

## **POSITION OF HUMAN TRAFFICKING VICTIMS IN COURT PROCEEDINGS**

### **- Analysis of judicial practice for 2014 -**

#### **I. Introduction**

Human trafficking is today recognized as a global problem and a phenomenon that violates basic human rights of victims and undermines values of any democratic society. Combating human trafficking requires a multidisciplinary approach which entails prevention, protection of human rights of victims and criminal prosecution of perpetrators, together with an organized cooperation of all actors in these areas of action. As a complex phenomenon, human trafficking occurs in areas of organized crime, migrations, labour and sexual exploitation of women and children in particular, as well as violence against women.

Bearing in mind the gravity of consequences suffered by victims of human trafficking, priorities of every judicial system must imply the establishing and improving of mechanisms to enable full realization of rights and protection of victims in judicial proceedings. The 2005 Council of Europe Convention on Action against Trafficking in Human Beings<sup>1</sup> along with the requirements of establishing a comprehensive legal framework for protection of victims and witnesses, and adopting specific and legally binding measures, focuses in particular on assistance for victims and protection of their human rights. In this respect, the Convention emphasizes that the research on combating human trafficking is crucial for the creation of effective methods of prevention.

Through annual analysis of judicial practice in Serbia, ASTRA – Anti Trafficking Action continues its endeavour to promote the position of human trafficking victims with the goal of achieving full realization of their guaranteed rights. The position of human trafficking victims and respect of their human rights in judicial proceedings are important not only from the aspect of each individual case and the position of victims in general, but also represent an indicator of the degree of democracy and respect for human rights and willingness of the state to combat human trafficking in an adequate manner. It is particularly important to bear in mind that the number of victims of human trafficking is increasing both globally and in Serbia. Data of the Centre for Human Trafficking Victims Protection show that the number of persons with victim status identified in 2014 increased by 26% in respect to 2013, while in 2013 the number of victims increased by 16% in respect to 2012<sup>2</sup>.

Continuation of monitoring and analysis of judicial practice in 2014 through collecting and analysis of court decisions represents a necessary extension of efforts invested thus

<sup>1</sup> Official Gazette of the Republic of Serbia – International Treaties, No. 19/2009.

<sup>2</sup> Centre for Protection of Human Trafficking Victims, Basic Statistics for Identifying Human Trafficking Victims in 2014, available at: [http://www.centarzztlj.rs/eng/images/statistika/eng/Basic\\_stats\\_for\\_trafficking\\_victims\\_of\\_2014.pdf](http://www.centarzztlj.rs/eng/images/statistika/eng/Basic_stats_for_trafficking_victims_of_2014.pdf)



far to improve the position of human trafficking victims in court proceedings. Continuous analysis of practice in this field enables monitoring changes in the implementation of the existing legal framework, degree of harmonization of Serbian legislation with international standards in this area, efficiency of existing legal norms, and represents a basis for future activities aiming to improve the position of victims in court proceedings. Since the analysis of judicial practice for previous years pointed out that, despite positive shifts in certain areas, the position of victims in court proceedings is still not in compliance with international standards in this area, continuation of monitoring and analysis of judicial practice offers a possibility to identify key problems and obstacles in realization of human trafficking victims' rights.

Monitoring the situation in practice with a special emphasis on the position of victims in court proceedings aims not only to offer a thorough overview of the problem, but also to provide a basis for further activities in order to correct the existing flaws and identify key areas that require improvement in regard to the existing legal solutions, or activities to facilitate a more consistent implementation of the existing legislation. Ensuring an efficient system for protection of human trafficking victims, and available mechanisms for realization of their rights needs to be treated as an issue of great importance both by the state and civil society organizations, given the gravity of consequences suffered by human trafficking victims. Protection of victims' privacy, timely information and counselling, safety of victims and respect for their dignity, right to compensation as well as adequate penal policy must be prioritized in the system of judicial protection.

Monitoring of judicial practice for 2014 was carried out by monitoring and analysis of first- and second-instance decisions of the Serbian courts for the purpose of obtaining a comprehensive insight into changes of the position of victims and realization of their rights, specificities such as trends in the type of exploitation the victims were exposed to, and penal policy at the annual level. The analysis of judicial practice for 2014 does not indicate any significant improvement or changes regarding the approach to the protection of interests and rights of victims in court proceedings. The degree of realization of the rights of human trafficking victims guaranteed by the ratified international documents is still not achieved in practice. This is especially true in areas of victim's safety and protection, hearing in the court proceedings and particularly victim's right to compensation. Secondary victimization, court hearing and direct confrontation with perpetrators in the court, impossibility of realization of compensation claims in criminal proceedings, along with unchanged penal policy, indicate that the existing legal framework, which has been significantly improved, is still inconsistently implemented in practice.

In the beginning of 2014, the first GRETA Report<sup>3</sup> was published for Serbia – a report by the Group of Experts on Action against Trafficking in Human Beings which monitors the implementation and fulfilment of obligations taken by the state parties under the 2005 Council of Europe Convention on Action against Trafficking in Human Beings. The Report points out that national legal framework in Serbia has been developed in line with international obligations and that significant steps have been taken in regard to legislative and institutional aspect as well as in cooperation of state authorities with non-governmental and international organizations. The Report points to similar problems as this year's analysis of judicial practice, especially the problem of protection for the victim in court proceedings, access to compensation for victims, legal aid as well as the fact that victims still depend on non-governmental organizations, which is why the Report urges

<sup>3</sup> The Report is available at Council of Europe's web page: <http://www.coe.int/trafficking>



the state authorities to use all available measures to protect victims in court proceedings for human trafficking offences and to take additional measures which would ensure protection of these persons from revenge or intimidation during court proceedings.

## **II Monitoring and Analysis of Judicial Practice**

### **1. Aims and methodology**

Like in previous years, the analysis of judicial practice for 2014 is focused on as comprehensive as possible consideration of the position and realization of victims' rights in court proceedings with regard to basic standards of protection and realization of rights and assistance for human trafficking victims set forth by the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (Palermo Protocol)<sup>4</sup> supplementing the 2000 United Nations Convention against Transnational Organized Crime, and by the 2005 Council of Europe Convention on Action against Trafficking in Human Beings.

Through the most important results and observations in regard to the position and rights of the victims in court procedures vis-à-vis minimum standards set forth in international documents, the aim of this analysis is to indicate problems in judicial practice in this field that can occur due to the flaws in Serbian legislation and inconsistent implementation of the existing legal solutions in the area of protection under criminal law or civil court proceedings for compensation.

Results and observations obtained during the monitoring and analysis of judicial practice from 2011 to 2013 pointed to serious flaws and problems in regard to implementation of existing legal norms, as well as the need for improving the existing legal regulations in certain segments of realization of human trafficking victim's rights. Thus, with the aim of further improvement of human trafficking victim's position in court proceedings, in line with the obligations taken from the ratified international documents in this field, continuation of monitoring and analysis of judiciary practice proves to be necessary and justified.

Continuous monitoring of judicial practice through the prism of the position of human trafficking victims in court proceedings allows not only an assessment of the degree of harmonization of Serbian legal norms with international standards in this field, but also of consistency in implementation of the existing legal norms in practice, uniformity of judicial practice as well as the influence of training implemented thus far for persons employed in the judiciary on correct consideration and understanding of the position of victims of this serious crime in court proceedings. Continuation of monitoring and analysis of judicial practice is still focused on the objective comprehension of the problem in practice as a further basis for the improvement of the efficiency of legal protection and position of human trafficking victims.

Analysis of judicial practice for 2014 is based on a qualitative and quantitative analysis of court decisions issued in the course of 2014 in criminal court proceedings in the first instance or in proceedings upon appeal. Information on the number of both pending and concluded court proceedings and the majority of court decisions which were analyzed, are

<sup>4</sup> Official Journal of FRY – International Treaties, no. 6/2001.



obtained in accordance with the Law on Free Access to Information of Public Importance, from first-instance and second-instance courts for proceedings before these courts in the course of 2014 pertaining to the crime of mediation in prostitution, crime of human trafficking and crime of trafficking in children for the purpose of adoption.

A total of 45 court decisions issued in criminal proceedings in 2014 were analyzed, both by first-instance courts (subject matter jurisdiction of the Higher Courts in Belgrade, Novi Sad, Zrenjanin, Sombor and Niš) and second-instance courts in the proceedings upon appeal (subject matter jurisdiction of the Courts of Appeal in Belgrade, Novi Sad, Niš and Kragujevac). Out of the total number of court decisions, this analysis includes 10 first instance judgements (out of which none are final) and 35 appellate courts' judgement (6 of which pertain to analyzed decisions rendered by first-instance courts), taking into consideration that a certain number of second instance decisions pertain to the proceedings for pronouncing aggregate sentences.

Analysis of judicial practice used parameters important for assessment of victim's position in regard to protection and realization of basic rights in court proceedings. Quantitative (statistical) analysis presented in the section containing general data and pertaining to the type of crime, duration of court proceedings, type of judgement and severity of sentences as well as data on the defendants and injured parties was based on first instance judgements, while second instance judgements represented the basis for determining the type of the decision (confirmed, revoked and reversed first instance judgements). Qualitative analysis on the basis of available statistical data as well as detailed analysis of all first and second instance judgements, deals with the issue of position and rights of the human trafficking victims through most important aspects such as protection of victims' privacy, counselling and information, safety and protection, while the aspect of hearing of the victim in court proceedings is separately presented as well as the right to compensation for damages. In addition to these aspects of protection and realization of the rights of the victims in court proceedings, through presentation of individual cases the analysis also deals with types of exploitation to which the victims are exposed, and addresses the topic of penal policy which is an indicator of the attitude of the judicial system and the state towards certain crimes.

