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# Analysis of Montenegrin Case Law on Trafficking in Human Beings





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# ANALYSIS OF MONTENEGRIN CASE LAW ON TRAFFICKING IN HUMAN BEINGS

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## **We are especially grateful to**

Miraš Radović, Supreme Court of Montenegro, judge

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# Table of Contents

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Introductory Remarks.....	7
Introduction.....	9
1. Strategic and Institutional Framework for Combating Human Trafficking in Montenegro .....	14
2. International Standards on Human Trafficking .....	17
3. National Criminal Law Framework for Combating Human Trafficking .....	25
4. Protection of the Rights of Human Trafficking Victims .....	32
4.1. International Standards on the Protection of the Rights of Human Trafficking Victims.....	32
4.2. National Victim Protection Framework .....	37
5. Human Trafficking in European Court of Human Rights Case Law.....	45
6. Analysis of Montenegrin Case Law on Human Trafficking.....	48
7. Conclusions and Recommendations:.....	70



# Introductory Remarks

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Dear Sir/Madame,

We have the great pleasure of sharing with you the Analysis the Supreme Court of Montenegro prepared with the AIRE Centre's support within a three-year project we have been implementing to improve the application of international standards in proceedings before domestic courts. The implementation of this project has been supported by the UK Government through the British Embassy in Podgorica.

Trafficking in humans continues to be one of the most pressing global problems, one that is intensively discussed both at the national and the international levels. The judiciary plays the key role in combatting human trafficking since judges adjudicating trafficking cases are simultaneously facilitating the fight against and suppression of this phenomenon affecting millions of victims around the world.

The Analysis aims to empower current and future practitioners involved in fighting against trafficking in humans. Notably, it provides a comprehensive analysis of national human trafficking case law, the first of its kind in Montenegro. The research focused on 18 final judgments in trafficking cases delivered by domestic courts in the 2004-2019 period. Apart from providing detailed insight in the case law of Montenegrin courts, this unique overview of the state of play will serve as a baseline for further research and comparative analyses, which will greatly facilitate measuring the effectiveness of the struggle against trafficking in humans.

In addition to the overview of case law, the Analysis aims to provide an overview of the international and national law and all the requisite information on the strategic and institutional framework, as well as to review the main international standards and review of applicable legal provisions within national legislation. The Analysis devotes particular attention to the protection of the rights of victims of human trafficking,

both within the review of the legislative framework and the analysis of the victims' status and analysed case law.

The Analysis also identifies specific shortcomings and offers recommendations to improve the situation in this field and facilitate the implementation of the Action Plan for the Implementation of the Anti-Trafficking Strategy.

The 20th anniversary of the adoption of the Palermo Protocol, the symbol of universal commitment to the fight against slavery and human trafficking, was marked in 2020. The anniversary is not only an opportunity to take stock of the headway made to date, but also to contemplate the next 20 years of the struggle, encourage even more intensive cooperation and take steps towards our ultimate goal – the eradication of trafficking in humans.

I would like to express my gratitude to the author, Montenegrin Supreme Court Adviser Bojana Bandović, for preparing this useful and comprehensive Analysis, and Supreme Court judge Miraš Radović for his contribution to its development.

**Biljana Braithwaite**

A handwritten signature in black ink, appearing to read 'Prof. Braithwaite', written in a cursive style.

Director of the AIRE Centre's Western Balkans Programme

# Introduction

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Trafficking in human beings is a global problem affecting nearly all the countries in the world, both developed and underdeveloped ones. It has not bypassed Montenegro either. International standards recognise trafficking in human beings as one of the gravest violations of human rights and an offence to the dignity and integrity of the human being, which may result even in the enslavement of the victims. Trafficking in human beings is often referred to as a form of modern-day slavery.

Around 225,000 victims of human trafficking have been identified globally over the past 13 years.<sup>[1]</sup> 49 percent of them were women, 21% men, while 30% were children (7% boys and 23% girls). Most women and girls were identified as victims of sexual exploitation and, to a less extent, of labour exploitation, while men were mostly victims of labour exploitation. However, the victims have been subjected to other forms of exploitation as well, e.g. exploitation of children in begging, forced criminality and for armed combat.

The Supreme Court of Montenegro, as the highest court of the land and an active participant in the fight against trafficking in human beings, prepared this Analysis of Montenegrin Case Law on Trafficking in Human Beings (hereinafter: Analysis), motivated by the need to explore the issue more deeply and fulfil its obligation to develop such a document under the 2019 Action Plan for the Implementation of the national Anti-Trafficking Strategy.

By ratifying the chief international legal documents in this field, Montenegro assumed the obligation to comply with legal and other obligations therein with a view to preventing and combatting human trafficking, as well as extending effective protection to victims of human

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[1] United Nations Office on Drugs and Crime (UNODC), Global Report on Trafficking in Persons, New York, 2018, available at: [http://www.unodc.org/documents/data-and-analysis/glotip/2018/GLOTiP\\_2018\\_BOOK\\_web\\_small.pdf](http://www.unodc.org/documents/data-and-analysis/glotip/2018/GLOTiP_2018_BOOK_web_small.pdf)

trafficking. Trafficking in human beings was introduced in Montenegrin criminal law as a separate offence in 2003. The legislative and strategic framework for addressing the problem was put in place with the adoption of the first national Anti-Trafficking Strategy a year later

The international community has continuously monitored the fight against human trafficking, taking stock of the overall efforts and results achieved in this field by Montenegro.

The **European Commission's Montenegro 2019 Report**<sup>[2]</sup> emphasised that the legal and institutional framework for trafficking in human beings was in place in Montenegro, but noted that the state was yet to demonstrate that it was capable of establishing a solid track record in this field. The EC specified that for the first time, in five years, a first-instance court decision was issued in a trafficking case with the two defendants being sentenced to a prison sentence of 17 and 15 years respectively. It went on to say that the number of ongoing investigations had risen to three, involving five potential victims and that preliminary investigations were being conducted in another four cases involving nine potential victims, of which four were children. The EC, however, noted that the cases were not related to organised crime and that no important trafficking rings had been uncovered in recent years, despite objective risk factors. The EC commended the creation of an anti-trafficking task force in December 2018, bringing together representatives of the Ministries of Justice and the Interior, the police and the prosecution service.

**In its 2018 Trafficking in Persons Report, the US State Department** categorised Montenegro as a Tier 2 country for the second consecutive year. It recommended to Montenegro to vigorously investigate and prosecute trafficking crimes under Article 444 of the Montenegrin Criminal Code.

This Report qualifies Montenegro as a source, transit, and destination country for men, women, and children subjected to sex trafficking and forced labour. It states that victims of sex trafficking identified in Montenegro are primarily women and girls from Montenegro, neighbouring Balkan

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[2] European Commission 2019 Montenegro Report.

countries, and, to a lesser extent, other countries in Eastern Europe. “Sex trafficking victims are exploited in hospitality facilities, bars, restaurants, nightclubs, and cafes. Children, particularly Romani and Albanian children, are subjected to forced begging. Romani girls from Montenegro reportedly have been sold into marriages in Romani communities in Montenegro and, to a lesser extent, in Kosovo, and forced into domestic servitude. International organized criminal groups occasionally subject Montenegrin women and girls to sex trafficking in other Balkan countries.”

**In its 2016 Report on Montenegro’s implementation of the Council of Europe Convention on Action against Trafficking in Human Beings, GRETA** (Group of Experts on Action against Trafficking in Human Beings) required of the Montenegrin state authorities to: take measures to ensure that human trafficking cases, including those involving public officials, were investigated proactively, prosecuted successfully and led to effective, proportionate and dissuasive sanctions, including by sensitising prosecutors and judges to the rights of victims of human trafficking and encouraging the development of specialisation among prosecutors and judges to deal with human trafficking cases; providing specialised training to investigators and prosecutors to reinforce financial investigations and the confiscation of criminal assets; making every effort to investigate and prosecute cases of human trafficking under Article 444 of the Criminal Code which carried heavier penalties than Article 210 of the CC.

**In its Concluding observations,**<sup>[3]</sup> **the UN Committee on the Elimination of Discrimination against Women (CEDAW)** recommended to Montenegro to ensure that all cases of trafficking in persons, especially women and girls, were effectively investigated and prosecuted and that the sentences imposed on perpetrators of trafficking related crimes, including corrupt law enforcement officials, were commensurate with the gravity of those crimes. It also recommended that Montenegro provide effective protection to and address the specific vulnerability, due to factors such as poverty, stigmatization and marginalization, of Roma, Ashkali and Egyptian women and girls, as well as refugee and asylum-seeking, displaced and internally displaced women and girls. The Committee further

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[3] CEDAW, Concluding observations on the second periodic report of Montenegro, July 2017.

recommended that Montenegro ensure that all victims of trafficking have free and immediate access to shelters, medical care, psychosocial counselling, legal assistance and specialized rehabilitation and reintegration services, as well as temporary residence permits, irrespective of their willingness or ability to cooperate with the prosecution authorities.

This Analysis explores the 18 human trafficking cases in which Montenegrin courts issued final decisions in the 2004-2019 period. Seventeen of the cases regarded the offence of trafficking in human beings under Article 444 of the Criminal Code, while one case concerned trafficking in children for adoption under Article 445 of the Criminal Code.

The Analysis provides an overview of Montenegrin case law on human trafficking. Due to methodological constraints, it does not aspire to provide answers to all questions. The obtained data will serve as a starting point for further comprehensive research, as well as for monitoring the phenomenon. In addition to the Introduction, which outlines general considerations on the human trafficking problem in Montenegro and describes the methodology and goals of the research, the Analysis comprises seven parts. To facilitate the overview of the national anti-trafficking policy, Part 1 outlines the strategic and institutional framework, whilst focusing on the role of courts in the process. Part 2 provides an overview of the main international standards in the field. Part 3 outlines the relevant national law and provides the necessary explanations of the complex definition of the crime of human trafficking and the elements of the crime. Part 4 is devoted to the protection of the rights of human trafficking victims and provides an overview of the main international standards in this area, as well as of the main provisions of national law on the status of witnesses and victims during criminal proceedings.

Part 5 provides an overview of the main views of the European Court of Human Rights (hereinafter: ECtHR) on Article 4 of the European Convention on Human Rights (hereinafter: ECHR) that applies to trafficking in humans as well. The most important section, Part 6, presents the research data and key findings and identifies specific shortcomings and open issues, while the last section, Part 7, comprises the main conclusions and recommendations on how to improve the situation in the field...

## ► Research Methodology

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The research involved perusal of final judgments forwarded by the competent courts to the Supreme Court on request. This method involved a restriction of the scope of research because it did not cover all stages of the criminal proceedings; the research was limited to data available in the judgments themselves.

In addition to judgments, the authors also perused other sources in their research, wherefore this document is based also on an analysis of the law, international documents and reports by relevant international entities, as well as commentaries of substantive and procedural law.

The research applied the approach recognised also in international standards – that the protection of the victims’ rights must have priority in the fight against human trafficking. Therefore, the Analysis devoted particular attention to issues regarding victims of human trafficking and their status in criminal proceedings. Furthermore, it focused on the Montenegrin courts’ sentencing policy, a priority of the Supreme Court given its constitutional role in ensuring the courts’ consistent application of the law.

### ► Key research issues:

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<b>Analysis of Case Law on Trafficking in Human Beings</b>
Volume of Montenegrin case law on human trafficking?
Duration of criminal proceedings?
Profiles of the perpetrators and victims?
Most widespread forms of exploitation of victims in Montenegro?
Courts’ sentencing practices and identified problems? Are the national courts’ sentencing practices in accordance with international standards?
Status of victims of human trafficking during criminal proceedings?
How to improve the status of the victims in court proceedings?

# 1. Strategic and Institutional Framework for Combating Human Trafficking in Montenegro

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Given that the efficient and effective fight against human trafficking requires a multi-disciplinary response, Montenegro had to take a strategic approach in order to adequately address this complex problem. Montenegro has adopted three strategic documents to date. The first was the 2004-2011 National Strategy on Combatting Human Trafficking adopted in 2003.

After the implementation of the first Strategy, in 2012, Montenegro adopted the second Strategy, covering the 2012-2018 period. The third Strategy for Combatting Trafficking in Human Beings, covering the 2019-2024 period, was adopted in February 2019. The Strategy defines the national anti-trafficking policy in the forthcoming five-year period in the following fields: prevention, witness protection, criminal prosecution, as well as in the fields of partnership, coordination and international cooperation.

