The severity of the imposed sentences of imprisonment in cases related to trafficking in human beings are either in the line with the special legal minimum or something above it.¹⁶⁵

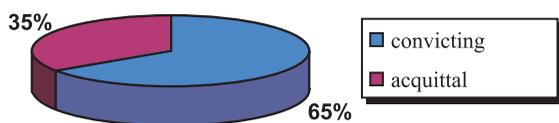
Mediation in Prostitution Art. 191, para.1, 4



The situation is similar in the crime of Mediation in Prostitution, as well.¹⁶⁶ The tendency of too lenient policy in the judicial meting the punishment out is present in 2005, too. Namely, in general the punishments are about or below the special legal minimum. If we add the data that in more than 30% of the cases the defendant is recidivist, which should, according to the logic, introduce addi-

¹⁶⁵ Five persons have been acquitted from the indictment.

¹⁶⁶ For this crime one person was acquitted from the indictment.



the punishment stricter under Article 418-a, the legislator explicitly showed the stance for the need of more severe punishment of the traffickers in human beings.

In the framework of all judged cases till the end of September, 2005, 65% are convicting judgments in the cases.

Besides the obligation of the court to pronounce the judgment immediately (or if not possible to do that the same day following the completion of the main hearing, he will postpone the pronouncement of the judgment for three days, at the most, and will determine the time and place for the pronouncement of the judgment), in 60%¹⁶⁷ of cases regarding criminal acts "Trafficking in Human Beings" and "Mediation in prostitution", after the completion of the main hearing the parties were informed that they will be served with judgment in written without being pronounced pursuant to the provisions of Article 344¹⁶⁸ of the LALCP.

Conclusions:

Regarding the half of all the imposed effective punishments of imprisonment in the Republic of Macedonia for the crimes of Trafficking in Human Beings in the period from 2002 till 2004 and Mediating in prostitution in the period from 2000 till 2004, the length of the sentences had been below the special legal minimum.

Too lenient approach of the courts in meting the punishments out in the field of trafficking in human beings points out that there is a gap between the court practice and the concept of the penal policy of the Republic of Macedonia expressed through the provisions of the CC on the severity of the punishments for the criminal offences in relation to Trafficking in Human Beings. There is a discrepancy between the severity of the crime and severity of the imposed punishments.

In more than half of the judged cases, the court did not pronounce the verdict in accordance with the provisions of Article 344 of the LCP.

Recommendation:

The broad authorizations of the courts in meting the punishment out, especially those pertaining to the use of institute "mitigation of punishment", may not represent attack upon the basic model of the legal meting out of the sentence, nor they may be in collision with the penal policy of the Republic of Macedonia expressed through the provisions on the severity of the punishments for the criminal offences in relation to Trafficking in Human Beings

¹⁶⁷ In 78% of the cases, the case were tried before the Basic Court Gostivar

¹⁶⁸ After the court has pronounced the verdict, the President of the Council announces the verdict immediately. If the court cannot pronounce the verdict on the same day when the trial is completed, it will postpone the announcement of the verdict for three days at longest and will determine the time and place of the pronouncement of the verdict.

The discretionary power of the judges in the process of meting out the punishment shall be in the framework of the special legal minimum and maximum.

The institute, mitigation of punishment should be applied in especially exceptional cases.

Development of general positions and principle opinions by the higher courts (by the Supreme Court of the Republic of Macedonia, primarily) as directives for meting out the punishment in the proceedings of the lower courts in the cases related to trafficking in human beings, i.e. for the purpose of more precise defining the distinction between especially mitigating circumstances and ordinary mitigating circumstances, and their application should serve in the determination of the punishment for the guilty perpetrators.