The structure of the analysis, like in previous years, follows the guidelines of the most important international documents that dedicate special attention to measures for provision of victims assistance and protection aiming to improve their position, such as *protection of privacy and identity of the victims* (Art. 6, Palermo Protocol and Art. 11, Council of Europe Convention on Action against Trafficking in Human Beings), *assistance to victims – provision of information and assistance in exercising the rights and fulfilling the interests of victims in court proceedings and measures for security of victims* (Art. 6, Palermo Protocol and Art. 12 and 15, Council of Europe Convention), and *compensation* (Art. 6, Palermo Protocol and Art. 15, Council of Europe Convention). With each individual segment of rights and position of the victims, possibilities and legal solutions envisaged in the Criminal Code<sup>5</sup>, Law on Juvenile Offenders and Criminal Justice Protection of Juveniles<sup>6</sup> as well as the latest Criminal Procedure Code<sup>7</sup> that brought about significant changes which, if implemented consistently, can contribute to the improvement of the position of human trafficking victims, were all considered too.

<sup>5</sup> Official Gazette of Republic of Serbia, Nos. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013 and 108/2014.

<sup>6</sup> Official Gazette of Republic of Serbia, No.85/2005.

<sup>7</sup> Official Gazette of Republic of Serbia, Nos. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 and 55/2104.



For the purposes of this analysis, victims of human trafficking or other related crimes which are the subject of this analysis, the following terms are used: "victim of human trafficking", "victim", "injured party" or "injured person". The term "defendant" is used as a general term to indicate a suspect, accused, defendant and convicted person, in line with the meaning of the term defined in Art. 2 of the Criminal Procedure Code.

## 2. Courts' data on number of conducted and concluded proceedings

With the aim of presenting as many as possible court judgements which would be the subject of this analysis as well as data on the number of initiated and concluded court proceedings for relevant criminal offences, competent courts were sent a request to send these data, in accordance with the Law on Free Access to Information of Public Interest. Information was requested from first-instance and second-instance courts on the number of proceedings which were conducted before them in the course of 2014 for criminal offences of mediation in prostitution under Art. 184, Criminal Code; human trafficking under Art. 388, Criminal Code; and trafficking in children for adoption under Art. 389, Criminal Code.

According to the data obtained from the competent first-instance courts, during 2014 there were no proceedings initiated before the Higher Court in Belgrade for crimes under Criminal Code Art. 184 and 389, while for the crime under Art. 288, 13 proceedings were initiated and 4 judgements were rendered, 2 of which became final in the meantime. Before the Higher Court in Novi Sad, 3 proceedings were conducted under Art. 388, of which one was concluded and 2 are still pending; for the crime under Art. 388 of the Criminal Code 14 proceedings were conducted, out of which 6 were concluded, 1 is before the Court of Appeal, while 7 remained pending; there were no proceedings for crime under Criminal Code Art. 389. According to the records of the Higher Court in Sombor, for crime under Art. 388, 3 proceedings were conducted, out of which 1 was concluded, 1 is still ongoing and 1 is before the Court of Appeal; there were no proceedings conducted for crimes under Art. 184 and 389. The Higher Court in Niš sent data on 3 pending and 1 concluded proceedings for the crime under Art. 388; for crimes under Art. 184 and 389 there were no proceedings initiated. One trial was conducted in 2014 before the Higher Court in Leskovac in which the defendants were charged with committing the crimes under Art. 184 and 388 of the Criminal Code, while there were no proceedings conducted for the crime under Art. 389.

Information obtained by the second-instance courts show that only one proceeding was conducted and concluded in 2014 before the Court of Appeal in Belgrade for crime under Art. 184 of the Criminal Code; for the crime under Art. 388 the proceedings were concluded in 4 cases, in 3 cases the first instance judgements were revoked and the case was returned to the first-instance courts, while one case is still pending; there were no proceedings conducted for the crime under Art. 389. Before the Court of Appeal in Niš one case was received and one case concluded for the crime under Art. 184; for the crime under Art. 388 2 cases were received and 5 concluded; for the crime under Art. 389 there were no cases recorded. 4 proceedings were conducted during 2014 for crime under Art. 388 before the Court of Appeal in Kragujevac, wherein 2 final decisions were rendered; 2 proceedings for criminal offence under Art. 184 in which final decisions were not reached; 2 proceedings for the crime under Art. 184 where final decisions were not rendered; for the crime under Art. 389 there were no proceedings conducted.



On the basis of information sent by the aforementioned courts, in 2014 a total of 40 court proceedings were conducted before first-instance courts for the crime of human trafficking, out of which final decisions were issued in 11 cases; while for the crime of mediation in prostitution 4 proceedings were conducted in this period, out of which the final decision was issued in 1 case. 19 court proceedings were conducted upon appeal before the second-instance courts which sent the data, out of which 11 were concluded during 2014. For the crime of trafficking in children for adoption, under Art. 389 of the Criminal Code, there were no proceedings conducted before either first-instance or second-instance courts.

### **III Analysis of Court Judgements**

#### **1. General data and observations**

Following the continuous monitoring of the position of human trafficking victims through the analysis of judicial practice during 2011, 2012 and 2013, ASTRA continued to monitor this area during 2014. Analysis of judicial practice for 2014 is based on quantitative and qualitative examination of court decisions rendered by first- or second-instance courts. Although the focus was on court proceedings, i.e. decisions concerning the crime of human trafficking, judgements pertaining to the crime of mediation in prostitution were also included, taking into consideration that in practice these crimes often overlap and that initial qualifications of the crime and charges for the crime of human trafficking in certain number of cases have the epilogue of sentencing for the crime of mediation in prostitution.

A total of 45 court decisions issued in criminal proceedings in 2014 were analyzed, rendered both by first-instance courts (subject matter jurisdiction of the Higher Courts in Belgrade, Novi Sad, Zrenjanin, Sombor and Niš) and second-instance courts in the proceeding on appeal (subject matter jurisdiction of the Courts of Appeal in Belgrade, Novi Sad, Niš and Kragujevac). Out of the total number of court decisions, this analysis includes 10 first instance judgements and 35 appellate courts' judgements (6 of which pertain to analyzed decisions by first-instance courts), with a certain number of second instance decisions pertaining to the proceedings for pronouncing an aggregate sentence.

The quantitative (statistical) analysis presented herein and pertaining to the type of crime, duration of court proceeding, type of judgement and severity of sentences as well as data on the defendants and injured parties, was based on first instance judgements, while second instance judgements represented the basis for determining the type of the decisions (confirmed, revoked and reversed first instance judgements). Qualitative analysis, combined with statistical data, also deals with the position and rights of victims of human trafficking through their most important aspects, and is based on both first and second instance court judgements. These aspects are: protection of victims' privacy, counselling and information, safety and protection, while aspects presented separately are the hearing of the victims in court proceedings and right to compensation of damages. In addition to these aspects of protection and exercise of the victims' rights in court proceedings, the analysis also includes the type of exploitation the victims are exposed to, presentation of individual cases and penal policy.

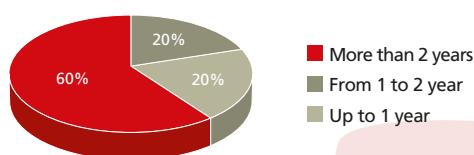
Almost all first instance judgements issued during 2014 in criminal proceedings pertain



to the crime of human trafficking under Art. 388 of the Criminal Code, except for individual cases of sentencing for the crime of mediation in prostitution under Art. 184 of the Criminal Code. Out of 10 first instance judgements which were the subject of the analysis, one is not final. Statistical analysis shows that the proceedings for the crime of human trafficking were conducted against 15 defendants, out of whom one defendant was simultaneously indicted for other crimes, while 2 defendants were charged with two crimes of human trafficking. Two defendants who had been previously charged with the crime of human trafficking were sentenced for the crime of mediation in prostitution (this is the only case which has not been finally concluded).

The duration of first instance proceedings was analysed relative to the time elapsed from the filing the indictment to rendering the first instance judgement. According to this criterion, maximum duration of court proceedings is 5 years and 8 months, while average duration of court proceedings is 1 year and 8 months. The majority of court proceedings were concluded in one year or less (6-10 judgments analysed), while the shortest lasting trial lasted only one month. Only 2 court proceedings lasted longer than 2 years. These data show that the first instance court proceedings are concluded in a shorter period of time compared to the previous years. In 2013 court judgements were issued within one year only in 19% of cases, while in 2014 they increased to 60%, although the percentage of court proceedings lasting longer than 2 years is only slightly decreased (from 25% to 20%).