In partnership with international and non-government organisations, the Montenegrin Government formulated the following vision, mission and goals for the 2019-2024 period:

## VISION:



**Just, humane, gender-sensitive and empowered society that protects people from all forms of trafficking in humans.**

## MISSION:



**Montenegro is committed to maintaining transparent, responsible and pro-active anti-trafficking initiatives in line with international human rights standards.**

## STRATEGIC GOAL:



**Improve, by 2024, the efficiency and functionality of the system for the prevention, identification, protection, assistance and monitoring of victims of trafficking in human beings, with special focus on children.**

**Improve, by 2024, the effectiveness of investigations, prosecution and adequate punishment of human traffickers in accordance with the national criminal legislation.**

A Coordination Committee was established to monitor the implementation of the Strategy, and coordinate the work and facilitate the activities of the relevant institutions.

The following institutions are engaged in combatting human trafficking in Montenegro: the Ministry of Internal Affairs – Department for Combatting Human Trafficking, the Police Directorate, the Ministry of Health, the Ministry of Labour and Social Welfare, the Ministry of Justice and Human Rights, the Ministry of Education and Science, the Ministry of Foreign Affairs and European Integration, the Ministry of Culture, the Ministry of Minority Rights, the Supreme Court of Montenegro and the Supreme State Prosecution Service.

The Supreme Court of Montenegro, as the highest court of the land, is actively involved in the fight against human trafficking and has been fully contributing to the eradication of this negative phenomenon. It has been systemically extending its support through its membership in the Task Force for Monitoring the Implementation of the Strategy for Combatting Trafficking in Human Beings, which has been carefully monitoring and assessing the relevant measures and policies with the aim of promptly and comprehensively responding to the problem of human trafficking. The Supreme Court is also the signatory of an Agreement on Inter-Institutional

Cooperation in the Prevention and Criminal Prosecution of Human Trafficking and the Protection of Potential and Actual Victims of Human Trafficking (hereinafter: Agreement on Inter-Institutional Cooperation) aiming to ensure the signatories' full contribution to the protection of potential and actual victims of human trafficking.

## 2. International Standards on Human Trafficking

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There is a developed and comprehensive international legal framework for combatting human trafficking. It recognises that human trafficking amounts to a violation of human rights and emphasises the States Parties' obligations to prevent, investigate and prosecute human traffickers and to protect their victims whether or not they are willing to take part in criminal proceedings and testify. Special emphasis is put on the approach focusing on the victims, based on the necessity and importance of protecting the rights of human trafficking victims. The standards are laid down in various conventions, protocols, directives, guidelines and decisions adopted under the auspices of the United Nations, Council of Europe, European Union and the International Labour Organization. Although not a member of the EU, Montenegro has been granted the status of candidate country and must endeavour to align its law with the EU *acquis*.

### ► Initial International Agreements on Human Trafficking

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The first international instrument to address human trafficking, the International Agreement for the Suppression of the White Slave Traffic, was adopted in 1904. The next was the International Convention for the Suppression of the White Slave Traffic adopted in 1910. In 1921, the League of Nations adopted the Convention for the Suppression of the Traffic in Women and Children, which was subsequently confirmed by the International Convention for the Suppression of the Traffic of Women of Adult Age in 1933. The Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, which was adopted in 1949, placed the other instruments under the auspices of the United Nations.

Furthermore, Article 8(1) of the 1966 International Covenant on Civil and Political Rights prohibits slavery and the slave-trade in all their forms and states that no-one shall be held in slavery.

Montenegro has ratified all the main international documents of relevance to this issue. Given the requirement under Article 9 of the Montenegrin Constitution<sup>[4]</sup>, all ratified international treaties shall be an integral part of the domestic legal order, have supremacy over domestic law and apply directly when they regulate issues differently than domestic law.

The most important international legal document applicable to human trafficking is the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (hereinafter: Palermo Protocol), supplementing the United Nations Convention against Transnational Organized Crime (hereinafter: UN Convention),<sup>[5]</sup> which gives the first comprehensive internationally recognised definition of trafficking in humans.

The purposes of the Palermo Protocol are to: prevent and combat trafficking in persons, paying particular attention to women and children; protect and assist the victims of such trafficking, with full respect for their human rights; and, promote cooperation among States Parties in order to meet those objectives.

States Parties to the Protocol commit to adopt such legislative and other measures as may be necessary to establish the conduct described as trafficking in persons as criminal offences.

The Palermo Protocol is also the first protocol on human trafficking supplementing a convention. It introduced the 3P paradigm in the States Parties' **obligations**:

- **Prevention**;
- **Protection**;
- **Prosecution**.<sup>[6]</sup>

Under Article 2 and 10 of the Palermo Protocol, States Parties shall cooperate and exchange information with the relevant authorities of other states, including law enforcement and immigration authorities, to **investigate and prosecute** human trafficking. Article 6 of the Palermo

Protocol lays down that States Parties shall extend assistance to and **protect** human trafficking victims, taking due account of their special needs<sup>[7]</sup>.

The first European treaty to address human trafficking is the **Council of Europe Convention on Action against Trafficking in Human Beings** (hereinafter: CoE Convention), which Montenegro ratified on 19 March 2010. The Convention states that trafficking in human beings constitutes a violation of human rights and an offence to the dignity and the integrity of the human being. The aim of the authors of the Convention to ensure better protection for the victims and advance the standards set in prior treaties is visible already in its Preamble, which stresses that “respect for victims’ rights, protection of victims and action to combat trafficking in human beings must be the paramount objectives.”

Like the Palermo Protocol, the CoE Convention is based on the international 3P fight against human trafficking. The purposes of the Convention are to prevent and combat trafficking in human beings, while guaranteeing gender equality; protect the human rights of the victims of trafficking, design a comprehensive framework for the protection and assistance of victims and witnesses, while guaranteeing gender equality, as well as to ensure effective investigation and prosecution; and, to promote international cooperation on action against trafficking in human beings. The Convention applies to all forms of human trafficking, national and international, whether or not it is linked to organised crime, as opposed to the UN Convention, which extends protection to victims of human trafficking international in character.

The CoE Convention also establishes a monitoring mechanism, the Group of Experts on Action against Trafficking in Human Beings (GRETA), which monitors the implementation of the Convention by the States Parties.

In addition to the UN Convention and its Protocols and the CoE Convention, Montenegro has ratified other important international

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[7] Ibid

treaties that lay down the states' obligations regarding human trafficking.

The key international legal instrument for the protection of child rights is the **UN Convention on the Rights of the Child**<sup>[8]</sup>, and its three protocols on the Sale of Children, Child Prostitution and Child Pornography, on the Involvement of Children in Armed Conflict and on communications. Under the Convention on the Rights of the Child, States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence.

Montenegro has also ratified the CoE **Convention on the Protection of Children against Sexual Exploitation and Abuse (the Lanzarote Convention)**<sup>[9]</sup>, which aims to prevent and combat sexual exploitation and sexual abuse of children and protect the rights of child victims of such exploitation or abuse.

Another relevant convention adopted under the auspices of the United Nations is the **UN Convention on the Elimination of All Forms of Discrimination against Women**<sup>[10]</sup>, under which States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.

The conventions of the **International Labour Organization** are also important for combatting human trafficking. They include, notably, Convention No. 29 on forced labour, which defines forced or compulsory labour, and Convention No. 182 on worst forms of child labour, which defines worst forms of child labour.

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[8] Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1989, entry into force 2 September 199, in accordance with Article 49.

[9] Montenegro signed the Convention on 18 June 2008 and ratified it on 25 November 2010; it entered into force on 1 March 2011.

[10] This Convention was adopted by the UN General Assembly in December 1979 and it entered into force in September 1981, after it was ratified by 20 countries. Montenegro acceded to the Convention by succession.

The International Labour Organization (ILO) is a specialised UN agency charged with setting international labour standards. It notes an explicit link between human trafficking and forced labour.<sup>[11]</sup> ILO recognises that forced labour and human trafficking are “closely related terms though not identical in a legal sense”, whilst simultaneously perceiving that most situations of slavery or human trafficking are covered by ILO’s definition of forced labour. The notion of exploitation of labour in the definition of trafficking in persons allows for a link to be established between the Palermo Protocol and the ILO Convention concerning Forced Labour (Convention No. 29).<sup>[12]</sup>

The link between the two elucidates that trafficking in persons for the purpose of exploitation is encompassed by the definition of forced or compulsory labour of Convention No.29. That Convention defines forced or compulsory labour as “*all work or service, which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.*”<sup>[13]</sup> The ILO Committee of Experts has emphasised that States that have ratified Convention No.29 must develop a comprehensive legal and policy framework to suppress forced labour in all its forms.<sup>[14]</sup>

ILO Convention No. 105<sup>[15]</sup> supplements Convention No.29 and calls for the “immediate and complete abolition of forced or compulsory labour” in five specific cases: “(a) as a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system; (b) as a method of mobilising and using labour for the purposes of economic

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[11] Presentation concerning standard setting on forced labour, 103rd Session of the International Labour Conference, Geneva, 2014.

[12] International Labour Organization, Convention concerning Forced or Compulsory Labour, 1930 (No.29).

[13] *Ibid*, Article 2(1).

[14] A guide to European Law on Human Trafficking through international law and Strasbourg Court jurisprudence

[15] International Labour Organization, Abolition of Forced Labour Convention, 1957 (No. 105) (‘Convention No. 105’)

development; (c) as a means of labour discipline; (d) as a punishment for having participated in strikes; (e) as a means of racial, social, national or religious discrimination.”<sup>[16]</sup>

The European Union has also devoted adequate attention to the fight against human trafficking. Trafficking in humans is expressly prohibited by Article 5 of the Charter of Fundamental Rights of the European Union.<sup>[17]</sup>

Although not binding on Montenegro, **Directive 2011/36/EU of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims**, replacing Council Framework Decision 2002/629/JHA, (the “Anti-Trafficking Directive”) is important for the further development of international standards.

Important standards also set by the **Victims’ Rights Directive 2012/29/EU**. This EU legislative instrument establishes minimum standards on the rights, support to and protection of victims of crime and ensures that persons who have fallen victim to crime are recognised and treated with respect.

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[16] *Ibid*, Article 1 (a)-(e)

[17] Available at: <https://eur-lex.europa.eu/legal-content/HR/TXT/?uri=celex:12012P/TXT>

## ► Definitions of Trafficking in Human Beings

The main definition of human trafficking is provided in Article 3 of the Palermo Protocol.

### PALERMO PROTOCOL – Definition of Trafficking in Persons



- (a) "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs
- (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;
- (c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article;
- (d) "Child" shall mean any person under eighteen years of age.

Article 4 of the CoE Convention on Action against Trafficking in Human Beings includes an almost identical definition. Under that Article,

- a) "Trafficking in human beings" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at

- a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;
- b) The consent of a victim of “trafficking in human beings” to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;
  - c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in human beings” even if this does not involve any of the means set forth in subparagraph (a) of this article;
  - d) “Child” shall mean any person under eighteen years of age;
  - e) “Victim” shall mean any natural person who is subject to trafficking in human beings as defined in this article.

As opposed to the definition of human trafficking in the Palermo Protocol, the CoE Convention definition provides for a broader scope of application and protection of human trafficking victims, since it applies not only to transnational crime but also to human trafficking within the territory of a state, which need not be linked to organised crime.

# 3. National Criminal Law Framework for Combating Human Trafficking

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The definitions of the crime of human trafficking of most European countries, including Montenegro, are based on the definitions of human trafficking in international treaties.

Human trafficking was first incriminated in the Montenegrin Criminal Code<sup>[18]</sup> in 2003, in the section on crimes against humanity and rights guaranteed under international law. In terms of substance, its construction is quite complex and involves a variety of acts, but all of them essentially amount to different forms of inhuman treatment of people.<sup>[19]</sup>

The Criminal Code has been amended several times since the incrimination of human trafficking. These amendments improved the domestic legal framework and aligned it with international standards and requirements of the international community. Such amendments were made in 2003<sup>[20]</sup>, 2004<sup>[21]</sup>, 2006<sup>[22]</sup>, 2008<sup>[23]</sup>, 2010<sup>[24]</sup>, 2013<sup>[25]</sup>, 2015<sup>[26]</sup> and 2017<sup>[27]</sup>.