9

Recommendations

1. Consistent implementation of the provision from Article 223 of the LCP is indispensable. According to this provision, the witness will be instructed that he/she is not obliged to answer particular questions if it is likely that by doing so he/she would expose himself/herself or his/her relative to a serious embarrassment, material damage or criminal prosecution.
2. The witness should be informed on the right to deny disclosure of personal data (name and surname, name of the father, occupation, residence, age and relation to the defendant) if by doing so he/she would expose himself or another person close to him to a serious life threat, danger to his health or physical integrity.
3. If the witness denies to disclose the said data and if it has been determined that the danger exists, there should be a possibility for application of the provisions on special manner of examination of the witness in the proceedings and not only application of the provision on inclusion in the program for witness protection. The assessment on the level of danger and manner of protection should be carried out according to the concrete situation.
4. It is necessary to improve the special manner of examination of witnesses and their participation in the proceeding in a more precise legal manner, provided that circumstances under Article 270-a exist. Thereby, more rapid and economic protection of the victims of trafficking in human beings-witnesses in the proceedings will be provided, and especially in the period before the Law on Witness Protection enters into force and until it becomes fully operational.
5. To provide adequate space for trial, especially in the sensitive, such as the cases related to trafficking in human beings, is a necessity in order to prevent secondary victimization of the victims, as well as for the purpose of providing conditions for obtaining statements in the proceedings against the perpetrators of this type of criminal offences.
6. Development of Handbook on the rights of the witnesses in the proceedings may contribute toward promotion of the rights of all persons summoned as witnesses in the cases before basic courts. Such a promotion leads toward knowledge and thus towards willingness of the citizens (including the victims of trafficking in human beings as well) for appearance and participation in the proceedings before the court.

7. There is a need for development of mechanism based on a law or bylaws, which will provide prompt access to adequate legal aid to all victims (and not only to victims-foreign nationals) in the proceedings against the perpetrators of criminal offences.
8. Taking into consideration the fact that the victim of trafficking in human beings, due to the non-existence of public funds for compensation, cannot be compensated otherwise except from the property of the perpetrator, there is a more than obvious need for a more frequent enforcement of provisions of the Criminal Code on confiscation of property or proceeds from crime, as well as provisions on provisional security measures regarding property or proceeds from crime. Confiscation of criminal proceeds can have stronger deterrence effect than the punishment with imprisonment, which in Macedonia, due to the mild policy of courts when determining sentences, in most of the cases is below the special legal minimum.
9. To respect the provisions of the Law on Criminal Procedure which refer to legal property claims is an imperative in terms of protection of the interest of the victim, i.e. strengthening the victim's position in the proceedings before the court.
10. The opinion (expertise) of experts in charge with provision of psychological assistance to victims immediately after their admission in the Transit Centre must be used as evidence in proceedings. Especially in circumstances where no other expertise of the psychological condition of the victim has been done prior to their repatriation to domicile countries, the use of this kind of expert opinion is a desirable solution in terms of the establishment of the grounds and the level of the fair compensation for victims of trafficking in human beings.
11. Considering the high rate of hearing postponements due to the absence of the defendant and at the same time the big number of measures available to the court for securing the presence of the defendant and successful management of the criminal procedure, efforts for more frequent application of the said measures in practice of our courts are desirable. In situations where ordering the measure of pre-trial detention is not necessary, more frequent application of the "other preventive measures" introduced with the amendments to the LCP, could lead towards reduction of the duration of the proceedings.
12. The courts have to undertake all available measures for reducing the time period within which the hearings in relation to trafficking in human beings are re-scheduled. Special attention should be placed on the requirement for not exceeding the term of 60 days, otherwise the proceeding before the court must start from the beginning.
13. Considering the sensibility of the nature of the criminal offences in the field of Trafficking in Human Beings, an effort must be made to hold the trials in courtrooms and not in the judges' offices which lack conditions for normal holding of the main hearing.
14. Application of Article 322 of the LCP, according to which, the council may order the witness, whose arrival at the main hearing is accompanied with significant difficulty or impossible, and whose testimony is important for the proceeding, to be examined out of the main hearing in situations when securing the attendance of the victims/witnesses is accompanied with high financial costs, additional mistreatment of the victim, initiation of the system of international cooperation, at least until the moment of providing of legal basis for securing the stay of the victim during the proceedings, would represent logical and necessary solution.