Duration of the trial



Graph 1

Data obtained from statistical processing of first instance judgements show that out of a total number of persons charged with human trafficking the defendants were convicted in 46% of cases – a total of 7 persons were pronounced guilty, and out of them, one case is a judgement issued on the basis of the plea agreement. All were sentenced to a term of imprisonment. 2 persons were pronounced guilty for the crime of mediation in prostitution although they had been initially charged with the crime of human trafficking (this judgement is not final). Judgements acquitting the defendants of the charges were issued in 27% of cases (4 defendants) in two different court proceedings: in one because of the lack of evidence; in the other, as stated in the reasoning of the judgement, as a consequence of the failure of the competent prosecutor to state the crucial element of the human trafficking crime, i.e. the act of committing the concrete criminal offence, in the facts of the indictment. One proceeding against a defendant was finalized by rejecting the charges since the competent public prosecutor's office abandoned the charges when the injured parties as privileged witnesses used their right not to testify. One defendant died during the conduct of proceedings.



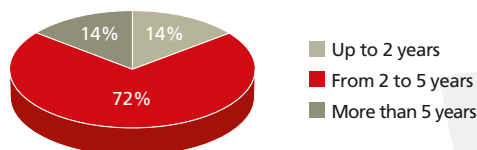
### Judgements



Graph 2

In regard to the severity of penalties pronounced for the crime of human trafficking, majority of defendants were sentenced to 2-5 years of imprisonment – 72% of cases. Term of imprisonment of up to 2 years was pronounced in 14% of cases, while the remaining 14% of cases were sentenced to more than 5 years of imprisonment. Statistical data indicate that the average duration of imprisonment for this crime is 3.9 years. The highest individual penalty pronounced is a term of imprisonment of 5 years. The longest total term of imprisonment is 6 years; while the lengths of other penalties range from 3.5 to 5 years of imprisonment. The shortest penalty ordered for the crime of human trafficking is 1 year of imprisonment. In this case the court found particularly mitigating circumstances on the side of the defendant and mitigated the penalty below the legal minimum (for existence of conditions allowing application of the former criminal law before the legislative amendments which abolished the possibility to mitigate the penalty for this crime below the legal minimum). In this case, the second-instance court modified the first instance sentence in the part pertaining to the modality of execution of the sentence and decided that the prison sentence will be executed in the premises in which the defendant lives. Comparing the penal policy with the data from the 2013 analysis leads to the conclusion that the average severity of penalties does not significantly differ compared to 2013, while it can be noted that the percentage of the sentenced term of imprisonment of more than 5 years decreased from 27% to 14% and that the penalties ranging from 2 to 5 years were sentenced more often than in the previous year (increase from 54% to 72%).

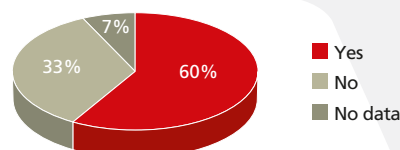
### Total duration of the sentence for the crime of human trafficking



Graph 3

Detention during the trial was ordered for 9 defendants, while for one defendant there was no data available. Thus, the total data does not differ from the previous year.

### Was the defendant detained?

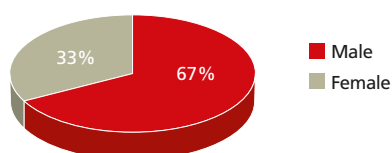


Graph 4



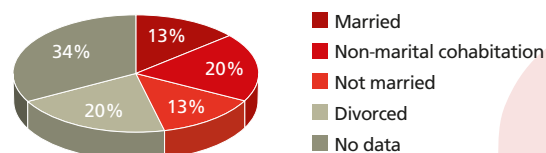
Analysis of the defendants' personal data led to the conclusion that they were mainly citizens of Serbia (11 defendants, out of whom 1 had dual citizenship of the Republic of Serbia and Republic of Croatia, while there is no data available for 4 defendants) and male (67%). These data do not significantly differ from the previous analysis for 2012 and 2013. Data for determining age distribution of the defendants at the time of commission of criminal offence are still incomplete and cannot provide an accurate picture of this aspect. In relation to marital status, 13% of the defendants were married, 20% lived in a non-marital cohabitation and 20% were divorced. All defendants for which data are available (12) had children, often minors (7 persons), and almost 50% had more than 3 children. The fact that defendants had children was assessed by the court to be a mitigating circumstance in all such cases, even where the defendant committed the crime against his/her own child.

**Defendants by gender**



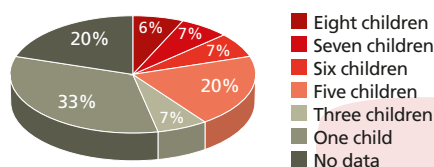
**Graph 5**

**Defendants by marital status**



**Graph 6**

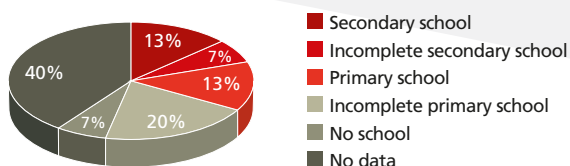
**Do the defendants have children?**



**Graph 7**

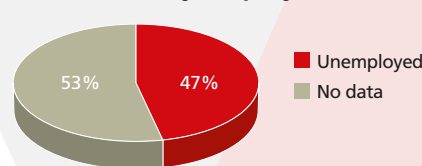
Statistical analysis of education and employment status of the defendants indicate lower educational level and high rate of unemployment. In regard to education, data are unavailable for 6 defendants, while the available data indicate that 2 defendants completed high school, one defendant completed three grades of high school, 2 defendants completed primary school, 3 defendants never completed primary school, and one defendant attended no school. Analysis of the available data of defendants' employment status (7 persons) indicates that they are all unemployed, which was not always stated as a mitigating circumstance in sentencing.

**Defendants by education**



**Graph 8**

**Defendants by employment status**

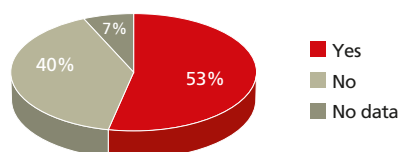


**Graph 9**

In regard to previous convictions, statistical data of the analyzed court judgements show that 53% of the defendants had not been previously convicted (none of the defendants

had been previously convicted for the crime of human trafficking, while one had been convicted for the crime of domestic violence). These data do not differ in percentage from those of 2012 and 2013 analysis. Previous convictions were assessed by the court as aggravating circumstance in determining the penalty.

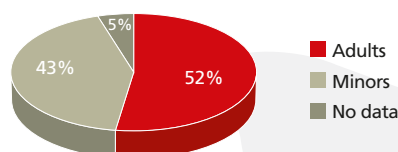
**Previous convictions**



**Graph 10**

Out of the total of 21 victims of human trafficking who had the status of injured parties in analysed first instance judgements, 18 persons were female. In relation to age, it is significant to note that a large percentage of victims at the time when the crime was committed, like in the analysis of the previous years, were still minors – just slightly less than a half (43%), while the youngest person was 7 years old at the time when the crime was committed. Analysis of the first instance court judgements indicates that in most cases the victims were exposed to sexual exploitation (prostitution and other form of sexual exploitation), thus 7 out of 10 court judgements pertain to this type of exploitation of injured parties. Two judgements pertain to forced begging, while one concerns coercion to commit criminal offences. It is also significant to note that in half of the cases (5 judgements) the defendants and victims were relatives, i.e. members of extended family, and that in these cases the defendants were the victim’s spouse or the non-marital partner (cohabitee), parent (father/mother) or relative (uncle/aunt) as well as that in two court judgements the existence of domestic violence was confirmed (in one case the defendant’s conditional sentence for the crime of domestic violence was revoked). Victims who submitted the compensation claim were referred to the civil litigation in all cases.

**Victims by age**

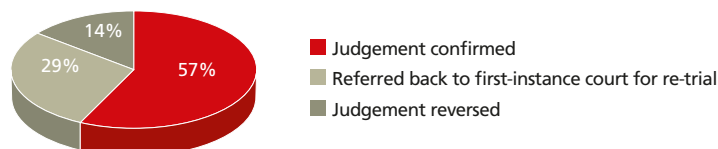


**Graph 11**

The total of 35 second instance court judgements (issued on appeal) were collected and analysed, 8 of which pertain to the crime of mediation in prostitution. A certain number of second instance judgements pertain to proceedings for pronouncing an aggregate sentence. In the proceedings upon appeals, the first instance judgements were confirmed in 20 cases (57%), in 10 cases the first instance judgement was revoked and returned to the first-instance court (29%), while in 5 cases the Court of Appeal reversed the first instance judgements (14%). In 2 cases, the second-instance court decided to reverse the decision on the penalty and sentenced the defendants to a longer term of imprisonment; in one case the sentence was reversed in regard to the modality of execution of the sentence; and in one case the acquittal was reversed and the defendant was found guilty. The longest period of deciding in a proceeding, counted from the day of issuing the first instance judgement

to the day of issuing the second instance one was 2 years. Analysis of the second instance judgements also shows that a large number of victims were exposed to sexual exploitation (prostitution or other forms of sexual exploitation) – 13 judgements in total. However, this number is probably higher, taking into consideration that a certain number of judgements upon appeal does not contain the data on concrete acts the defendants were charged with.