The amendments added the following purposes of exploitation to the initial ones: “slavery and practices similar to slavery”; “other forms of sexual exploitation” and “unlawful marriage”.

The amendments also expanded the list of perpetrators of the aggravated form of the crime, which now includes also public officials who committed it whilst exercising their duties and jeopardised the lives of one or more people. Moreover, the law now also includes an explicit provision on the irrelevance of the victim’s consent to the intended exploitation.

The scope of Article 445 of the Criminal Code (Trafficking in Children for Adoption) has also been extended to cover children under 18.

Pursuant to Article 444 of the Criminal Code of Montenegro, the crime of human trafficking is committed by “*anyone who by force or threat, deception, abuse of power, trust, relationship of dependency or position of vulnerability, withholding, seizure, destruction or forgery of identification papers, or by giving or receiving money or other benefits to achieve the consent of a person having control over another person for the purpose of exploitation: recruits, transports, transfers, hands over, sells, buys, mediates in the sale of, hides or harbours another person for the purpose of exploiting their work, for forced labour, servitude, slavery or practices similar to slavery, crime, prostitution or other forms of sexual exploitation, begging, pornographic use, unlawful marriage, removal of organs for transplantation or participation in armed conflicts*”. The simple form of the crime carries a sentence of imprisonment ranging from one to ten years.

The Criminal Code also provides for aggravated forms of the crime and a separate milder form of the crime of human trafficking.

Perpetrators who did not apply force, threat or another of the above-mentioned means shall be held liable for the simple form of the crime if they committed it against minors. The aggravated form of the crime is committed against minors or by public officials exercising their duties or in the event the life of one or more people was intentionally jeopardised; three years’ imprisonment is the minimal penalty in the latter cases.

The Criminal Code also prescribes stricter penalties for human trafficking with graver consequences. If the offence resulted in grave bodily injuries, the perpetrator shall be sentenced to between one and 12 years of imprisonment. If it resulted in the death of one or more persons, the perpetrator shall be punished by minimum ten years' imprisonment.

Whoever habitually commits the offences referred to in paragraphs (1) to (3) of this Article or participates in their organised commission together with other persons shall be punished by minimum ten years' imprisonment.

Paragraph 7 of Article 444 of the Criminal Code provides for imprisonment ranging between six months and five years for anyone who knowingly availed themselves of the services of human trafficking victims. The aggravated form of this crime is committed against minors and warrants imprisonment ranging between three and 15 years.

The last paragraph of Article 444 is also important, since it lays down that the victims' consent to the exploitation shall be irrelevant, which is in accordance with the above international definitions of human trafficking.

## ► Elements of the Crime of Human Trafficking

The simple form of the criminal offence of human trafficking is characterised by three elements: the act, the means and the purpose.

Radnja vršenja	Način izvršenja	Cilj
Recruitment; Transport; Transfer; Handover; Sale; Purchase; Mediation in sale; Hiding; Harbouring;	By force or threat, deception, abuse of power, trust, relationship of dependency or position of vulnerability, withholding, seizure, destruction or forgery of identification papers; or by giving or receiving money or other benefits to achieve the consent of a person having control over another person	Labour exploitation, forced labour, servitude, slavery and practices similar to slavery, crime, prostitution or other forms of sexual exploitation, begging, pornographic use, unlawful marriage, removal of organs for transplantation or participation in armed conflicts

The simple form of the crime of human trafficking entails the following acts: recruitment, transport, transfer, handover, sale, purchase, mediation in the sale, hiding or harbouring of another. It is committed by the following means: force or threat, deception, abuse of power, trust, relationship of dependency or position of vulnerability, withholding, seizure, destruction or forgery of identification papers, or by giving or receiving money or other benefits to achieve the consent of a person having control over another person.

The above-mentioned acts are clear and do not require an explanation. The term “recruitment” might cause some dilemmas but it should be construed in the context of the purpose(s) it aims to achieve. It entails persuading other persons, seeking their consent to undertake an activity or place themselves in a specific position; this act usually refers to the commission of criminal activities, prostitution, begging, et al.<sup>[28]</sup>

For a criminal offence to exist, the perpetrator must have undertaken one of the acts by one of the means. Essentially, the act and the means should be viewed as a whole. For instance, the act of transporting a person does not in itself constitute the crime of human trafficking. But it does amount to human trafficking if it is effected by force or threat, deception or by other means laid down in the law.<sup>[29]</sup>

## ► Purpose

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For the crime of human trafficking to exist, it must have a purpose. The acts are directed at achieving a specific purpose in relation to the persons subjected to trafficking, who are passive subjects. These acts have to be performed for the purpose of labour exploitation, forced labour, servitude, slavery or practices similar to slavery, crime, prostitution or other forms of sexual exploitation, begging, pornographic use, unlawful marriage, removal of organs for transplantation or participation in armed conflicts. The terms used to describe the acts and purposes should be construed in accordance with their use in the relevant articles of the Criminal Code, while understanding some of them requires reference to their definitions in the Palermo Protocol and other relevant international

conventions.<sup>[30]</sup>

Some of the purposes appear also as features (usually consequences) of other criminal offences but they are clear and do not need to be elaborated. The definitions of “forced labour” and “servitude” in Montenegrin law are imprecise. Forced labour should be construed as coercing others to engage in activities against their will. This is usually achieved by use of force or threat. The nature of forced labour is irrelevant. Such labour may be lawful and even useful, but the crime is essentially committed because the passive subject is not performing the work under coercion from the perpetrator rather than voluntarily. Servitude should be construed as total submission to another, the passive subjects’ obligation to “serve” the perpetrators, to obey their orders without question. Servitude should not be equated with dependency or subordination; it is worse and entails total submission.<sup>[31]</sup>

A crime will have been committed even if the purpose for which an act has been committed by any of the listed means has not been achieved. However, the intention to achieve the purpose has to be determined.<sup>[32]</sup>

**Trafficking in children for adoption** is incriminated in **Article 445** of the Montenegrin Criminal Code. This offence is incriminated as a separate criminal offence because Article 444 does not cover trafficking in children for adoption.<sup>[33]</sup>

The simple form of this criminal offence is committed by anyone who abducts children for adoption in contravention of the law in force, adopts the children or mediates in their adoption, and anyone who, for that purpose, buys, sells, hands over or transports children under 14 years of age, or provides accommodation for or hides such children. The simple form of the crime warrants between one and five years’ imprisonment.

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[30] *Ibid.*

[31] Comment of the Criminal Code of Montenegro, Dr Ljubiša Lazarević, Dr Branko Vučković, Dr Vesna Vučković, 2004

[32] Comment of the Criminal Code of Montenegro, Prof Dr Zoran Stojanović, 2010

[33] *Ibid.*

Whoever habitually commits this crime or engages or participates in its organised commission together with others shall be punished by minimum three years' imprisonment.

**Slavery and transportation of enslaved persons** is incriminated in Article 446 of the Montenegrin Criminal Code. It is committed by anyone who enslaves other persons or places them in a similar position or maintains them in such a position, or buys, sells or hands them over to other persons or mediates in their purchase, sale or handover, or induces other persons to sell their own freedom or that of their dependants and persons in their care. The offence warrants between one and ten years' imprisonment. Whoever transports enslaved persons or persons in a position similar to slavery from one country to another shall be punished by imprisonment ranging from six months to five years. Perpetrators of this crime against minors shall be punished by a sentence of imprisonment ranging from five to 15 years.

## ► **Types of Penal Sanctions, Purposes of Punishment and Determination of Penalties**

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Given that the Analysis addresses the courts' sentencing practices as well, the ensuing text outlines the main criminal law provisions on types of penal sanctions, the purposes of punishment and the general rules on sentencing.

Article 4 of the Criminal Code<sup>[34]</sup> lays down the types of penal sanctions that may be ordered in criminal proceedings and their general purpose:

- 1) Criminal sanctions shall include the following: penalties, warning measures, security measures, and correctional measures.
- 2) Criminal sanctions shall be prescribed and imposed for the general purpose of suppressing acts violating and threatening values protected under criminal law.

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[34] Article 4 of the Criminal Code of Montenegro (Official Journal of the Republic of Montenegro Nos 70/2003, 13/2004 - corr. and 47/2006, and Official Journal of Montenegro Nos. 40/2008, 25/2010, 32/2011, 64/2011 – other law, 40/2013, 56/2013 - corr., 14/2015, 42/2015, 58/2015 – other law, 44/2017 and 49/2018);

Under Article 32 of the Criminal Code, punishment will have the following purposes:

- 1) Prevent perpetrators from committing criminal offences and deter them from reoffending;
- 2) Deter others from committing criminal offences.
- 3) Express social condemnation of the criminal offence and the obligation to obey the law; and,
- 4) Strengthen morality and contribute to the development of social responsibility.

Sentencing is governed by Articles 42-51 of the Criminal Code. **The general rules on sentencing** are laid down in Article 42 of the Criminal Code, which reads: (1) The court shall impose upon the criminal offender a penalty within the statutory limits for the particular offence, taking into account the **purpose of punishment** and giving due consideration to all circumstances resulting in a lighter or more severe penalty (extenuating and aggravating circumstances), in particular: degree of culpability, motives for the commission of offence, degree of peril or injury to the protected value, circumstances under which the offence was committed, perpetrator's antecedents, his personal circumstances, his conduct after the commission of criminal offence, particularly his attitude towards the victim of the criminal offence, as well as any other circumstances concerning the perpetrator's personality. (2) When fixing a fine, the court shall give particular consideration to the perpetrator's financial standing. (3) A circumstance that is an element of the criminal offence may not be taken into account as either an aggravating or an extenuating mitigating circumstance, except where it exceeds the extent required for the existence of a criminal offence or a specific form of a criminal offence, or where there are two or several such circumstances of which only one is sufficient for the existence of a graver or milder form of the criminal offence.

# 4. Protection of the Rights of Human Trafficking Victims

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## 4.1. International Standards on the Protection of the Rights of Human Trafficking Victims

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*Protection of all human rights of human rights victims should be at the centre of any measures taken to prevent and end trafficking<sup>[35]</sup>*

The first generation of human rights conventions, such as the Universal Declaration of Human Rights, the European Convention on Human Rights and the International Covenant on Civil and Political Rights, do not mention the concept of ‘victims’.

Although Article 6 of the ECHR does not explicitly mention the rights of victims and witnesses, it implies that all participants in criminal proceedings are under the duty to respect the dignity of the defendants, as well as to protect victims and witnesses. The ECHR does not contain specific provisions on the rights of victims. However, in its *Recommendation R(85) 11 on the position of the victim under the framework of criminal law and procedure*<sup>[36]</sup> the CoE Committee of Ministers emphasised the need to have more regard in the criminal justice system to the physical, psychological, material and social harm suffered by the victim, and to consider what steps are desirable to satisfy his needs in these respects. The Preamble of the Recommendation states that “that it must be a fundamental function of criminal justice to meet the needs and to safeguard the interests of the victim” and that “it is also important to enhance the confidence of the victim in criminal justice and to encourage his co-operation, especially in his capacity as a witness”.

The concept of ‘victim’ was introduced in international law by the **United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power**<sup>[37]</sup>, which was adopted in 1985. The Declaration defines ‘victims’ as persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights. The Declaration sets important standards on access to justice and fair treatment of victims. Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered. The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by: (a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information; (b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system; (c) Providing proper assistance to victims throughout the legal process; (d) Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation; (e) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims.

As noted, many international law documents recognise and acknowledge the protection of the rights of human trafficking victims and that effective combating of human trafficking must be based on an approach oriented on the victims, their safety, protection and respect of all their guaranteed rights

The **Palermo Protocol** includes a number of provisions on the protection of and support to human trafficking victims. Under these provisions, each State Party shall ensure that its domestic legal or administrative system contains measures that provide to victims of trafficking in persons, in appropriate cases: (a) Information on relevant court and administrative proceedings; (b) Assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal

proceedings against offenders, in a manner not prejudicial to the rights of the defence. Each State Party shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons, including, in appropriate cases, in cooperation with non-governmental organizations, other relevant organizations and other elements of civil society, and, in particular, the provision of: (a) Appropriate housing; (b) Counselling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand; (c) Medical, psychological and material assistance; and (d) Employment, educational and training opportunities. Each State Party shall take into account, in applying the provisions of this article, the age, gender and special needs of victims of trafficking in persons, in particular the special needs of children, including appropriate housing, education and care. Each State Party shall endeavour to provide for the physical safety of victims of trafficking in persons while they are within its territory. Each State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered.