- 15. The broad authorizations of the courts in meting the punishment out, especially those pertaining to the use of institute "mitigation of punishment", may not represent attack upon the basic model of the legal meting out of the sentence, nor they may be in collision with the penal policy of the Republic of Macedonia expressed through the provisions on the severity of the punishments for the criminal offences in relation to Trafficking in Human Beings**
- 16. The discretionary power of the judges in the process of meting out the punishment shall be in the framework of the special legal minimum and maximum. The institute, mitigation of punishment should be applied in especially exceptional cases.**
- 17. Development of general positions and principle opinions by the higher courts (by the Supreme Court of the Republic of Macedonia, primarily) as directives for meting out the punishment in the proceedings of the lower courts in the cases related to trafficking in human beings, i.e. for the purpose of more precise defining the distinction between especially mitigating circumstances and ordinary mitigating circumstances, and their application should serve in the determination of the punishment for the guilty perpetrators.**



Organization for Security and Co-operation in Europe
Spillover Monitor
Mission to Skopje

Conclusions

**from the Round Table regarding the report
"Combating Trafficking in Human Beings through the practice of domestic courts"
of the
Coalition "All for fair trials"**

On 11.11.2005 in Hotel "Arka" in Skopje, Coalition of 22 NGO's "All for fair trials" and OSCE Spillover Monitor Mission to Skopje, have organized Round Table" in order to present the conclusions and recommendations from 9 months observation of Trafficking in Human Beings related trials in all Basic courts in Macedonia from the report "Suppression of Trafficking in Human Beings through the practice of domestic courts".

Beside the members of the Coalition engaged in the project "Observation of Trafficking in Human Beings related trials" and representatives of the OSCE Spillover Mission to Skopje, the representatives of the judiciary attended the Round table, as well as the representatives from the Ministry of Justice of R. Macedonia, Ministry of Interior, members of National Commission for combating Trafficking in Human Beings and Illegal migration and the representatives of the international organizations operating in this area. The following conclusions resulted from the discussion:

- Report "Suppression of Trafficking in Human Beings through the practice of domestic courts" have been appraised positively acquiring support from the participants on the round table. The same have been qualified as a very serious attempt to create a picture of what is going on in the judicial practice regarding Trafficking in Human Beings, and also as a suitable mean for the science, legislation and judiciary for locating the problems that Macedonia is facing with while suppression and sanctioning trafficking in Human Beings.
- The judges should use all possibilities given by the law in order to secure that all prerequisites for holding the main hearing are satisfied, especially securing the presence of the parties who have to be at the trial.

- The participants have agreed with the conclusion that creation of state funds for compensation of the victims of Trafficking in Human Beings is crucial in the process of securing the adequate protection of victim’s rights and interest in the criminal procedure. Also, although the provisions from CPC before the amendments in 2004, have allowed about legal property claim (request for compensation) to be decided in the frame of the criminal procedure, still this opportunity in the practise of domestic courts have been neglected. With the Law Amending the Law on Criminal Procedure¹⁶⁹, there has been attempt to overcome this situation with establishing the mandatory obligation for the court always to decide regarding legal property claim in the frame of the criminal procedure when the convicting verdict will be reached.
- Confiscation of property of the perpetrators is most efficient tool for securing the compensation of the Trafficking in Human Beings victims, especially in the situation when there is no state fund for compensation in Republic of Macedonia.
- There is a need of harmonization of the judicial practice when determine which circumstances are taken in consideration as a mitigating circumstances and which as a especially mitigating circumstances, in order to build up a precise frame for using the institute "mitigation of punishment".
- More attention should be given to period in which the verdict are pronounced and announced in Basic courts.
- The participants have concluded that the reasons for increasing of time efficiency of the courts in dealing with Trafficking in Human Beings trials in 2005, which have been concluded by the Coalition’s report, are some of those: new legislation changes in CC and CPC, engagement of the higher courts through visiting the Basic courts and control of their work, more serious beehive of the judges, help of the national and international organizations such as Coalition, SEKI center, Transit Center etc.
- Taking in consideration the sensitivity of the trials observed by the Coalition, the efforts must be done the trials to be hold in courtrooms not in the judge’s office, what will lead to lowering the chances for secondary victimization of the trafficking victims and increasing the possibilities for securing the quality statement of the victim in the procedure.
- The participants has agreed upon the need of organizing additional meetings with representatives from the judiciary in order to present the conclusions fro the report and in order to discuss regarding the problems located during observation process.
- The Report, together with the recommendations once published, will be delivered to the members of the National Commission for combating Trafficking in Human Beings as well as other professional that are active in the frame of Trafficking in Human Beings area.