Decisions on appeal



Graph 12

## 2. Position and rights of victims

This analysis of judicial practice, i.e. court judgements issued in 2014, similarly to the previous ones, focuses on the assessment of the human trafficking victims' position in court proceedings, following the basic standards of protection and realization of human trafficking victims' rights and assistance envisaged in relevant international documents in this field. The most important documents such as Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime dating from 2000 (Palermo Protocol) and Council of Europe's Convention on Action against Trafficking in Human Beings from 2005, emphasize the protection and improvement of the human trafficking victims' position as one of the basic goals, especially protection of victims' human rights and creation of a comprehensive framework for protection and assistance. These international standards dedicate special attention to measures for ensuring protection and assistance to victims with the goal of improving their position such as protection of privacy and identity of victims, assistance to victims – providing information and assistance in realization of rights and interests of victims in court proceedings and measures for security of victims, as well as measures for realization of compensation of damages.

Analysis of court judgements can therefore offer important data on acting of competent prosecutor's offices and courts, that is, on measures taken to ensure safety and security for victims, especially during the hearings, as to protect victims' rights and avoid secondary victimization but also to simultaneously ensure high quality testimony in the interest of correct conduct of the proceeding and determining criminal liability. Also, bearing in mind that the Criminal Procedure Code introduced new important provisions in this area, the analysis of judicial practice represents a relevant indicator of the degree of implementation of new legal solutions which could improve the position of human trafficking victims. Special rules for examination of victim with the status of especially vulnerable witness can be of particular importance for this field (such as special attention treatment, questioning with the assistance of psychologist or social worker, questioning by using technical equipment without the presence of other participants, hearing in one's apartment or other authorized institution, prohibition of confrontation without the consent of especially vulnerable witness); improved measures which may be ordered during the proceedings, such as prohibition of approaching, meeting and communicating with the specific person, supervision of which is maintained by the police; amendments



which pertain to realization of compensation claim and provide a basis for deciding on the claim within the criminal proceedings.

### **2.1. Protection of victim's privacy**

One of the basic preconditions for protection of human trafficking victims in court proceedings is the protection of victims' privacy indicate in the Art. 6 of the Palermo Protocol and Article 11 of the CoE Convention on Action against Trafficking in Human Beings.

Despite this, the existing provisions on exclusion of the public as well as the institutes of protection of witnesses and injured parties in proceedings for human trafficking are not sufficiently implemented in practice. This is especially surprising taking into consideration that according to the Criminal Code the crime of human trafficking belongs to the group of particularly serious crimes. Adequate implementation of legal provisions which would enable protection of identity and privacy of victims, as well as safety, is largely a consequence of insufficient understanding of vulnerable position of human trafficking victims by judges and prosecutors.

This aspect of protection of human trafficking victims is especially important when data on the age of victims and type of prevailing exploitation are taken into consideration. Data from 2014, like those contained in the analysis for the previous years, indicate that a large percentage of victims – 43% – were again persons who at the time of commission of the offence were minors, the youngest being only 7 years old at the time when the crime was committed. Analysis of the first instance court judgements indicates that in most cases victims were exposed to sexual exploitation (prostitution and other forms of sexual exploitation), thus 7 out of 10 court judgements pertain to this type of exploitation of injured parties. A large number of this type of exploitation is also recorded in second instance judgements – 13 – the share being probably higher since the judgements on appeal do not always contain these data.

By the analysis of the first instance court judgements it can be determined that the public was, as stated, excluded from the main hearing in 5 cases on legally stipulated grounds – protection of the minors, that is, when the injured parties were minors.

The stated data indicate that the measures for protection of privacy and identity of victims are not sufficiently implemented in court proceedings in spite of the binding international standards and constitutional provisions which envisage the possibility of exclusion of the public to protect the privacy of the participants in the proceedings. Provisions of the Criminal Procedure Code offer this possibility since it is prescribed (Art. 363) that the panel may *ex officio* or at the proposal of parties or defence exclude the public during the entire main hearing or one part of it if this is necessary because of the public order and morale, interest of minors or privacy of the parties. In this case, however, the panel can allow the presence of expert public and, on the request of the defendant, the presence of his/her spouse or close relatives who are required to maintain confidentiality of everything they learn at the hearing (Art. 364).

Also, the provisions of this Code pertaining to especially vulnerable witnesses (Art. 104) prescribe the possibility of examining the witness without presence of parties or other participants in the proceedings in the room where the witness is located if examined by using technical devices for transmission images and sound, which would certainly need to find its application in cases of victims of human trafficking.



## **2.2. Assistance to victims – counselling and information**

Another important aspect for reviewing the position of victims in court proceedings is assistance to victims, i.e. provision of information and assistance in realization of the rights and interests by the victims in court proceedings (Art. 6 of the Palermo Protocol and Art. 12 and 15 of the Council of Europe Convention on Action against Trafficking in Human Beings). As mentioned above, the absence of monitoring of trials in this area necessarily leads to the fact that certain aspects cannot be the subject of detailed analysis since court judgements by their nature do not contain data which would be significant for the analysis of degree of realization of rights in certain areas and this is particularly true for the area of providing information and assistance in realization of rights and interests of the victim in court proceedings.

The law prescribes the duty of the authority conducting the proceedings to advise participants in the proceeding about the rights to which they are entitled, and is required to caution the participants in the proceedings where they might omit to perform an action or fail to exercise a right due to ignorance (Art. 8 of the Criminal Procedure Code). In addition, public prosecutor and the court are obliged to inform the injured party of his/her rights in the proceeding (Art. 50 of the Criminal Procedure Code). Bearing in mind that the Constitution guarantees the right to legal aid in cases prescribed by the law, it is clear that the adoption of the law on free legal aid, together with advancement of especially vulnerable victims' position in court proceedings represents one of the priorities in realization of the right to timely information and free legal aid, and representation in criminal proceedings.

In 2012 the Ministry of Justice adopted Special Protocol on actions of judicial bodies to protect victims of human trafficking in the Republic of Serbia. The Protocol emphasizes the role of the judiciary, particularly of the prosecutor's offices, in relation to observance and realization of victims' rights in criminal proceedings. The Protocol provides for the duty of the public prosecutor to build a relationship of confidence with victims, to provide them full information about the proceedings, to advise the victims about their rights, obligations and their role in the proceedings, as well as to assess by interviewing them the need for professional psychological, psychiatric or medical assistance, and at the same time to provide information about the non-governmental organisations engaged in provision of support to victims of human trafficking. It is significant to notice that the Centre for the Protection of Human Trafficking Victims has been established in 2012, with the purpose of identification and referral of victims to assistance. The activities of the Centre are also recorded in the reasoning of the analysed first instance judgements.

The first GRETA Report for Serbia states that victims of human trafficking depend on non-governmental organisations for the provision of legal aid, and urges the Serbian authorities to adopt measures to facilitate and guarantee systematic provision of information to victims. The Report also states that in Serbia there is a lack of funds for providing assistance for victims of human trafficking.

## **2.3 Security and protection of victims**

The obligation to provide the system of measures for security, safety and protection of victims of human trafficking (Art. 6 of the Palermo Protocol and Art. 12 of the Council of Europe Convention on Action against Trafficking in Human Beings) represents one of the most important aspects in realization of victims' rights in court proceedings. Analysis of court judgements indicates that this aspect has still not received sufficient attention,



especially in the segments of court proceedings such as hearing or confrontation of the victim with the defendant. This will be further elaborated in the section 2.4. Hearing.

As shown in the data for the previous years' analysis, victims usually react with fear and anxiety to the presence of the defendants. This indicates that victims feel safest when the defendants are in detention. Statistical processing of data obtained from the first instance court judgements for 2014 shows that during the trial, detention was ordered for 9 defendants (60% of cases), while there were no data on detention for one defendant. Thus, data do not differ in respect to the previous year. Even in situation when the defendant is in detention, the victims' safety can sometimes be jeopardized by friends and family of the defendant.

Although the analysis of court judgements provides less information on safety of the victim, unlike monitoring of trials, except in regard to statements found in the reasoning of the decisions pertaining to hearing or confrontation, in some cases useful data can be obtained from evidence stated in the reasoning of the judgement, such as reports by guardian authorities or other bodies providing protection for victims, in which the aspect of victims' safety is mentioned. One analysed case states the findings and opinion of the Centre for the Protection of Human Trafficking Victims which indicates that injured parties (defendant's wife and minor daughter) were receiving threats from defendant's friends and death threats from his family although the defendant was in detention and that the change of statements by the injured parties was to a possibility to consider; also, the findings and the opinion of guardian authority which states that injured parties were threatened: "the defendant was threatening from prison through his neighbours and relatives that he will slaughter them all with the knife when he is released from prison", with the assessment that there is a high risk of escalation of the existing domestic violence upon his release from prison.

Since the victims in most cases react negatively to the presence of the defendants, the actions of the authorities conducting proceedings, more precisely the competent prosecutor's offices and courts, need to be focused on ensuring security and safety of victims, especially during the hearing, in order to protect victims' rights and avoid secondary victimization but also to simultaneously ensure high quality of both content and essence of the testimony in the interest of correct conduct of the proceeding and determining criminal liability. If all available measures to ensure victims' safety are not taken, the odds are increased that the victims will change their testimony because of pressures or threats and fear they feel or provide an untrue testimony or use their right not to testify when such a legal option exists.

Provisions of the Criminal Procedure Code prescribe the duty of the court to protect the injured party from an insult, threat or any other attack (Art. 102), which with the provisions on especially vulnerable witnesses (Art. 103. and 104) can provide a higher degree of safety and protection of rights for victims of human trafficking. Analysis of judgements cannot establish if any of the cases applied these legal provisions or other measures (except detention) that can contribute to the protection of the victims, such as measures to secure the presence of the defendant and unobstructed conduct of criminal proceedings prescribed in Art. 188 – prohibition of approaching, meeting or communicating with a certain person and visiting certain places.