The rights of human trafficking victims are further strengthened by the **CoE Convention on Action against Trafficking in Human Beings**, which considers human trafficking a violation of human rights and an offence to the dignity and integrity of the human being. The States Parties' obligations under the Convention those regarding the protection of the rights of victims in court proceedings, notably, to protect the victims' private life and, where appropriate, identity; and ensure the victims' safety and protection from intimidation. In the case of child victims, States Parties shall take special care of children's needs and ensure their right to special protective measures. The Convention also lays down that each State Party shall, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so.

Under the CoE Convention, each Party shall adopt such legislative and other measures as may be necessary to ensure that the criminal offences established in accordance with Articles 18 to 21 are **punishable by effective, proportionate and dissuasive sanctions**. These sanctions

shall include, for criminal offences established in accordance with Article 18 when committed by natural persons, penalties involving deprivation of liberty which can give rise to extradition. Furthermore, each State Party shall ensure that legal persons held liable in accordance with Article 22 shall be subject to effective, proportionate and dissuasive criminal or non-criminal sanctions or measures, including monetary sanctions (Article 23).

At the EU level, the importance and necessity of protecting the rights of victims are emphasised in **Directive 2011/36/EU of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims**. As noted, this EU directive is not binding on Montenegro, but given its status of candidate country and ambition to join the EU, Montenegrin law must be harmonised with EU legal standards. The Directive lays down that EU Member States shall take the necessary measures to ensure assistance and support to human trafficking victims, their protection in criminal proceedings, and especially the protection of child victims of trafficking in humans. The Directive emphasises that victims should be provided with legal counselling and representation free of charge, at least when they do not have sufficient financial resources. Victims are entitled to compensation and assistance and support should be available to them “before, during and for an appropriate time after criminal proceedings” irrespective of their willingness to act as a witness. The Directive also prohibits the prosecution and punishment of victims for criminal activities that they have been compelled to commit as a direct consequence of being subject to trafficking.

Mention also needs to be made of the **Victims’ Rights Directive 2012/29/EU**, which sets the minimum standards on the rights of, support to and protection of victims of crime. This Directive underlines that the victims’ needs need to be reviewed comprehensively and that partial or unsatisfactory solutions that may result in secondary victimisation should be avoided. Member States shall ensure the victims access to the relevant information from their first contact with law enforcement officers in order to enable them to adequately protect their interests. The Directive also provides for the establishment of victim support services in all EU Member

States.

Under this Directive, victims are entitled to:

- be treated with respect and sensitivity throughout criminal proceedings;
- receive information and clarifications about their case;
- impart information to those taking decisions regarding the defendants;
- access legal aid, irrespective of their financial standing;
- the protection of their privacy and physical safety, and
- compensation, primarily from the perpetrators and then from the state.

## ► Compensation of human trafficking victims

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The right to compensation for harm suffered is key to the victims' social inclusion, because, in a way, it allows them to eliminate the consequences of the trauma they had suffered. A number of international documents address the compensation of damages of victims of crimes and state compensation funds. The most important one is the Council of Europe Convention on Compensation of Damages to Victims of Violent Crimes, which obligates States to establish a national compensation scheme.

Article 6(6) of the Palermo Protocol lays down that each State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered.

Article 15 of the CoE Convention also obligates States Parties to provide, in their internal law, for the right of victims to compensation from the perpetrators and establishment of a fund for victim compensation that the victims could apply for directly.

## 4.2. National Victim Protection Framework

The provisions of the Montenegrin Criminal Procedure Code (hereinafter: CPC)<sup>[38]</sup> are relevant to the protection of victims' rights in criminal proceedings, whereas the protection of victims outside court is governed by the Witness Protection Law<sup>[39]</sup>.

The Montenegrin Criminal Code defines a 'victim' as a person who has suffered, by means of an unlawful act which constitutes a crime under law, physical or mental pain or suffering, property damage or a violation of human rights and freedoms.<sup>[40]</sup>

The concept of a 'victim' is not mentioned in the Criminal Procedure Code, which uses the expression "injured parties and their rights" instead.

As per the protection of the victims' privacy, the CPC<sup>[41]</sup> lays down that, from the opening of the session to the conclusion of the main hearing, the panel may at any time, either ex officio or on the motion of the parties, but always after hearing their statements, exclude the public from the entire main hearing or any part of it, if that is necessary to maintain the confidentiality of information, protect public order, preserve morality, protect the interests of a minor or the personal or family life of the defendant or a victim.

The CPC lays down special rules on hearing children and minors. Child witnesses are entitled to testify in a separate room, in the presence of the judge and the court reporter, while the prosecutor, the defendant and their defence counsel are entitled to watch the testimony from another room and ask the witness questions, after having been duly instructed by the court. Furthermore, when questioning minors, especially crime victims, special care shall be taken to ensure that the hearing would not have an adverse effect on their psychological well-being. If necessary, the minors shall be heard with the assistance of a psychologist or another expert.<sup>[42]</sup>

Other relevant CPC provisions include those on the victims' right to use their language during the proceedings (Article 8), the courts' obligation to

instruct them on their rights during proceedings and the consequences of waiving them (Article 14), as well as a series of provisions guaranteeing the victims' rights to familiarise themselves with the evidence and to present evidence<sup>[43]</sup>.

The CPC also entitles victims to exercise their rights in proceedings via their legal counsel. Namely, when the criminal proceedings concern a crime warranting more than three years' imprisonment and the victims cannot afford a lawyer, they may be assigned a lawyer at their request and in the interest of fairness. If the victims are minors, the court shall review the need to assign them a lawyer *ex officio* and throughout the criminal proceedings.<sup>[44]</sup>

The Law on Free Legal Aid<sup>[45]</sup> is also of relevance to these issues. This law, which has been applied since 1 January 2012, provides for a comprehensive free legal aid system and facilitates access to court of parties to proceedings that have insufficient financial resources. Victims of domestic violence and human trafficking have privileged status under this Law; they are provided with free legal aid irrespective of their financial standing.

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[43] Article 58 (1-5), CPC

[44] CPC, Article 58(6)

[45] The Law was published in the Official Journal of Montenegro Nos. 20/2011 and 20/2015.

## ► Compensation of Damages – Damage Claims and Civil Proceedings

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Under Montenegrin law, victims of crime are entitled to claim pecuniary and non-pecuniary damages. The compensation proceedings are conducted in accordance with the Criminal Procedure Code and the Civil Procedure Code. In 2015, Montenegro adopted a separate law allowing victims to claim compensation directly from the state.

Montenegro's ratification of the **European Convention on Compensation of Damages to Victims of Violent Crimes** put in place the legal grounds for the adoption of a law governing the right to financial compensation of damages of victims of premeditated violent crimes. To that end, Montenegro adopted the Law on Compensation of Damages to Victims of Violent Crimes, thus aligning its judicial system with European standards, in this case in order to protect the status of victims of violent crimes. The Law, which regulates the requirements, manner and procedure for exercising the right to compensation of damages, will be applied as of the day Montenegro accedes to the EU. Under this Law, victims of premeditated violent crimes are entitled to compensation of loss of earnings, medical and hospitalisation expenses and funeral expenses. The dependants of persons who have died as a result of such crimes are entitled to compensation. The compensation shall be paid out of the state budget.

Under Article 2 of the Law, for the purposes of this Law, a **violent crime** shall denote any of the following premeditated crimes:

- crimes involving the use of physical force or other actions violating psychological integrity.
- crimes against sexual freedoms:
- crimes jeopardising life or limb or property and involving a generally dangerous act or means resulting in death, grave physical injury or grave harm to the physical or mental health of one or more individuals, which are defined as aggravated forms of premeditated crimes in the Montenegrin Criminal Code.

The Law also defines **victims, the purpose and types of compensation, and governs the funds for payment of compensation, and compensation eligibility requirements.**

The right to compensation may be exercised by Montenegrin nationals, nationals of States Parties to the European Convention on Compensation of Damages to Victims of Violent Crimes, nationals of CoE Member States habitually residing in Montenegro and nationals or lawful residents of EU Member States.

The claims are reviewed by a Commission, which must render its decision within three months and, in complex cases, within six months from the day of submission of a complete claim. By paying compensation to the victim or the dependant, the state shall be subrogated to the rights of the victim or the dependant towards the offender for the amount of compensation paid.

The Criminal Procedure Code<sup>[46]</sup> provides for the submission of a claim for damages caused by the crime provided its review does not substantially prolong the criminal proceedings. The claimants may require compensation of damages, return of items or invalidation of legal transactions. In criminal proceedings, such claims may be filed by individuals entitled to file them in civil proceedings; such claims shall be filed with the state prosecutor or the criminal court hearing the case. The claims must be filed before the completion of the main hearing before the trial court. Individuals entitled to submit claims are under the obligation to specify their claims and submit evidence substantiating them.

All victims of crimes are entitled to claim damages. Under Montenegrin law, the court shall rule on a claim during the criminal proceedings provided that its review would not “prolong the proceedings substantially”. Therefore, the duration of criminal proceedings depends on the court’s assessment. The court may uphold the claim in its entirety or in part in the judgment proclaiming the defendant guilty and refer the claimant to claim the remainder in civil proceedings. In the event the findings of fact in criminal proceedings do not provide reliable grounds for a decision on the claim in its entirety or in part, and the review would

result in substantial prolongation of the proceedings, the court shall instruct the claimant about the possibility of filing the entire claim with the civil court.

In the event the court instructs the victim to pursue their claim in civil proceedings, the court protection is exercised before the basic court as the court with real jurisdiction. The Law of Contract and Torts governs the compensation of pecuniary and non-pecuniary damages. The civil court is under the obligation to conduct the proceedings without delay and at minimum cost, and to preclude any abuse of the parties' rights during the proceedings.

Enforcement proceedings are, as a rule, urgent. In such cases, the burden of proof is on the claimant and the costs of evidence and other court expenses during the proceedings are advanced by the party proposing them, although they ultimately fall on the party that lost the case. The court may waive the payment of court fees and advanced costs of witnesses, court experts, inquiries and presentation of other evidence in the event the parties cannot afford to advance the costs without jeopardising their subsistence or that of their families. Human trafficking victims are also entitled to free legal aid, which automatically entails a waiver of their obligation to pay the costs of the proceedings.

The enforcement of the final decisions on damage claims is conducted in accordance with the Law on Enforcement and Security of Claims<sup>[47]</sup>.

Furthermore, victims are entitled to claim damages in ordinary civil proceedings. The right to compensation of damages is based on the rules set forth in the Law of Contract and Torts. The claimant is under the obligation to specify the value of the claim, unless its value cannot be expressed in monetary terms.

## ► Witness Protection during Criminal Proceedings – Procedural Measures

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Generally, all witnesses are entitled to physical and other protection. In Montenegro, witnesses are provided with physical protection by the Protection Unit of the Police Directorate. This Unit implements temporary protective measures and witness protection programme measures.

The status of protected witness is granted under the Criminal Procedure Code to witnesses who are especially jeopardised precisely because they are testifying in criminal proceedings, wherefore special protective measures need to be applied to allow them to testify without fear, and who are instrumental for securing the necessary evidence.

Therefore, under Article 120 of the CPC, where there are reasonable fears that the witnesses would gravely imperil their own lives, health, physical integrity, freedom or property of substantial value or that of their spouse, close relative or a person close to them by giving a statement or answering specific questions, such witnesses may withhold the data referred to in Article 113(3) (their personal data), or refuse to answer specific questions or give a statement altogether until their protection is secured.