¹⁶⁹ (Official Gazette of the Republic of Macedonia, No.74/04) from 22.10.2004.

Articles from Criminal Code and Criminal Procedure Code

Mediation in prostitution Article 191

- (1) A person who recruits, instigates, stimulates or entices another to prostitution, or a person who in any kind of way participates in handing over another to someone for performing prostitution, shall be punished with imprisonment of six months to five years.
- (2) A person who because of profit enables another to use sexual services shall be punished with a fine, or with imprisonment of up to one year.
- (3) A person who because of profit, by using force or by serious threat to use force, forces or by deceit induces another to give sexual services, shall be punished with imprisonment of six months to five years.
- (4) If the crime from items 1, 2 and 3 is committed with a juvenile, the offender shall be punished with imprisonment of six months to five years.
- (5) If the crime from items 1, 2 and 3 is committed with a child, the offender shall be punished with imprisonment of one to five years.
- (6) A person who organizes the crimes from items 1 to 5 or the activities that this person will commit while performing family violence shall be punished with imprisonment of one to ten years.

Trafficking in Human Beings Article 418-a

- (1) The one who by force, serious threat misleads or uses other forms of coercion, by kidnapping, by deceit and abuse of his/her position¹⁷⁰ or a state of pregnancy, weakness, physical or mental incapability of another person, or by giving or receiving money or other benefits in order to obtain consent of the person who has

¹⁷⁰ Both, the “force”, which consists of physical activity for the purpose of overcoming the expected or unexpected resistance by the victim, and the “threat” that means making some wrong in prospect, whose accomplishment lies in the power of the perpetrator and depends on the issue whether the victim will react according to the will of the perpetrator, are means for extortion of certain behaviour of the victim. Namely, both activities, although they mean fulfilment of the legal substance of the crime under Article 139 of the CC “Coercion”, in the criminal offence of Trafficking in Human Beings represent only mean

control over other person¹⁷¹, recruits, transports, transfers, buys, sells, harbours or receives persons for the purpose¹⁷² of exploitation through prostitution or other forms of sexual exploitation, forced labour or servitude, slavery, forced marriages, forced fertilization, unlawful adoption or a similar relationship, or illicit transplantation of human body parts shall be sentenced with imprisonment of at least four years.

(2) The one who recruits, transports, transfers, buys and sells, harbours or receives children or juveniles for the purpose of exploitation shall be sentenced with at least eight years of imprisonment.

(3) The one who withholds or destroys another person's identity card, passport or other identification document for the purpose of committing the crimes referred to in paragraphs (1) and (2) of this Article, shall be sentenced with imprisonment of at least four years.

(4) The one who uses or procures sexual services of a person with the knowledge that the person is a victim of trafficking in human beings, shall be sentenced with imprisonment of six months to five years.

(5) If the crime referred to in paragraph (4) is committed against a child or a juvenile, the offender shall be sentenced with imprisonment of minimum eight years.

(6) If the crime referred to in paragraph (1) is committed by a legal entity, this shall be sentenced with a fine.

(7) The items and means of transport used in committing the crime shall be confiscated

Article 418-b, Smuggling of migrants

(1) One who, using force or serious threat that will attack the life or body, with kidnapping, fraud, out of greed, with misuse of his/her official position or using of the powerlessness of other illegally transfers migrants through the state border, as well as one that produces, purchases or owns fake passport with such intention, shall be sentenced with imprisonment of at least four years.