In its Report for Serbia GRETA points in particular to the problems in this area and urges



the state authorities to make full use of the measures available to protect victims and witnesses of human trafficking and to take additional measures to ensure that they are adequately protected from potential retaliation or intimidation in the course of judicial proceedings, including by reviewing the practice of direct confrontation of victims with suspected traffickers in court.

#### **2.4. Hearing**

Provisions of the Palermo Protocol and the CoE Convention referring to protection of human trafficking victims' rights and exercise of their rights in the proceedings must be particularly evident in the course of the questioning of victims. The actions of the competent prosecutor's offices and courts must be focused on ensuring safety and security of victims especially during the hearing, in order to safeguard the rights and interests of victims, avoid secondary victimisation, but also to simultaneously ensure high quality testimony in the interest of correct conduct of the proceeding and determining criminal liability.

In regard to the position of victims of human trafficking as injured parties in criminal proceedings analysis of judicial practice for 2014 points to similar results and problems established in the analysis for the previous years. The position of the victim in criminal proceedings has not been improved in regard to human trafficking victim's rights such as right to information, protection of privacy and security, and it is still far from the standards set forth by the ratified international documents in this area.

Statistical analysis of the first instance court decisions covers a total of 19 human trafficking victims with the status of injured parties. Number of minor injured parties is still high, 9 persons (43%), the youngest being 7 years old at the time when the crime was committed. Analysis of the first instance judgements determined that, as noted, the general public was excluded from the main hearing in 5 cases for reasons stipulated by the law – for the purpose of protecting the interest of minor injured party, that is, when the injured parties were underage persons. One injured party was not examined as witness since the guardian authority initiated proceedings for complete deprivation of legal capacity and a temporary guardian was appointed for her.

As in the court judgements analysed during previous years, it is evident that the prevalent practice in most cases which were the subject of analysed court judgements is to examine victims of human trafficking at the main hearing in the presence of the defendants, despite the existing adequate legal framework which provides the basis for avoiding or at least reducing to a minimum secondary victimization. It may be concluded that the practice of examining the injured parties in the presence of the defendants, and even having the injured party confronted with the defendants, is still present, wherein the assessment of credibility of victim's testimony is put forward to his/her interests, since they are exposed to secondary victimization and re-traumatization, as indicated by certain examples from the practice. In one case it was stated that the minor injured party stopped testifying during the main hearing and "started crying, fearing the defendant". This was followed only by a statement regarding the credibility of her testimony – that it was given in a clear manner, with many details.

Direct confrontation of the victim with perpetrators of the crime, i.e. defendants in court proceedings, is probably the most traumatic for victims of human trafficking. Analysis of the first instance judgements shows that in one case confrontation of the injured party



with the defendant was carried out with the statement that the injured party “remained consistent in her testimony during the entire proceedings, including the confrontation with the defendant, even if she had stated that she was afraid”. In another case it was recorded that the injured party was confronted with the witness. Application of legal provisions on confrontation seem utterly inadequate when it comes to victims of human trafficking, especially bearing in mind the provisions of the Art. 89 of the Criminal Procedure Code prescribing that the defendant may be confronted with the witness if their statements do not match in respect of facts which are being proved, which is surely not imperative in all cases. The very modality of carrying out the confrontation prescribed by the law (“the persons confronting each other are placed facing each other and are asked by the authority conducting proceedings to repeat to each other the statements about every disputed circumstance and to discuss the veracity of their statements”) indicates its incompatibility with the basic rights of human trafficking victims in court proceedings. The practice shows that the sensation of fear and insecurity which the victim is feeling during the hearing in the presence of the defendants influences not only her/his psychological condition but also the credibility of her/his testimony. Thus, protection of victims’ safety during testifying represents a general interest. On the basis of the analysis of judgements it may be determined that in one case the competent prosecutor’s office abandoned the charges after the injured parties as privileged witnesses used their right not to testify. This problem is also pointed out in the report (findings and opinion) of the Centre for the Protection of Human Trafficking Victims contained in the reasoning of one first instance judgement concluding that “because of the existence of family relations between the defendants, injured parties and witnesses, the possibility of changing the witnesses’ and injured parties-witnesses’ statements should be taken into consideration due to pressures and threats”.

Consistent implementation of the existing legal solutions which are harmonized with international standards, together with understanding of the specific position of the human trafficking victims by the court or prosecutor’s office can to a great extent lead to improvement of the position of human trafficking victims in criminal proceedings. This particularly pertains to the provisions of the Criminal Procedure Code concerning rules for examination of persons with the status of especially vulnerable witness (treatment with particular care, examination conducted with the assistance of a psychologist or social worker, examination using technical devices without presence of other participants in the proceeding, examination in his/her dwelling or other premises or in an authorised institution, prohibition of confrontation with the defendants without the consent of the especially vulnerable witness), as well as the provisions of the Law on Juvenile Offenders and Criminal Justice Protection of Juveniles (possibility of examining minor injured persons using technical devices for transmission of images and sound, that is, examining without the presence of the parties or other participants in the proceeding), which are rarely or never used in practice.

GRETA Report for Serbia indicates particularly problems in this area, and the state authorities are urged to make full use of the measures available to protect victims and witnesses of human trafficking and to take additional measures to ensure that they are adequately protected from potential retaliation or intimidation in the course of judicial proceedings, including by reviewing the practice of direct confrontation of victims with suspected traffickers in court. Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims states that, without prejudice to the rights of the defence, Member States shall ensure that victims of trafficking in



human beings receive specific treatment aimed at preventing secondary victimisation by avoiding, as far as possible and in accordance with the grounds defined by national law, unnecessary repetition of interviews during investigation, prosecution or trial as well as visual contact between victims and defendants by appropriate means including the use of appropriate communication technologies, avoid giving of evidence in open court and unnecessary questioning concerning the victim's private life.

## **2.5. Compensation of damages**

The right to compensation of victims of trafficking as one of the essential issues in the area of realization of human trafficking victims' rights is included in international standards of protection such as Art. 6 of the Palermo Protocol and Art. 15 of the Council of Europe Convention on Action against Trafficking in Human Beings. The existence of an adequate legal framework which is a guarantee for human trafficking victims' exercise of the right to compensation of damages is also undeniable in national legislation.

Despite this, the analysis of the judicial practice shows that the practice in this area is almost inexistent, bearing in mind that so far there has been only one case in which a human trafficking victim realized her right to compensation, after conclusion of the criminal proceeding and after years of civil proceeding. This proceeding was finalized in 2014 but because of its importance it was also presented in the analysis of judicial practice for 2013, taking into consideration that the judgement had become final in the time of the creation of the analysis for 2013. The civil proceeding that lasted 3 years was conducted against five persons who had been previously sentenced for committing the crime of human trafficking, and the victim was awarded the total of 1,000,000.00 RSD for emotional pains suffered due to the violation of personal rights and suffered fear. Detailed analysis of the first and second instance judgement in this proceeding can be found in the analysis of judicial practice for 2013<sup>8</sup>.

Analysis of court judgements issued in criminal proceedings in 2014 shows that the situation in this area has not changed in respect to previous years. In criminal proceedings, in situations when the victims acting as injured parties submit their compensation claims, the court still does not decide on these claims but instructs them to realize these claims through civil proceedings. Victims submitted their compensation claims in the majority of the cases, but in none of the cases it was demanded that the claim is fully or partially decided on in the criminal court decision. Bearing in mind the new solutions in the area of criminal procedure legislation, consistent application of the existing legal provisions would certainly encourage the victims to claim compensation in all cases, as well as their attorneys to demand that the compensation is decided on within criminal proceedings.

Data obtained from the first instance judgements indicate that the injured parties are instructed to realize these claims through civil proceedings in all cases where the legal preconditions are fulfilled (3 first instance judgements). In one case it is stated that the court referred the injured parties to civil proceeding for realization of the compensation claim since such claim was not submitted in terms of the amount claimed and thus it could not be decided upon.

In cases where compensation claims are submitted, application of new legal solutions provides sufficient grounds to decide on the claim in the criminal proceeding, especially bearing in mind the fact that judicial and medical expertise of the victim's condition is

<sup>8</sup> Available at the ASTRA internet presentation: <http://www.astra.org.rs/wp-content/uploads/2015/01/ASTRA-Legal-Analysis-2013.pdf>



required in all cases, and that the reports of court experts often include enough data to serve as evidence for deciding on type and amount of damages suffered, especially non-material damage. Psychiatric evaluations are highly detailed and indicate that the existence of harmful consequences due to the crime suffered was established in a large number of victims, including anxious depressive disorders and even psychiatric ward hospitalization due to the mental health impairment. One judgement states a detailed expertise of the fear suffered by the injured parties in terms of intensity, duration and consequences, which is entirely suitable to serve as a ground for deciding on non-material damage.

Of course, it needs to be noted that there are exceptions regarding the quality of court experts' findings. In one case pertaining to a 14 year old girl who was only 12 at the time when the crime was committed, and exposed to labour and sexual exploitation and physical abuse (physical injuries were inflicted by blows of baton and cable), the court expert's findings and opinion concluded that the "critical event, apart from the present fear and waking up during the night, did not have a character of a strong traumatic experience for the child but had momentary effect with moderate intensity of fear and did not leave subsequent negative sequences in her functioning".