The protection of this category of witnesses entails special arrangements for their participation and questioning during criminal proceedings, specifically: questioning under a pseudonym, questioning with the help of technical devices (a screen, voice distortion devices, video conferencing) et al.<sup>[48]</sup>

The CPC provides for two ways of concealing the identity of protected witnesses: 1) non-concealment of only their personal data listed in Article 113(3) of the CPC, i.e. their first and last names, occupation, place of residence, year of birth, et al, and 2) concealment of both their personal data and their image (Article 121(2 and 3) of the CPC. Namely, if only the witnesses' personal data referred to in Article 113(3) of the CPC are concealed, they shall be questioned during the proceedings under a pseudonym, while the rest of the hearing shall be conducted in accordance with the general CPC provisions on the hearing of witnesses

Measures ensuring the confidentiality of the witnesses' identity include: obligation of all individuals who know the witnesses' personal data to maintain their confidentiality; criminal liability for the disclosure of the confidential data; obligation to address and refer to the witnesses under their pseudonyms; and the separation, labelling and separate storage of minutes on the questioning of such witnesses. Non-disclosure of the identity of protected witnesses is also achieved by undertaking special protective measures outside court.

Under Article 122 of the CPC, the decision to grant a witness the status of protected witness is taken by the investigation judge on the motion of the witness, the defendant, the defence counsel or the state prosecutor, or by the panel during the main hearing. The motion must be reasoned.

Before issuing a ruling conferring the status of protected witness, the investigation judge will review whether the witness's statement warrants conferral of such status. The investigation judge may summon the state prosecutor and the witness to a separate hearing to ascertain the relevant facts.

**Witness protection outside court** is provided in accordance with the Law on Witness Protection, with a view to proving crimes against the constitutional order or security of Montenegro, crimes against humanity and rights guaranteed under international law, organised crime and crimes warranting at least five years' imprisonment. The Law governs the conditions and procedure for extending protection and assistance to witnesses outside court where there are reasonable fears that their life, health, physical integrity, freedom of property of substantial value would be jeopardised if they gave a statement and other protective measures do not suffice. Furthermore, the Law provides for extending such protection and assistance to persons close to the witnesses at their request. Witness protection is provided through the witness protection programme only when a crime cannot be proven without the witness's testimony or its proving would otherwise be difficult. Measures and actions undertaken in accordance with the Law shall not prejudice the defendants' rights in criminal proceedings.

Montenegro also adopted **Guidelines on the Non-Punishment of Human Trafficking Victims for Police Officers, State Prosecutors and Judges**, which are publicly available on the website of the Montenegrin Supreme Court. The Guidelines were adopted in accordance with Article 26 of the CoE Convention on Action against Trafficking in Humans, under which each Party to the Convention, including Montenegro, shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so. The Guidelines provide clear and specific guidance to practitioners on how to recognise situations in which they should apply the provisions on the non-punishment of human trafficking victims.

# 5. Human Trafficking in European Court of Human Rights Case Law

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Slavery and forced and compulsory labour are prohibited under Article 4 of the ECHR, which reads:

1. *No one shall be held in slavery or servitude.*
2. *No one shall be required to perform forced or compulsory labour*
3. *For the purpose of this article the term “forced or compulsory labour” shall not include:*
  - a. *any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;*
  - b. *any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;*
  - c. *any service exacted in case of an emergency or calamity threatening the life or well-being of the community;*
  - d. *any work or service which forms part of normal civic obligations.*

Article 4(1) of the ECHR does not expressly prohibit trafficking in humans. The reason lies in the fact that the ECHR was modelled after the 1948 Universal Declaration of Human Rights, which does not address human trafficking. The ECtHR, however, correctly concluded that human trafficking fell under the umbrella of Article 4, considering it unnecessary to identify whether the treatment complained of constituted “slavery”, “servitude” or “forced and compulsory labour”.<sup>[49]</sup>

In its judgment in the case of *Siliadin v. France*, the ECtHR quoted the applicant as saying that reference should be made to international conventions to determine the term human trafficking and that importance had to be attached “to the criteria laid down by both the United Nations and the Council of Europe for identifying modern forms of slavery and servitude, which were closely linked to trafficking in human beings, and to the internationally recognised necessity of affording children special protection on account of their age and vulnerability.”<sup>[50]</sup>

The ECtHR defined trafficking in humans in its judgment in the case of *Rantsev v. Cyprus and Russia*<sup>[51]</sup>. It considered that “trafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership. It treats human beings as commodities to be bought and sold and put to forced labour, often for little or no payment, usually in the sex industry but also elsewhere [...]. It implies close surveillance of the activities of victims, whose movements are often circumscribed [...]. It involves the use of violence and threats against victims, who live and work under poor conditions [...].”

In the same case<sup>[52]</sup>, the ECtHR said that there could be no doubt that “trafficking threatens the human dignity and fundamental freedoms of its victims and cannot be considered compatible with a democratic society and the values expounded in the Convention. In view of its obligation to interpret the Convention in light of present-day conditions, the Court considers it unnecessary to identify whether the treatment about which the applicant complains constitutes “slavery”, “servitude” or “forced and compulsory labour”. Instead, the Court concludes that trafficking itself, within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention, falls within the scope of Article 4 of the Convention.”

The ECtHR has developed in its case law the States’ positive obligations under Article 4 of the ECHR, including: to establish comprehensive policies and programmes to prevent and combat trafficking; to extend effective and practical protection to human trafficking victims; to conduct prompt and effective investigations; and to set standards for determining liability for the failure to conduct an investigation. If there are indications that an

individual is a victim of human trafficking the authorities must conduct an effective investigation leading to the identification and punishment of the traffickers; member States are also subject to a duty in cross-border trafficking cases to cooperate effectively with the relevant authorities of other States concerned in the investigation of events which occurred outside their territories.<sup>[53]</sup>

# 6. Analysis of Montenegrin Case Law on Human Trafficking

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## ► General Information about the Research Topic

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The research covered 18 final judgments in human trafficking cases delivered by the relevant Montenegrin courts in the 2014-2019 period.

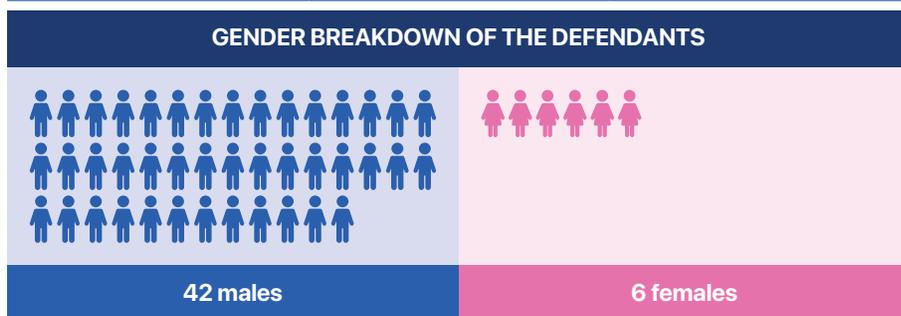
Seventeen of the 18 judgments concerned trafficking in human beings incriminated in Article 444 of the Montenegrin Criminal Code, while one case was initiated under Article 445 of the Criminal Code on trafficking in

children for adoption<sup>[54]</sup>.

The statistical processing of the data shows that, in most of the analysed cases (seven), the criminal proceedings concerned the crime under Article 444(6) of the CC, five concerned the simple form of the offence incriminated in Article 444(1) of the CC, while the other criminal proceedings concerned the crimes under paragraphs 2 and 3 of Article 444 of the CC.

**Table 1 Overview of Analysed Judgments**

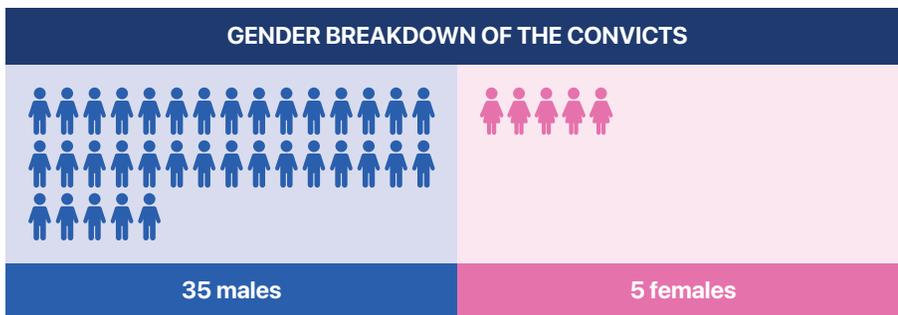
Case No.	Court:	Date of Adoption:
K. No. 35/09	Podgorica Higher Court	6 May 2011
K. No. 261/09	Podgorica Higher Court	1 March 2010
K. No. 197/08	Podgorica Higher Court	16 Feb 2011
Kž. No. 470/08 <sup>[55]</sup>	Podgorica Higher Court	13 Feb 2009
K. No. 267/07	Podgorica Higher Court	3 June 2008
K. No. 6/13	Podgorica Higher Court	18 Nov 2013
K. No. 271/08	Podgorica Higher Court	2 July 2009
Ks. No. 2/10	Podgorica Higher Court	28 April 2010
K. No. 201/07	Podgorica Higher Court	9 March 2013
K. No. 28/08	Podgorica Higher Court	24 July 2009
K. No. 19/12	Podgorica Higher Court	10 June 2013



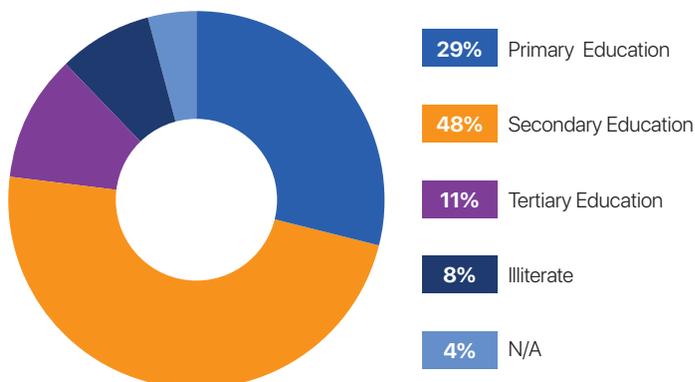
[54] Podgorica Higher Court judgment in case K. No. 28/08. The defendants had initially been charged with trafficking in children for adoption under Article 445. The indictment was modified at one of the main hearings and the defendants were charged with change of family status under Article 218(1) of the Montenegrin Criminal Code.

[55] Case Kž. No. 470/08. The Montenegrin Appeals Court partly upheld the defendant's appeal and modified the judgment of the Podgorica Higher Court in case K. No. 267/2007 of 3 June 2008.

## GENDER BREAKDOWN OF THE CONVICTS



Case No.	Court:	Date of Adoption:
K. No. 87/17	Podgorica Higher Court	16 April 2019
Ks. No. 3/09	Bijelo Polje Higher Court	29 Sept 2009
Ks. No. 12/12 <sup>[56]</sup>	Bijelo Polje Higher Court	3 Dec 2012
K. No. 55/08	Bijelo Polje Higher Court	19 May 2009
K. No. 9/1332	Podgorica Basic Court	15 Dec 2010
K. No. 05/1087	Podgorica Basic Court	28 Sept 2006



Case No.	Court:	Date of Adoption:
K. No. 05/789	Podgorica Basic Court	23 Dec 2005
K. No. 54/11	Ulcinj Basic Court	23 Sept 2014
K. No. 78/09	Rožaje Basic Court	15 May 2009

## a. Profile of the Defendants and Convicts

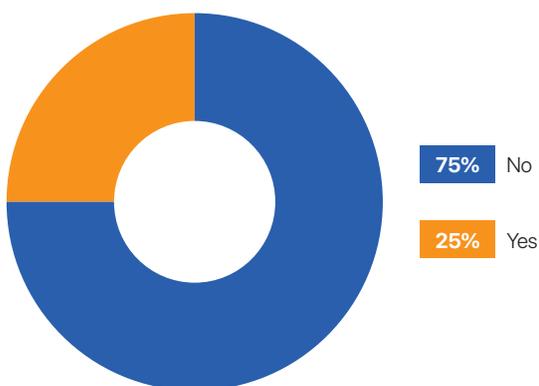
**Figure 1 Gender Breakdown**

[56] In its judgment in case Ks. 12/12, the Bijelo Polje Higher Court partly overturned the judgment of this Court in case Ks. No. 3/09 of 29 September 2009, specifically the penalty imposed on a co-defendant in this case.