(2) One that engages, transports, transfers, buys, sells, hides or accepts migrants, shall be sentenced with imprisonment of one to five years.

(3) If during the commitment of the crimes stipulated in the paragraphs 1 and 2 the life or the health of a migrant is endangered, or the migrant is treated especially humiliating or cruelly, or he/she is prevented to use the rights he/she has according to the international law, the stipulator shall be sentenced with imprisonment of at least eight years.

(4) If the crime stipulated in the paragraphs 1 and 2 is committed with a minor, shall be sentenced with imprisonment of at least eight years.

(5) The means and the vehicles used for committing the crime shall be confiscated,

Article 418-c, Organization of a group and urging for commitment of the crimes human trafficking and smuggling of migrants

(1) One who will organize a group, gang or other association with intention to commit crimes stipulated in the articles 418-a and 418-b, shall be sentenced with imprisonment of at least eight years.

(2) One who will become a member of a group, gang or other association stipulated in paragraph 1 or in other way helps the group, gang or association, shall be sentenced with imprisonment of at least one year.

for accomplishment of some of the preliminary stated aims. The issue that arises here, partly in aesthetic, and partly in practical nature, is the need for existence of the words - to mislead-. Considering that the fraud, in fact is misleading or maintaining mislead by false presentation or covering the facts, even more, there is no need for repeating the issues.

¹⁷¹ Hereby, both female and male persons may appear as a passive subject. i.e. an adult as well as juvenile person, child. Regarding the indicators on the risk of involving young persons at the age of secondary school into trafficking in human beings, see, “Assessment of the positions and knowledge among secondary school population on the phenomenon of hidden prostitution and trafficking in human beings”, HOPS, Skopje, 2004, p.34.

¹⁷² The intent of the perpetrator is the second cumulative condition that must exist together with some of the abovementioned ways of commission of crime. Namely, the intent of the perpetrator contains conscience that the person is trafficked for the purpose of...

- (3) The member of the group stipulated in the paragraph 1 who will disclose the group before he/she commits a crime as its member or on its behalf, shall be pardoned.
- (4) One that calls, urges or supports commitment of the crimes stipulated in the articles 418-a and 418-b, shall be sentenced with imprisonment of one to ten years.

Protection of the Witness, Justice Collaborators and Victims

Article 270-a

- (1) The public prosecutor, or the investigative judge or the president of the council during the procedure shall undertake measures and activities in order to secure the effective protection of witnesses justice collaborators and victims if in case they will appear as witnesses in the procedure, at any time when they are endanger of being frightened, threatened with revenge or there is danger upon their lives or physical integrity or when there is need of their protection.
- (2) The protection of the persons mentioned in paragraph 1 of this article shall be carried out on special manner of questioning and attendance in the procedure.
- (3) In the cases of paragraph (1) of this article, the witness will be questioned only in the presence of the public prosecutor and the investigative judge or the president of the council, on the place which can guarantee the protection of his identity, except in the cases when upon the decision of the, with consent of the witness, the council will decide to perform the hearing on different way trough the court or with use of other technical equipment for communication and other appropriate means for communication. Transcript of the minutes with the statement of the witness, without witness signature, shall be delivered to the accused and his lawyer, who make questions to the witness via court.

Article 270-b

- (1) Protection of the person mentioned in article 270a paragraph 1 of this Law can be performed also trough the inclusion of the Programme for witness protection.
- (2) The request for inclusion in the Programme of paragraph 1 of this article may be submitted by the competent Public Prosecutor, investigative Judge or the President of the Council to the State Public Prosecutor.
- (3) If there are grounds for inclusion in the Programme from the paragraph 1 of this article, the State Public Prosecutor will submit a proposal to the competent state body which should bring a decision for inclusion in the Programme.
- (4) The composition, the responsibilities of the state body mentioned in paragraph 3 of this article as well as the measures for protection and the manner of their implementation will be determined with the Law.

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