The Criminal Procedure Code has introduced significant changes in regard to realization of compensation claims (Art. 252-260), which provide better legal basis for deciding upon such claims in criminal proceedings. It prescribes the duty of the authority conducting the proceeding to collect evidence for deciding upon claim even before the claim is submitted, unless it would significantly slow down the proceedings. Also, there is a possibility within criminal proceedings, under the provisions of the law regulating the procedure of enforcement and securing, to adopt interim measures to secure compensation claims arising from the commission of the crime. It is stipulated that the court will award compensation claim partially or in full, as a part of the sentence pronouncing the defendant guilty, while the claimant is instructed to claim the remaining amount in civil proceedings, except when the data gathered in the criminal proceedings fail to provide reliable foundation for either partial or full award of compensation, in which case the court instructs the authorized person to claim the full amount of the compensation in civil proceedings.

Results of the analysis of judicial practice for the period 2011–2014 indicate that it is necessary to change the practice in the direction of deciding on compensation claim in criminal proceedings in order to avoid lengthy and expensive proceedings before civil courts and spare the victims from additional proceedings, testifying and judicial and medical expertise. In this way and especially through education and training of the employees in judiciary who deal with criminal matter, the present focus on the victim as an injured party who can provide insight into the circumstances of a crime would be shifted to victims being truly treated as injured parties whose rights in the proceedings need to be fully respected. Analysis of the judgments indicate that realization of the right of a victim to be adequately indemnified within criminal proceedings may be the right solution, especially bearing in mind that judicial and medical expertise of the victim's condition is required during criminal proceedings, while the reports of court experts include enough data on the suffered non-material damage and harmful consequences which, providing that the aim of the expertise is widened to identify the types of non-material damage suffered, could serve as a basis for awarding at least a partial amount of the compensation, without causing the proceedings to be particularly prolonged.



In addition, it is important to emphasize that the available mechanisms for compensation and improvement of human trafficking victims' position in order to achieve full respect of guaranteed right, certainly requires adoption of new legislative solutions and solving the issue of guarantee fund. Among other things, the first GRETA Report for Serbia states that there have been no cases of successful compensation claims concerning victims of trafficking and that there is currently no possibility for victims of trafficking to obtain compensation from the state. Thus, GRETA urges the Serbian authorities to adopt measures to facilitate and guarantee access to compensation for victims of trafficking, including through the systematic provision of information to victims and the setting up of a state compensation scheme accessible to victims of trafficking. For the purpose of establishing an efficient system of compensation for victims ASTRA took the initiative aimed at amending the law and establishing the fund for compensation of victims of human trafficking, in the framework of the project *Balcans ACT Now!* For this purpose, in 2014 ASTRA formed an expert group for creation of amendments of legal solutions.

### 3. Types of exploitation: presentation of cases

First instance court judgements issued in the course of 2014 in most cases pertain to the crime of trafficking in human beings under Art. 388 of the Criminal Code (9 out of 10 first instance judgements, all final), while one pertains to the crime of mediation in prostitution under Art. 184 of the Criminal Code (this judgement is not final). Analysis of the first instance judgements showed that the victims were in most cases exposed to sexual exploitation (prostitution or other forms of sexual exploitation) with 7 out of 10 judgements pertaining to this type of exploitation of injured parties, 2 judgements pertain to forced begging and in 1 judgement the injured parties were coerced to commit criminal offences. It is significant to note that in half of the cases (5 judgements) the defendants and victims are relatives, i.e. members of extended family, and in those cases the defendants are victims' spouses or non-marital partners (cohabitee), parents (father/mother) or cousins (uncle/aunt). Analysis of the second instance judgements also indicates that the victims were in many cases exposed to sexual exploitation (prostitution or other forms of sexual exploitation), a total of 13 judgements, while bearing in mind that this number is probably higher since the data on concrete actions the defendants were charged with cannot be found in some of the second instance judgements.

This part of the analysis presents individual first instance judgements, that is, 6 cases in regard to the type of exploitation the victims were exposed to, which includes final first instance judgements in which the defendants were found guilty for committing one or more criminal offences of trafficking in human beings. 2 cases of acquittal and one case of rejecting the charges as well as one non-final sentence pronouncing the defendant guilty of the crime of mediation in prostitution were not included in this presentation. Out of total of 6 cases presented, 4 pertain to sexual exploitation (prostitution or other forms of sexual exploitation), one pertains to coercion into committing criminal offences and one to forced begging. Presentation includes the types and modalities of exploitation, possible kinship of defendants and injured parties, level of penalty and circumstances assessed in sentencing, as well as specificities of certain cases.

Case 1: The first accused forced his wife to engage in prostitution by abuse of trust as a spouse, use of force and abuse of her dependency relationship with him as a spouse; thereafter, with the aim of prostitution, he handed her over to the second accused, who

abused difficult circumstances of the victim, led her to believe that he “bought” her from the first accused and forced her to engage in prostitution. By the decision of the guardian authority the victim had her temporary guardian appointed in the procedure of deprivation of legal capacity, bearing in mind that she was a young mentally ill person without adequate family protection, and that at one time she also resided in the temporary safe house (shelter). The victim was hospitalized at the psychiatric ward and due to the initiated procedure for deprivation of legal capacity she was not questioned as witness. The public was not excluded during the proceeding. The defendants were found guilty for committing the criminal offence of human trafficking and sentenced to 4 years and 1 month, and 3 years and 6 months of imprisonment respectively. The fact that the first accused is a father of an underage child was assessed as a mitigating circumstance on the side of the first accused, while the previous convictions were assessed as an aggravating circumstance. Family life and the fact that he was the father of an underage child were assessed by the court as mitigating circumstances at the side of the second accused, while the previous convictions were assessed as aggravating circumstance. The injured party was instructed to realize her compensation claim in a civil litigation. This judgement was confirmed by the second-instance court.

Case 2: The defendant bought and kept a minor 12 year old girl by force with the aim of labour and sexual exploitation. The girl’s independent movement was restricted and she was exposed to physical violence (she was beaten with hands, baton and cable, which inflicted light bodily injuries of the whole body). Judicial and medical expertise concluded that the “critical event, apart from the present fear and waking up during the night, did not have a character of a strong traumatic experience but had a momentary effect with moderate intensity of fear and did not leave subsequent negative sequences in her functioning”, and the court expert concluded that the victim (14 years old at the time of trial) was capable to be examined as witness and give evidence. The defendant was found guilty for committing the crime of human trafficking and sentenced to 1 year of imprisonment. The court did not find any aggravating circumstances at the side of the defendant, while the facts that the defendant was the father of three underage children he was supporting and that he had not been previously convicted were assessed as mitigating circumstances, as well as the significant contribution of the deceased mother of the victim which was taken as a particularly mitigating circumstance by the court. He was sentenced below the legally stipulated minimum for this crime. The decision of the second-instance court in the proceeding upon appeal, the first instance decision was altered only in regard to the modality of serving the sentence, and ordered that the defendant shall serve the sentence by not being allowed to leave the premises in which he lived, since the court found that “it was not necessary that the defendant serves the sentence in the condition of penal environment”.

Case 3: The defendant was engaged in recruiting for prostitution and other forms of sexual exploitation by persuading his cousins, of whom one was underage, by misguiding them (they trusted him because they were relatives), by force and death threats, by restriction of movement (one of the victims was kept locked). In the course of the proceeding the opinion of guardian authority was provided too, which stated that one victim tried to diminish the guilt of the defendant in her testimony since he was her cousin. The public was excluded from the trial. The defendant was found guilty for committing the crime of human trafficking and sentenced to 5 years of imprisonment. The court found as mitigating circumstances the facts that the defendant was the father of 6 children, while simultaneously the court assessed as aggravating circumstance the fact that the



victims were his close cousins, i.e. members of the defendant's family. The judgement was confirmed by the second-instance court.

Case 4: The defendant recruited several victims by maintaining the deception that she would provide jobs for them, when she handed them over to the third person by selling them, after which the victims were forced to engage in prostitution, one of them with serious threats of attacks to her life and body, all with the aim of labour and sexual exploitation of the victims. The public was excluded from the trial. The defendant was found guilty for committing the crime of human, sentenced to 5 years of imprisonment, and security measure of confiscation of object of the crime was ordered. The mitigating circumstances the court assessed on the side of the defendant were the fact that she was a mother and that she had not been previously convicted, while the aggravating circumstance assessed was the fact that she committed the crime over 6 injured parties and showed persistence in committing the crime. The sentence was confirmed by the second-instance court.

Case 5: The defendant recruited two 13 year old victims, residents of social protection institutions, with the aim of committing criminal offence by abuse of trust and their difficult circumstances, abusing their immaturity and establishing trust relationship so that they could commit crimes with him and for him. The injured parties were coerced to do so since the defendant was violating them both psychologically and physically. The judgement was rendered on the basis of the plea agreement in regard to committing the crime of human trafficking under Art. 388 Para. 3, and the defendant was sentenced to 5 years of imprisonment. The victims were instructed to realize their compensation claim in civil proceedings. The judgement was confirmed by the second-instance court.