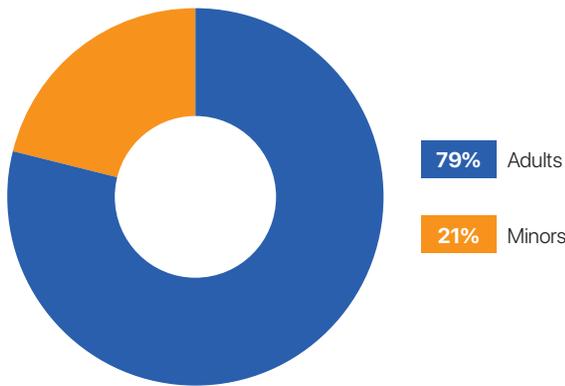
The analysis of the data shows that most defendants charged with human trafficking were men. Specifically, out of 58 defendants, 42 (87%) were male and six (13%) were female. Men accounted for 85% and women for 15% of all individuals convicted of human trafficking.

### Figure 2 – Education Levels of the Defendants

The analysis of available data shows that most (48%) of the defendants had completed secondary education, followed by those with primary education (29%), while five (11%) had a college degree; four of the defendants were illiterate and no data were available on the education levels of two defendants.

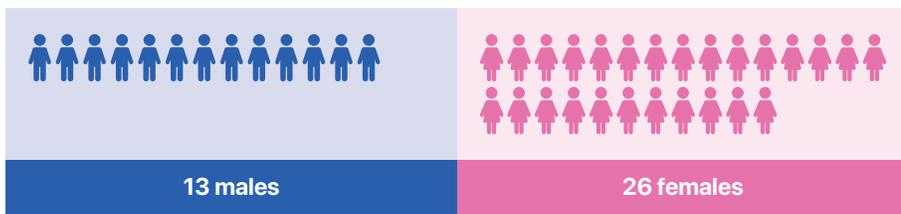


**Table 2: Nationality of the Defendants**



Montenegro	Serbia	Kosovo	Ukraine	Stateless
31	8	7	1	1

The above figure clearly shows that Montenegrin nationals accounted for most (31 out of 48) of the individuals tried for human trafficking. Next came the nationals of Serbia (8) and Kosovo (7). One defendant was a Ukrainian national and one was stateless.

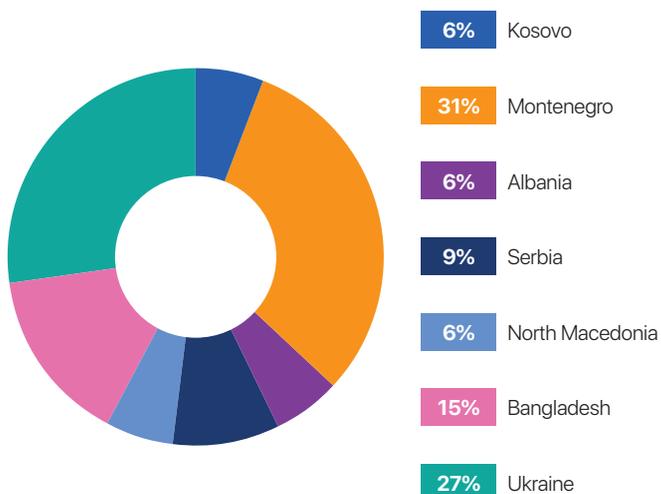


To conclude, most of the defendants were Montenegrin nationals.

**Figure 3: Prior Criminal Records of the Defendants**

The analysis of the judgments and penal record data show that **12** (ten) of the 48 defendants had already been convicted of the same or other

crimes, while **36** (thirty-six) did not have criminal records<sup>[57]</sup>.



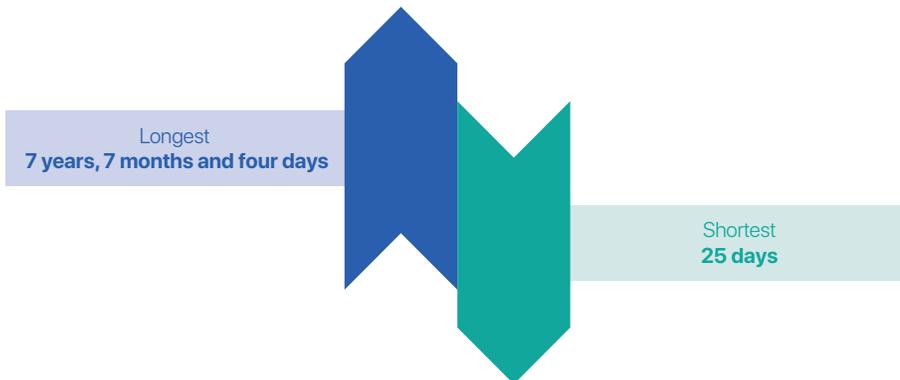
## **b. Profile of the Victims**

**Figure 5: Age of the Victims**

The analysis of the 18 judgments shows that 31 of the 39 victims were adults and eight were minors. All of them were female and they were identified in the following cases: K. No. 261/03, K. No. 267/07, K. No. 6/13, K. No. 5/1332, K. No. 28/08, K. No. 197/08 and K. No. 87/17.

**Figure 6: Gender of the Victims**

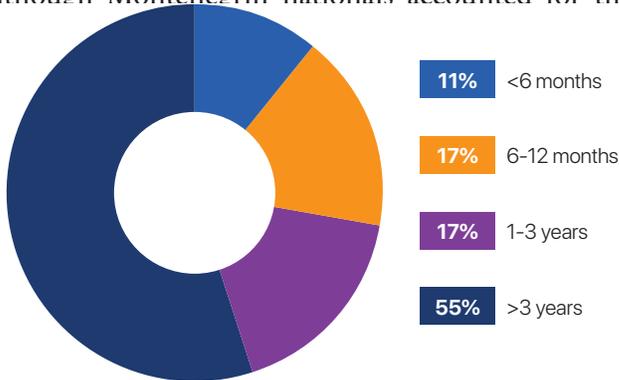
The figure shows the clear gender dimension of trafficking in human beings. Out of the 39 victims identified in the judgments, 26 were female and 13 were male.



**Figure 7: Nationality of the Victims**

Statistics on the nationality of the victims<sup>[58]</sup> show that most were nationals of Montenegro and Ukraine, while the rest were nationals of Bangladesh, Serbia, Republic of Northern Macedonia, Kosovo and Albania.

Although Montenegrin nationals accounted for the majority of the



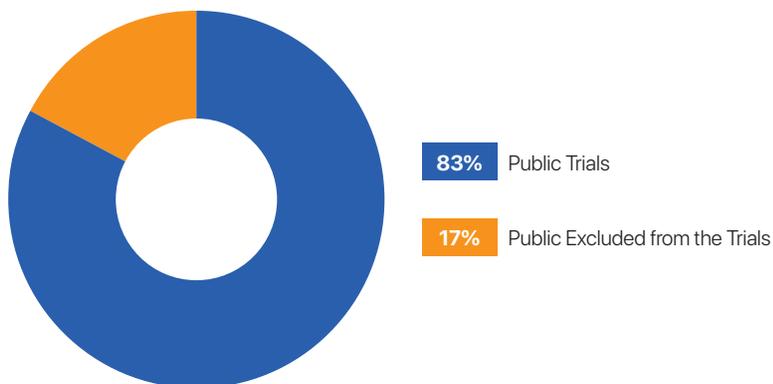
victims, data show that human trafficking with a cross-border dimension was at issue.

### **c. Length of Criminal Proceedings**

The defendants' right to a trial within the shortest possible time and the courts' obligation to conduct proceedings without unnecessary delay and prevent any abuse of the rights of parties to the proceedings are general principles laid down in the Criminal Procedure Code.

According to ECtHR case-law, the "reasonable time" referred to in Article 6(1) begins to run as soon as a person is "charged"; this may occur on a date prior to the case coming before the trial court, such as the date of arrest, the date when the person concerned was officially notified that he would be prosecuted or the date when preliminary investigations were opened "Charge"; for the purposes of Article 6(1) may be defined as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence", a definition that also corresponds to the test whether "the situation of the [suspect] has been

substantially affected.”<sup>[59]</sup>



Pursuant to Article 6 of the Annex on Prevention and Prosecution of Trafficking in Humans and the Protection of Potential and Actual Victims of Trafficking in Humans to the Agreement on Inter-Institutional Cooperation, judges will give priority to human trafficking cases in accordance with the Law.

Although, in assessments of “reasonable time”, time begins to run much earlier, when the initial actions in a criminal case are undertaken, this research measured the length of proceedings from the day the indictment was filed to the day the first-instance judgment was delivered.

**Figure 8: Length of Trials**

As the above figure shows, the length of criminal proceedings ranged from seven years and seven months, which was the duration of the longest trial of a trafficking case before the Podgorica Higher Court (case K No.78/09) to 25 days, which was the duration of the shortest trial of a trafficking case before the Ulcinj Basic Court (case K No. 54/14).

On average, criminal proceedings before all the courts lasted **two years, ten months and six days**.

[59] *Eckle v. Germany*, 1982.

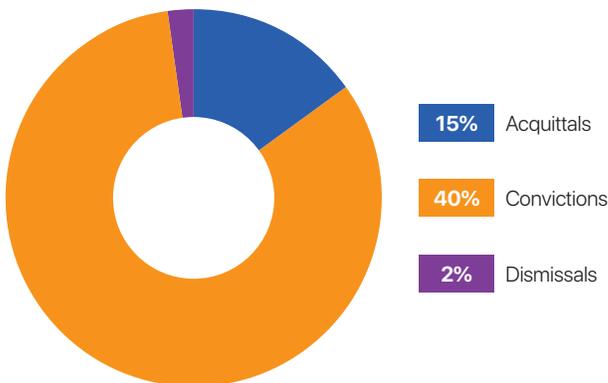
## Figure 9 Length of Criminal Proceedings

The analysis of the data showed that the criminal proceedings lasted less than six months in two cases, between 6 and 12 months in three cases, between one and three years in three cases, and over three years in most (10) cases.

Of the criminal proceedings that lasted three or more years (purple on the graph), the shortest trial took three years, two months and 15 days and the longest seven years, seven months and four days.

### d. Publicity of Trials

As noted, criminal trials are generally public in character and may be attended by all persons of age. The CPC provides for the exclusion of the public from a trial in order to maintain the confidentiality of information, protect public order, preserve morality, or protect the interests of a minor or the personal or family life of the defendant or a victim (Article 314 of the CPC).



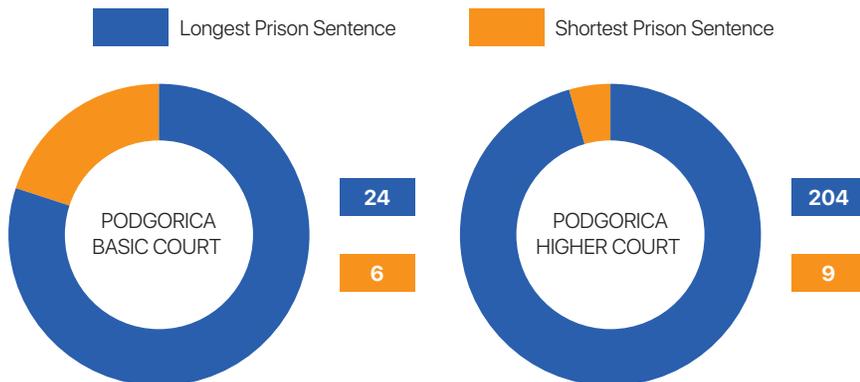
**Figure 10: Publicity of Trials**

The analysis of the main hearings before the courts competent for hearing human trafficking cases shows that the public was allowed to attend 14 out of the 18 trials. The courts issued rulings excluding the public on grounds provided by law in four cases (K. No 267/07, K. No. 6/13, K. No 271/08 and K. No.87/17).

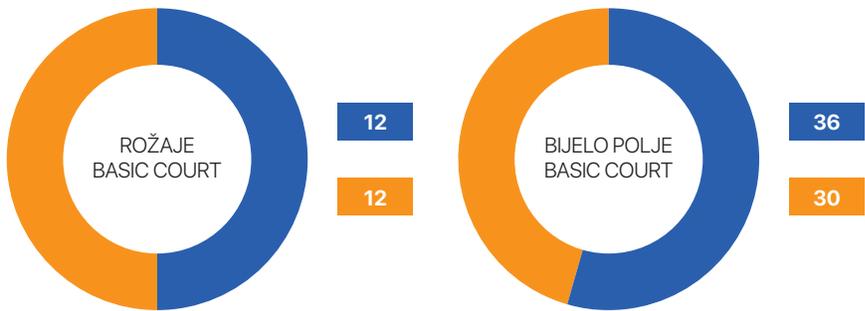
In all these cases, the courts excluded the public from the entire trial under Article 314 of the CPC in order to protect the interests of minors and their family life.