Case 6: The defendant recruited his non-marital partner and minor daughter younger than 14 to engage in begging, forced them to beg, and the victims did this contrary to their will, being afraid of beating, which they were exposed to when they would refuse to go begging. He was beating them and taking all their money or beating them when they did not bring back enough money. Personal and family circumstances of the defendant and the victims were established on the basis of findings and opinion of the Centre for the Protection of Human Trafficking Victims and the findings of the guardian authority. The Centre stated that even though the defendant was in detention, the victims received threats from his friends and death threats from his relatives and that the possibility of changing testimony should be taken into consideration. The opinion of the guardian authority stated that "the defendant was threatening (the victims) from prison through his neighbours and relatives that he will slaughter them all with the knife when he is released from prison". The guardian authority also determined the existence of intense physical, psychological and economic violence that lasted for years against members of the family, which the defendant was constantly beating, forcing to begging, locking and restricting their movement, preventing underage children to attend school, usurping the money from social assistance and child benefits, withholding money from the rest of the family. The guardian authority assessed that there was a high risk from escalation of violence upon defendant's release from prison. The public was excluded from the trial. The defendant was found guilty for committing the crime of human trafficking and sentenced to aggregate penalty of 6 years of imprisonment. The court assessed as mitigating circumstance the fact that the defendant had not been previously convicted and that he was a father of 7 children, whereas his persistence and the fact that he committed the crime against two persons, members of his family, were assessed as aggravating circumstances. The judgement was confirmed by the second-instance court.



#### 4. Penal policy

Data obtained from statistical processing of first instance court decisions show that out of the total number of defendants for the crime of human trafficking, in 46% of cases the defendants were convicted – a total of 7 persons were found guilty, out of whom in one case the judgement was based on the plea agreement. They were all sentenced to a term of imprisonment. Two persons were found guilty for the crime of mediation in prostitution although they had been previously charged for the crime of human trafficking (this judgement is still not final). In 59% of cases the judgement convicting the defendants was rendered for all crimes, which is slightly less in respect to the previous year (76%). Acquittal was issued in 27% of cases (4 defendants) in two different court proceedings: in one proceeding because of the lack of evidence; in the other, as stated in the reasoning of the judgement, as a consequence of the failure of the competent prosecutor to state the crucial element of the human trafficking crime, i.e. the act of committing the concrete criminal offence, in the facts of the indictment. One proceeding was concluded with rejecting the charges since the competent public prosecutor's office dropped the charges after the injured parties with the status of privileged witnesses used their right not to testify. One defendant died during the conduct of the proceedings.

In relation to the severity of penalties for the criminal offence of human trafficking, the majority of defendants were sentenced to a term of imprisonment of 2-5 years (72% of cases), term of imprisonment of 2 years was pronounced in 14% of cases, while 5 years of imprisonment was pronounced also in 14% of cases. Statistical data indicate that the average term of imprisonment for this criminal offence is 3.9 years. The highest individual sentence is a term of imprisonment of 5 years, while the highest pronounced aggregate sentence is a term of imprisonment of 6 years. Other terms of imprisonment range from 3.5 to 5 years. The lowest sentence for the crime of human trafficking is a term of imprisonment of 1 year, where the court found particularly mitigating circumstances on the side of the defendant and sentenced him below the legally stipulated minimum.

Analysis of the second instance judgements, out of which a certain number pertains to the proceeding for pronouncement of an aggregate sentence, shows that in the proceedings upon appeals the first instance judgement was confirmed in 20 cases (57%), in 10 cases the judgement was revoked and the case was returned to the first-instance court for re-trial (29%), while in 5 cases the Court of Appeal reversed the first instance judgements (14%). In 2 cases the Court of Appeal reversed the decision on the penalty and sentenced a term of imprisonment of longer duration; in one case the decision was reversed in regard to the modality of execution of the sentence; and in one case the acquittal was reversed into conviction.

Comparison of these penal policy data with those from the analysis for 2013 leads to the conclusion that the average sentence for the criminal offence of human trafficking (3.9 years of imprisonment) does not significantly differ from the 2013 average (4 years). This further leads to the conclusion that despite certain improvement in respect to 2012, when the average sentence was below 2 years of imprisonment, the courts' sentences in practice are still low and penal policy still mild. This is also indicated in the data that the percentage of sentenced terms of imprisonment of more than 5 years in 2014 decreased to 14% from 27% in 2013, as well as that sentences ranging from 2 to 5 years are pronounced more often than during the previous year (increase to 72% from the previous 54%).



Due to the passage of time, previously available possibility of sentencing defendants below the legally stipulated minimum<sup>9</sup> for the crime of human trafficking was recorded only in one case, just like in 2013. In the 2014 case, the defendant was sentenced to a term of imprisonment of one year, taking into consideration that the court found particularly mitigating circumstances on the side of the defendant that justify sentencing below the legally stipulated minimum. Although the concrete criminal offence was committed against the injured party who was younger than 14 at the time when the crime was committed and who was exposed to sexual exploitation and physical abuse, the court assessed the circumstances such as the facts that the defendant was the father of underage children whom he had been supporting, that he had not been previously convicted, and that the mother of the underage injured girl contributed to the situation. In addition to sentencing the defendant below the legally stipulated minimum, the second-instance court reversed the first instance decision in regard to the modality of execution of the sentence and decided that the defendant will serve the sentence in the premises in which he lived.

According to the provisions of the Criminal Code, the court shall determine a punishment for a criminal offender within the limits set forth by the law for such criminal offence, taking into account extenuating and aggravating circumstances, and particularly the degree of culpability, the motives for committing the offence, the degree of endangering or damaging protected goods, the circumstances under which the offence was committed, the past life of the offender, his/her personal situation, his/her behaviour after the commission of the criminal offence and particularly his/her attitude towards the victim of the criminal offence, and other circumstances related to the personality of the offender (Art. 54). Analysis of the judgements rendered in 2014 shows that in determining the punishment the court was still most often taking into account circumstances which pertain to personal situation of the perpetrator, such as family life and underage children or absence of previous convictions. Circumstances prescribed by the law, such as the motives for committing the offence, the degree of endangering or damaging protected goods, the circumstances under which the offence was committed, defendant's behaviour after the commission of the criminal offence and particularly his/her attitude towards the victim, are still rarely assessed in an adequate manner in the analysed first and second instance judgements.

Particularly worrying is the fact that the courts, as recorded also in the analysis of the judicial practice for the period 2011-2013, do not pay enough attention to the nature of crime and injured persons when determining the penalty and assessing mitigating circumstances. They still almost automatically noted that the defendant is a "father/mother of underage children", even though this is only one of the circumstances that the court may take into consideration and even though this particular circumstance cannot represent a mitigating circumstance in the cases of trafficking in human beings and especially children. The list of aggravating and mitigating circumstances stipulated by the law is extensive and not definite. Thus, the court is obliged to make overview of the entire situation pertaining to the defendant. Unfortunately, it is common in judicial practice to always state family life when listing mitigating circumstances, even where these circumstances are contradictory to the crime itself.

In all analysed first instance judgements, the fact that the defendants had children was used as a mitigating circumstance, even in cases where the defendant committed the crime against his/her own child or the child who was member of extended family or against other underage person. There are also some drastic examples from the

<sup>9</sup> Untill the adoption of amendments and supplements to the Criminal Code in August 2009.



practice such as the already mentioned case of mitigating the penalty below the legally stipulated minimum, where the fact that the defendant had underage children was used as mitigating circumstance although the criminal offence was committed against an underage victim, i.e. child who was younger than 14 at the time of commission of crime, who was exposed to sexual exploitation and physical violence. In another analysed case, the fact that the defendant had seven underage children was stated as mitigating circumstance, although he committed the crime against one of his daughters who was 12 at the time of commission of criminal offence and against his pregnant wife, whom he both forced to begging, wherein the report of the guardian authority, which the court accepted entirely, indicates intense domestic violence which lasted for years (physical, psychological and economic) against members of his family. It is interesting that the same judgement simultaneously states “the criminal offence committed against family members” as aggravating circumstance. One more case shares the same characteristics, where with the mitigating circumstance that the defendant was father of six children of whom some were still underage was stated along with the aggravating circumstance that the crime was committed against two victims who were the defendant’s cousins.

A commonly used aggravating circumstance is the one pertaining to previous convictions, although some cases also state the following: persistence in committing the criminal offence (2 cases), number of injured parties (2 cases), abuse of mental condition of the injured party as well as the kinship of the defendants and victims as members of immediate and extended family (2 cases). Recognizing family relations as aggravating circumstances is significant since the data of the analysis indicate that in 50% of analysed judgements (5 decisions), the defendants and victims were relatives, i.e. members of extended family and in those cases the defendant was the spouse, non-marital partner (cohabitee), parent (father/mother) or cousin (uncle/aunt), with the remark that in two judgements the existence of domestic violence was established too (in one case the defendant’s conditional sentence for the crime of domestic violence was revoked).