### **e. Compensation of Damages during Criminal Proceedings**

The analysis of the judgments shows that nine out of 39 victims identified in the judgments filed compensation claims during the criminal proceedings. However, none of them were upheld by the criminal courts. In all these cases, the victims were instructed to pursue their claims in civil court, as exemplified by the Podgorica Higher Court judgment K No. 19/12: “Pursuant to Article 239 of the CPC, the injured party S.Lj. is instructed



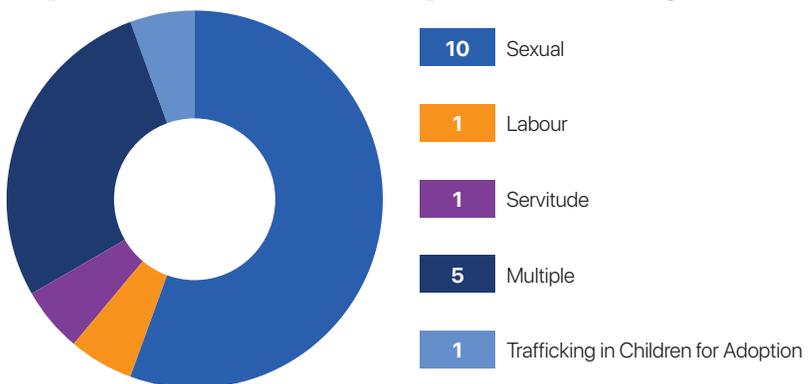
*to pursue her claim against the defendants in civil proceedings, given that the findings of fact in the criminal proceedings did not provide reliable grounds for a decision on the claim in its entirety or in part and the determination of such facts would substantially prolong the proceedings.”*



In some cases, such as K. No. 87/17, the courts instructed the victims to pursue their damage claims in civil court because their claims were imprecise.

Therefore, the data indicate that damages are rarely awarded during criminal proceedings because consideration of the claims would prolong the proceedings. The criminal courts thus regularly instruct the victims to pursue their claims in civil courts, all the more since specific medical expert analyses need to be conducted to ascertain the amount of compensation, which results in longer proceedings.

The problems regarding the long proceedings on the victims' damage claims could be addressed by providing for payment of compensation by the state, a possibility envisaged by the Law on Compensation of Damages to Victims of Violent Crimes, which Montenegro adopted in 2015. The CoE Convention on Action against Trafficking in Human Beings (Article 15), the European Convention on the Compensation of Damages to Victims



of Violent Crimes (Article 2), and the Council of Europe Convention on

preventing and combatting violence against women and domestic violence (Article 30) obligate Montenegro to put in place a mechanism allowing victims to obtain compensation from the state to mitigate the absence of compensation from the perpetrators.

## **f. Types of Court Decisions**

**Figure 11: Types of Decisions**

The above Graph clearly shows that convictions accounted for most of the court decisions – 40 out of 48 defendants were found guilty and sentenced to imprisonment. Seven defendants were acquitted and the case against one defendant was dismissed because the prosecutor abandoned prosecution.

All the convicted defendants were sentenced to imprisonment. The courts also issued two security measures, specifically: seizure of assets from three defendants in the Podgorica Higher Court Case Ks. No. 2/2010) and mandatory substance abuse treatment and seizure of cell phones in the Podgorica High Court Case K. No. 87/17.

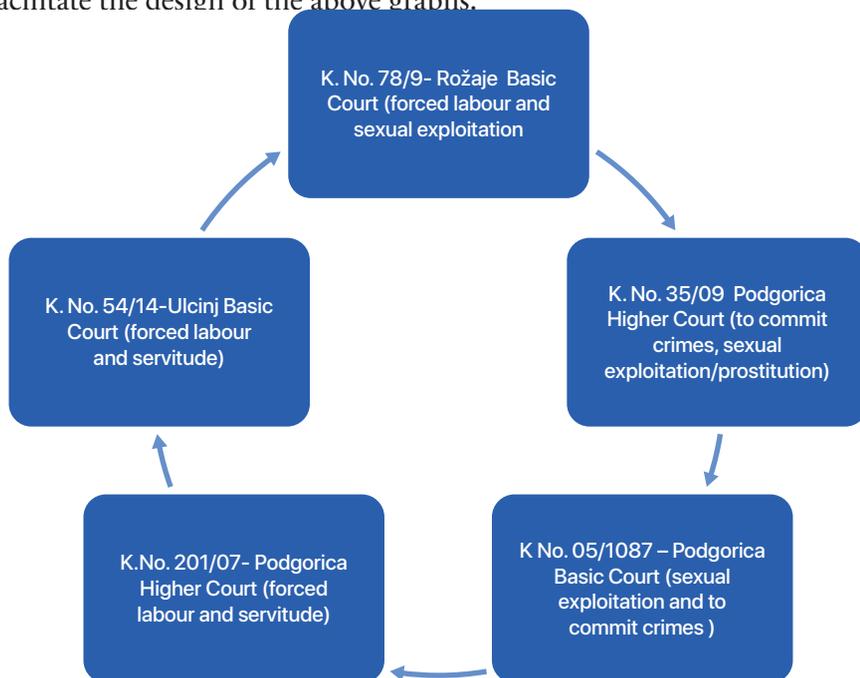
**Table 3: Imprisonment Sentences, by Court**

<b>Name of Court:</b>	<b>Longest Prison Sentence</b>	<b>Shortest Prison Sentence:</b>
Podgorica Basic Court	2 years	6 months
Podgorica Higher Court	17 years	9 months
Rožaje Basic Court <sup>[60]</sup>	1 year	1 year
Bijelo Polje Higher Court	3 years	2 years and 6 months

**Prison Sentences  
(in months)**

[60] Each of the four defendants convicted in case K. No. 78/09 was sentenced to one year imprisonment.

Note: the duration of prison sentences was provided in months solely to facilitate the design of the above graphs.



The above graphs show the lengths of prison sentences for human trafficking handed down by all the courts.

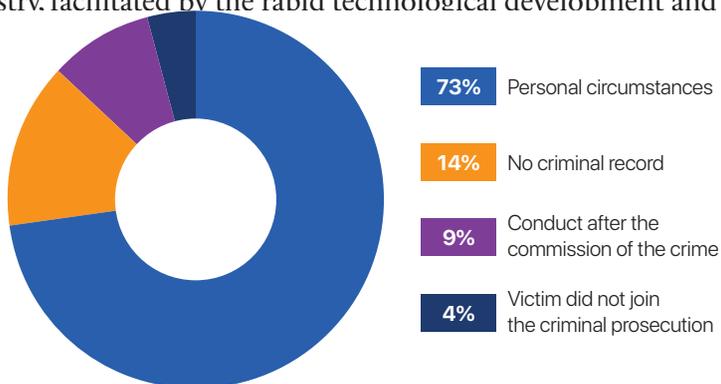
The harshest penal sanctions for this criminal offence were the prison sentences handed down by the Podgorica Higher Court in case K No. 87/17 on 16 April 2019, which convicted the two defendants to **cumulative 17 and 15 years’ imprisonment** respectively for human trafficking and rape.

On the other hand, **six months’ imprisonment** was the mildest penalty for this criminal offence registered in Montenegrin case law.

## g. Types of Exploitation

The above graph clearly shows that sexual exploitation was the most widespread form of exploitation of human trafficking victims, registered in a total of 10 cases. Other types of exploitation included: forced labour (one case<sup>[61]</sup>), servitude (one case) and trafficking in children for adoption (one case). Multiple forms of exploitation of human trafficking victims were registered in five cases. Other types of exploitation – such as organ removal, forced begging and forced marriage – were not registered in the analysed court decisions.

Sexual exploitation is the most widespread form of exploitation not only in Montenegro but globally as well. In its Second report on the progress made in the fight against trafficking in human beings,<sup>[62]</sup> the European Commission said that trafficking in human beings for the purpose of sexual exploitation continued to be the most reported form. In 2015-2016, there were 9,759 registered victims of sexual exploitation. i.e. over half (56%) of the registered victims who had a recorded form of exploitation, predominantly women and girls (95% of registered victims of sexual exploitation). A sharp increase had been noted in the number of women and girls trafficked through the Central Mediterranean route for sexual exploitation in the EU. Victims were exploited in the sex and entertainment industrv. facilitated by the rapid technological development and the use of



internet for advertising services and the recruitment of victims. Emerging patterns reported include pornography, the use of live web cameras and live distant child sexual abuse. Around one quarter (26%) was trafficking for labour exploitation. Labour exploitation primarily affected males (80% of the registered victims) although in certain sectors of labour victims were predominantly women (such as domestic work). The EC said that several

Member States had reported that trafficking for labour exploitation was on the rise.

In its 2017 Serious and Organised Crime Threat Assessment<sup>[63]</sup> Europol said that organised crime groups catered to the growing demand for cheap labour across many Member States and that traffickers took advantage of discrepancies in labour legislation to organise the exploitation of victims in the grey zone between legal employment and labour exploitation. It noted that vulnerable sectors included agriculture, catering, cleaning, construction, entertainment, fishing, hospitality, retail and transportation. Many reports by Member States and civil society contributions indicate the role of labour inspectors in identifying the victims and/or the need to improve cooperation between prosecutors and labour inspectorates.

The analysis of the judgments indicates that sexual exploitation most often involves abuse of the victims' difficult financial circumstances, their deceit and abuse of their trust. Podgorica Higher Court's judgment in case K No. 267/2007 is illustration of human trafficking for the purpose of sexual exploitation. In that case, the Court found S.S. guilty of ***“exploiting for prostitution underage M.D, from late September to 17 October 2004 by abusing her position of vulnerability and her trust and by harbouring her in his apartment for the purpose of prostitution. Aware that the victim had come from Niš, that she was unemployed and did not have money to buy food, the defendant suggested that she stay in his apartment in D.O. Street until she found a job. The victim agreed, but, when she moved in, the defendant told her that she owed him rent and money for food. On a number of occasions, he brought the men first to his apartment and then to the apartment in VI C. Street, and ordered the victim to provide them with sex services. The defendant kept the money the men paid for her services. When she wanted to leave his apartment on 17 October 2007 to start waiting tables in a restaurant owned by G.M., he tried to keep her from moving by not letting her take her wardrobe and cell phone.”***

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[63] Available at: <https://www.europol.europa.eu/activities-services/main-reports/european-union-serious-and-organised-crime-threat-assessment-2017>

Montenegrin courts found multiple forms of exploitation of the victims in the following cases as well:

Herewith an example of multiple forms of exploitation the victims had been subjected to established by the Rožaje Basic Court in judgment K No. 78/09, in which it found the three defendants guilty: “From November 2008 to mid-January 2009, K.S. and K.S. **jointly applied force, threats, deception and abused the position of vulnerability of D.M, a national of Serbia, and harboured her in the restaurant “A.” in “J.K.” Street in Rožaje for the purpose of forced labour and prostitution.** S., the owner of the restaurant, hired the victim to work as a waitress. He did not pay her for her work, and the defendants later beat her and threatened her, and then **handed her over for prostitution to unidentified individuals.”**

## **h. Determination of Penalties**

The main criteria for the imposition of penal sanctions – determination of a penalty for a specific criminal offence within the statutory limits - include the penalty prescribed by law, purpose of punishment and the extenuating or aggravating circumstances. During sentencing, the court must primarily take into account the statutory penalty for the committed criminal offence. The third criterion, extenuating and aggravating circumstances, serves to determine the penalty within the statutory limits, whilst taking into account the purpose of punishment, i.e. such circumstances are direct grounds for sentencing.<sup>[64]</sup>

The below section illustrates in their application of the general rules on sentencing, the courts assessed the identified extenuating and aggravating circumstances, which of them they referred to the most in the analysed judgments, and the extent to which they applied the penalty mitigation institute. Herewith an overview of all the circumstances the courts assessed in the analysed cases.

### **Figure 12: Extenuating Circumstances**

The analysis showed that the courts took into account the following **extenuating circumstances** during sentencing: the defendants' personal circumstances, including their family circumstances/marital status<sup>[65]</sup>, parenthood), health, age (young or old age), unemployment, poor financial standing; the fact that the victims did not join the criminal prosecution; the defendants' attitude towards their crime (admission of guilt and circumstances in the crime was perpetrated), the fact that the defendants did not have a criminal record and their conduct after they committed the crime (proper conduct in court).

The above figure clearly shows that, in the vast majority of cases, the courts considered the following as extenuating circumstances: personal circumstances (73%), absence of a criminal record (14%); conduct after the commission of the crime (9%) and, in the fewest cases, the fact that the victims did not join the criminal prosecution (4%).

These data lead to the conclusion that the courts attached the most importance to the defendants' personal circumstances during sentencing.

Personal circumstances denote the circumstances and conditions in which the perpetrator of the crime has been living and working. These circumstances are, indeed, important, but this Analysis also shows that some courts had failed to properly justify their decisions, i.e. that they often did not provide detailed analyses citing specific and valid reasons why a particular circumstance should be considered extenuating. For example, in one of the analysed judgments, the court, *inter alia*, considered as an extenuating circumstance the fact that the defendant was married and had two children, but did not specify whether his children were minors he was under the obligation to support.

Courts have also frequently failed to explain the extenuating circumstances and their association with the crime and the individual perpetrators.

When imposing sentences for human trafficking crimes, which are most often committed for the purpose of sexual exploitation of the victims, the courts must exercise caution when qualifying as extenuating circumstances the fact that the defendants are married and have children, which is absurd, especially when the victims are minors, because one would especially expect of people with families to respect the basic social values protected by criminal law.

The Analysis shows that the courts most often considered as aggravating circumstances the fact that the defendants had already been convicted of the same or similar crimes. More precisely, the courts qualified the defendants' criminal records as an aggravating circumstance with regard to 12 human traffickers. The courts also frequently specified in their decisions that they had not identified any aggravating circumstances (in 12 cases), while, in two cases, they qualified as aggravating the circumstances in which the crimes had been committed.

The Analysis also showed that the courts tended to refer to some aggravating circumstances in general, whilst failing to properly and specifically explain them. For instance, in one of the analysed judgements, the court said that, during sentencing, it had "considered as aggravating the circumstances in which the crime of human trafficking had been committed, and which are reflected in the defendant's actions during the commission of the crime."

It may thus be concluded that, during sentencing, the courts take into account extenuating rather than aggravating circumstances and that the defendants' personal circumstances predominate among the extenuating circumstances.

## ► **Penalty Mitigation Institute**

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The analysed judgments show that the courts often applied the penalty mitigation provisions in cases in which they identified particularly extenuating circumstances and when they held that the purpose of punishment would be achieved by a milder sentence. The courts concluded as much in the following judgments:

- Case K. No. 267/07 – sentence of one defendant mitigated;
- Case K. No. 201/07 - sentences of four defendants mitigated;
- Case K. No. 19/12 - sentences of six defendants mitigated;
- Case K. No. 6/13 - sentence of one defendant mitigated;
- Case Ks. No. 2/10 – sentence of one defendant mitigated;
- Case Ks. No. 3/09 - sentences of three defendants mitigated;
- Case K. No. 789/ 05 – sentence of one defendant mitigated.

It may be concluded that the courts often applied the penalty mitigation institute, resorting to it in a total of seven cases and in regard to 17 defendants.

For instance, in its judgment in case K. No. 6/13, the Podgorica Higher Court said that *“given that the listed extenuating circumstances in their entirety have the character of particularly extenuating circumstances, the court commuted the penalty below the statutory limit and sentenced him to three years and six months’ imprisonment, which corresponds to the mitigation threshold for the criminal offence at issue (under Articles 45 and 46 of the CC), holding that the general purposes of penal sanctions (Article 4 of the CC) – to prevent the perpetrator from committing crimes and reoffending and deter others from offending – will have been achieved, and that the penalty simultaneously reflects the social condemnation of the committed crime and the obligation to abide by the law, i.e. strengthen morality and contribute to the development of social responsibility (Article 32 of the CC).”*

It needs to be noted that a comparative solution exists in Serbian criminal law, which provides for an exception to penalty mitigation for specific crimes, including human trafficking<sup>[66]</sup>. Namely, Article 57 of the Serbian Criminal Code prohibits mitigation of penalties for human trafficking.

## ► **Witness and Victim Support Services and Information Booklet for Domestic Violence and Human Trafficking Victims and Witnesses**

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With a view to complying with the best victim protection standards, the Montenegrin judiciary established Services for Supporting Injured Parties/Witnesses in Human Trafficking, Domestic Violence and Sexual Crime Cases in all Montenegrin courts that have the jurisdiction to rule on such cases. Authorised Support Service staff extend services with a view to minimising the so-called secondary victimisation of the victims in court and to ensuring respect for the rights of all victims without discrimination on any grounds.

The view was taken that the courts' role should not boil down only to assessment of the presented evidence and decisions on the defendants' guilt or innocence. It is crucial to ensure that the injured parties (victims) in their role of prosecutor (or witness) do not feel uncomfortable because they are appearing in court. This reflects the importance of the Support Services' role, given that they are tasked with ensuring that all the victims feel safe in court and that they are not subjected to threats before, during or after trial.

The Support Services are tasked with extending support to the victims, informing them about the work of the court and their rights and obligations during the proceedings, protective measures and other issues regarding their testimony in court and protection from domestic violence and human trafficking.

In compliance with the standards on the human trafficking victims' right to be informed, the Supreme Court of Montenegro and its partner NGO Centre for Women's Rights issued the supplemented and updated edition of the **Information Booklet for Witnesses/Victims of Domestic Violence and Human Trafficking**<sup>[67]</sup> in March 2017. The Information Booklet provides answers to all questions regarding participation of witnesses and victims in court proceedings, their rights and obligations, kinds of support extended by the Support Services and contact details of staff charged with extending it.

## ► Kinds of Support Extended by Support Services<sup>[68]</sup>

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- *Practical information on the work of courts, criminal and misdemeanour proceedings, courtroom seating arrangements, your rights and obligations as victims/witnesses, protective measures and other issues regarding your appearance and testimony in court, and protection from violence or human trafficking.*
- *Emotional support and accompaniment during testimony.*
- *Meeting the victims and witnesses on their arrival to court, keeping the victims company during the trial in a separate waiting room and the courtroom.*
- *Ensuring safe and secure testimony, i.e. protection from physical assaults and insults in court before and after trial.*
- *Cooperation with the police, social welfare centres, courts and civil society organisations to ensure the provision of comprehensive support.*
- *Cooperation with prisons and probation departments.*
- *Provision of information about the release of abusers or traffickers from prison.*

The analysis of data received from courts shows that the victims/witnesses asked these Services for assistance extremely rarely. This holds true of not only victims of human trafficking, but victims of other crimes as well, including domestic violence. Lack of public awareness appears to be the main reason.

Hence the need to ensure greater dissemination of information on the existence of the Services, in order to raise the awareness of not only the general public but of the witness and victims of the specified crimes as well. This should entail display of leaflets, posters and other information materials in courts, prosecution services, police stations, out-patient health clinics and hospitals. Such materials should follow the same format and include the same information.

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[68] Source: Information Booklet

Given that victims may contact the Services even before the criminal proceedings officially begin, victims should be referred to these Services also by other stakeholders in the human trafficking protection system, not only by judges.

The sensitisation of staff charged with extending support is key to winning the victims' trust. Sometimes, the mere presence of a trusted person accompanying the victim throughout the proceedings means a lot. In that sense, continuous training should be organised for staff to upgrade their professional and practical skills prerequisite for working with victims.

The Montenegrin Supreme Court has organised two such trainings in partnership with the NGO Centre for Women's Rights to date and their evaluation showed that the Service staff were extremely interested in them and that additional trainings should be organised.

# 7. Conclusions and Recommendations:

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The following conclusions can be drawn from the research and the analysis of collected materials:

- *Montenegro has a legal and institutional network for efficiently combating human trafficking, as noted also in the EC's Montenegro 2019 Report;*
- *Human trafficking must be considered one of the gravest forms of violations of human rights and all the stakeholders in the system must act in concert to suppress and efficiently address this complex problem. Protection of the victims' rights must be the priority and the concept of protection must not depend on the victims' willingness to participate in criminal proceedings and testify;*
- *The research covered a total of 18 final judgments on human trafficking cases adopted in the 2004-2019 period;*
- *Human trafficking trials in all courts lasted two years, four months and two days on average;*
- *Human trafficking is usually perpetrated by men. Specifically, men accounted for 42 and women for six of the 48 defendants;*
- *Most of the judgments were convictions. Forty of the 48 defendants were sentenced to prison, seven were acquitted, while the court decided to dismiss a case against one individual because the prosecutor abandoned prosecution;*
- *Most of the defendants (31) were nationals of Montenegro, eight were nationals of Serbia, seven of Kosovo, one of Ukraine and one was stateless;*
- *Most human trafficking victims were women, demonstrating the strong gender dimension of human trafficking in Montenegro. Of the 39 victims identified in the judgments, 26 were women and 13 were men;*
- *Although the majority of human trafficking victims were Montenegrin nationals, the analysis shows that most of the cases had a cross-border dimension;*
- *Eight of the 39 victims of human trafficking were under age;*
- *None of the trafficking victims were awarded compensation in criminal*

*proceedings; in the view of the courts, deliberation of their claims would have prolonged the proceedings wherefore they regularly instructed the victims to pursue their claims in civil court;*

- *Sexual exploitation accounted for the most widespread form of exploitation of human trafficking victims;*
- *Other forms of exploitation – such as organ removal, forced begging and forced marriage – were not registered in the analysed court decisions*
- *The longest prison sentences handed down by courts in human trafficking cases were 17 and 15 years and the shortest was six months;*
- *The defendants' personal circumstances (marital status, parenthood, age, health, financial situation, unemployment) prevailed among the extenuating circumstances courts took into consideration during sentencing. Montenegrin courts appear to automatically refer to such circumstances not only when they sentence human traffickers but other criminal offenders as well;*
- *Although the defendants' personal circumstances are, indeed, important, courts tend to provide general and insufficiently reasoned explanations of their decisions on the sentences and qualifications of the defendants' personal circumstances as extenuating circumstances;*
- *Courts have also been applying the penalty mitigation institute frequently, in seven cases (concerning 17 defendants); commutation of sentences should be avoided given the gravity of the crime of human trafficking and comparative law practice;*
- *Victim Support Services are not fulfilling their role in practice, presumably due to lack of awareness of their existence among the general public and the victims.*

### **Recommendations:**

- *Establish a state compensation fund that will enable the victims to claim damages not only from the perpetrators but directly from the state as well (Montenegro has ratified a number of international treaties on human trafficking requiring the establishment of such a fund);*
- *It is recommended that courts decide on compensation whenever there are sufficient grounds for it in criminal proceedings;*
- *The Supreme Court of Montenegro should issue a leaflet on the trafficking victims' right to compensation of damages, given the importance of their*

*access to justice and in order to provide them with more information about their rights;*

- *Montenegro should comply with international standards and ensure that the penalties imposed for human trafficking are efficient, proportionate and deterrent;*
- *The analysis of human trafficking case law indicates the need to re-examine the courts' sentencing policy to ensure their adequate response to the crime of human trafficking;*
- *When sentencing, the courts should proceed with caution when assessing whether specific facts should be considered extenuating circumstances and whether there are particularly extenuating circumstances because of which they should impose milder penalties on the perpetrators and sentence them to penalties below the statutory limit;*
- *Courts should exercise particular caution when assessing extenuating circumstances in cases in which the victims are children and minors;*
- *Courts need to devote more attention to the explanations of their decisions on penalties, and include specific and valid reasons prompting them to consider specific circumstances as extenuating circumstances, especially the association of these circumstances with the committed crimes and the specific perpetrators;*
- *More information on the existence of the Victim/Witness Support Services should be disseminated to raise the awareness of their existence among the general public, as well as the victims; this should entail the display of leaflets, posters and other information materials in courts, prosecution services, out-patient health clinics and hospitals. The materials should follow the same format and include the same information;*
- *Other stakeholders in the support and protection system (social welfare centres, police, state prosecution services, etc.) should also refer the victims to the Support Services;*
- *Trainings upgrading the specialised skills of Support Services staff have proven useful and should continue.*