Recognizing and evaluating other circumstances stipulated by the law can be observed in appellate decisions, where the circumstance that the defendant was a family man was assessed as mitigating only in one case, although he had been pronounced guilty for the crime of mediation in prostitution against an underage victim. In two cases the first instance judgements were reversed and the defendants were sentenced to longer terms of imprisonment. In the first case it was stated that the first-instance court did not assess as aggravating the circumstances of persistence and determination of the defendant to commit the crime, the degree of endangering and damaging of protected goods, taking into consideration that the injured parties suffered permanent consequences in regard to mental health impairment, especially one underage victim who was hospitalized for treatment in psychiatric hospital. In the second case the reasoning of the decision also states that the first-instance court did not correctly assess aggravating circumstances on the side of the defendants – social danger of the crimes they were found guilty of, i.e. motives and consequences on the side of the victims. It is interesting to notice that the aforementioned problem of incorrect application of legal provisions on determining the penalty is rightly pointed at in a second instance decision which in regard to the statement contained in the appeal of the defence that the first-instance court had not assessed as mitigating the circumstance that the defendant was father of four underage children, states that “exactly the circumstance that the defendant had committed the crime against children prevents assessment of the fact that he was a father of four underage children as mitigating”.





## IV Concluding Remarks and Recommendations

Monitoring and analysis of judicial practice for 2014 was implemented with the aim to provide an objective overview and improve the position of human trafficking victims in proceedings before the courts of law, in accordance with international standards in this field. Continuous monitoring of judicial practice provides the possibility to examine the effectiveness and implementation of the existing legal norms, uniformity of case law, efficiency of the established cooperation mechanisms and state bodies, as well as the influence of the education and training for state authorities' employees implemented so far.

Despite positive shifts in legal and institutional framework, education and training for employees in state authorities and bodies, and a continuous cooperation of state authorities with civil society organizations, this analysis indicates that the position of human trafficking victims in court proceedings is still not at the sufficient level and that serious obstacles in realization of full protection of human trafficking victims still persist. Victims' basic human rights, such as the right to protection of privacy, right to assistance, counselling and information on rights and free legal aid, and right to safety and compensation are still not realized in the degree which would provide a minimum standard of protection for the victims of this serious crime. Thus, advancing the mechanisms for protection of human trafficking victims in court proceedings with the goal of realization of their guaranteed rights and avoiding secondary victimization must represent a priority.

Results of the analysis of judicial practice show that the position of human trafficking victims in court proceedings has not been significantly improved compared to the situation reported in the analysis of judicial practice for the period 2011-2013, and that serious obstacles for realization of full protection and respect of victims' rights in court proceedings still exist. Legal regulations in the area of protection under criminal law, the majority of which are harmonized with international standards, are not fully and consistently implemented in practice. Basic rights of victims, such as the right to protection of privacy, right to assistance, counselling and information on rights and legal aid, right to safety and compensation of damages are still not realized to a sufficient degree. In addition to the data indicating a certain reduction of the duration of court proceedings and rendering the decisions, victims of human trafficking are still exposed to hearings in the presence of the defendants, sporadic cases of confrontation of victims with the defendants and witnesses are still recorded in practice, along with the absence of reaction in regard to protection of victims' security. The victims' right to compensation in criminal proceedings is not exercised, while the penal policy in cases of the crime of human trafficking remains unchanged compared to previous years. While some of these problems can be addressed by insisting on a consistent implementation of the existing legal norms and further training and education for employees in judiciary, the issue of free legal aid and compensation for the victims, as persisting problems in practice, require new legal solutions and serious dedication of the state to solving them.

Protection and safety of the victims are especially important as well as avoiding secondary victimization in court proceedings and during hearings. Thus, these need to be areas which will receive special attention. Since the practice records cases in which the victims are exposed to pressures and threats by the defendants and their environment, it is important to bear in mind that feeling unsafe and the feeling of fear lead not only to secondary victimization but seriously influence the changes in victims' statements,



which can significantly alter the outcome of the court proceedings. Especially worrying is the fact that the victims are still examined in the presence of the defendants in court proceedings, and in certain cases also confronted with the perpetrators or witnesses in court proceedings. The public is rarely excluded during the questioning of the victim, except in cases strictly prescribed by the law, while the improved legal solutions of the Criminal Procedure Code, i.e. provisions on especially vulnerable witnesses were not implemented in any of the cases, although certain courts are equipped with technical devices which allows examining the victim without the direct confrontation with the defendant.

It is important to note that the situation is alarming, especially taking into consideration that the percentage of children, i.e. underage victims, remains unchanged compared to the data of the previous years, with underage persons at the time when the crime was committed counting for nearly half of victims. Analysis of first instance judgements shows that the majority of victims are women, exposed to sexual exploitation (prostitution or other forms of sexual exploitation), often together with labour exploitation, and that in half of the cases the defendants and victims are relatives, i.e. members of extended family, where domestic violence was also established.

Right to indemnification of human trafficking victims, as one of the most important issues for realization of full protection of victims of this crime, although included in the minimum standards of protection and regulated in national laws, represents a right which is the hardest to exercise in practice, thus deserving full attention. Only one case of the concluded civil proceeding for compensation of damages was recorded, in which the victim succeeded to exercise her right after years of proceedings. This judgement, even though it became final during 2014, had been the subject of the analysis of judicial practice for 2013. Analyzed judgements for 2014 indicate, just like in previous analysis for the period 2011-2013 that the situation in this field is unchanged compared to previous years, and that the courts do not decide on compensation claim of the injured parties during the criminal proceedings but are still instructing them to civil proceedings, despite the improved legal solutions contained in the Criminal Procedure Code.

Data from the analysis show that the percentage of first instance convictions is lower in respect to the previous year. Also, by comparing these penal policy data with those from the 2013 analysis, it may be concluded that the average sentence for the crime of human trafficking does not significantly differ from that in 2013, and is ranging close to 4 years of imprisonment, which leads to the conclusion that despite certain improvement recorded in respect to the previous period, low prison sentences are still being pronounced in practice and the penal policy is still mild. This is indicated in the data of almost double decrease of the percentage of sentenced terms of imprisonment of more than 5 years in respect to the previous year as well as the fact that the prison sentences ranging from 2-5 years are pronounced more often than during the previous year.

The distribution of the perpetrators is almost unchanged, with half of the defendants being persons with conviction history. Analysis for 2014 shows that when determining the penalty the court most often takes as mitigating circumstances those pertaining to personal situation of the defendant, such as family life and underage children. In all analysed first instance decisions, the fact that the defendants had children was taken as a mitigating circumstance, even in cases where the defendants committed criminal offence against his own child or the child who is a member of extended family, or against other



underage child. In the analysed judgements issued by the first- and second-instance courts, circumstances prescribed by the law, such as the degree of endangering protected goods, circumstances under which the offence was committed, behaviour after the commission of the criminal offence, and particularly defendant's attitude towards the victim, were not assessed in an adequate manner, which indicates the lack of understanding of the criminal offence of human trafficking and the position of the victims of this crime.

The problems observed during the analysis of the judicial practice indicate that the activities implemented in legislative and institutional segments need to be continued with the goal of improving the position of human trafficking victims, and directed toward a more consistent implementation of the existing legal norms in the field of protection under criminal law, permanent education of the judiciary employees and continuous monitoring of the practice of courts and public prosecutor's offices for realization of full degree of victims' rights. Key problems pointed at in the 2013 analysis were also noticed in 2014 as obstacles in realization of the victims' rights in court proceedings. It may be concluded that there was no progress accomplished in regard to measures for prevention of secondary victimization, especially in regard to examination of the victim in court proceedings and realization of the right to compensation.

Inconsistent implementation of the existing legal norms in the said aspects of protection and realization of human trafficking victims' rights, as well as lack of legal regulations to address the issues of free legal aid and a compensation fund as efficient mechanism for indemnification of victims, still represent key problems the analysis of the judicial practice points to.

Bearing in mind the problems observed in practice, as well as the gravity of consequences suffered by victims of the crime of human trafficking, establishing of an efficient and comprehensive system of protection together with coordinated cooperation of all relevant actors in combating human trafficking is imperative for the improvement of the position of victims in court proceedings. With this aim, taking the following measures and activities is recommended:

- Consistent implementation of the existing legal regulations in the segment of protection of security and integrity of human trafficking victims in court proceedings, hearing and confrontation of victims with perpetrators, particularly provisions on especially vulnerable witnesses, in order to decrease or avoid secondary victimization;
- Stricter penal policy,
- Advancement and harmonization of national legal framework with international standards in the area of human trafficking victims' protection, especially in the field of free legal aid and realization of the right to compensation;
- Intensifying activities aimed at establishing a compensation fund in order to enable the realization of the human trafficking victims' right to compensation;
- Continuous education and training with the aim of standardization of actions of professionals employed in state institutions, adoption of the rights-centred approach and improved understanding of the position of the victim of human trafficking;



- Continuous cooperation of non-governmental organizations for protection of human trafficking victims' rights and competent state bodies with the aim of establishing a more efficient support network for victims in order to provide timely identification, legal aid and representation, psychological and medical assistance;
- Continuous monitoring of judicial practice and implementation of the existing legal provisions for protection of victims' rights through monitoring of trials for the crime of human trafficking and related criminal offences, and monitoring of results of the proceedings through collecting and analysis of the court judgements;
- Advancing the statistical monitoring and systematic collecting of data on victims, prosecution and punishing the perpetrators in the area of human trafficking;
- Engagement of organizations, independent bodies and competent institutions, especially social protection institutions, on prevention of sexual and labour exploitation with the aim of decreasing risk factors and susceptibility of groups especially at risk, such as minors, residents of institutions of social protection and families registered with the social protection system.

