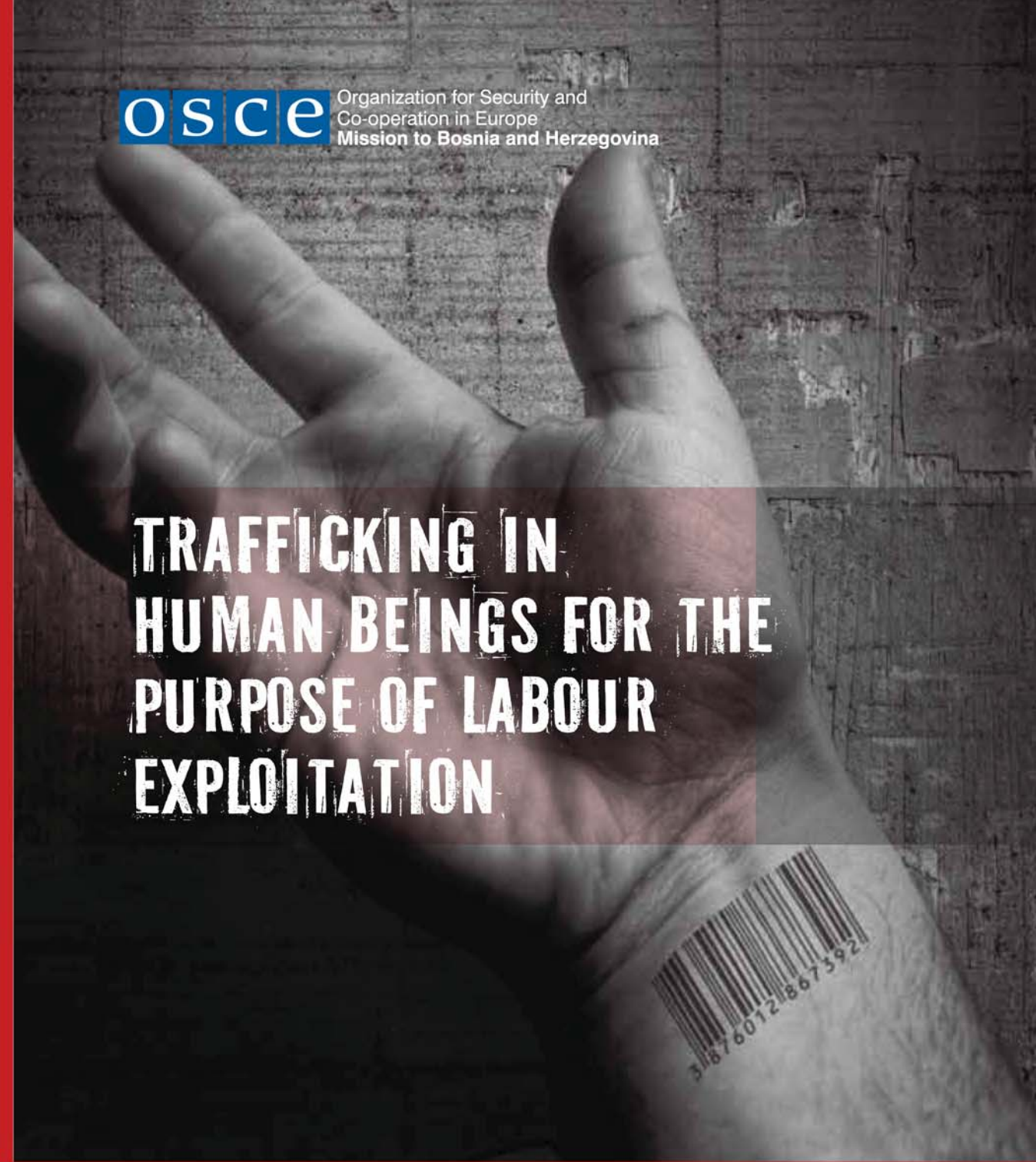


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A black and white photograph of a person's hand and forearm. The hand is open, palm facing up, with fingers slightly spread. On the inner side of the forearm, there is a tattoo of a barcode. The background is a dark, textured wall, possibly made of brick or stone.

TRAFFICKING IN HUMAN BEINGS FOR THE PURPOSE OF LABOUR EXPLOITATION

A reference paper for
Bosnia and Herzegovina

July 2011

This publication was developed by Ms. Lejla Kablar-Sarajlić, M.Sc., for the Project entitled “Strengthening the Response of Domestic Institutions to Trafficking in Human Beings for the Purpose of Labour Exploitation in Bosnia and Herzegovina,” which was generously supported by the Permanent Delegation of Finland to the Organization for Security and Co-operation in Europe (OSCE).

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Executive Summary

The overall purpose of this reference paper, produced with the support of the Organization for Security and Co-operation in Europe (OSCE) Mission to Bosnia and Herzegovina,¹ is to serve as a tool not only to raise awareness of human trafficking for the purpose of labour exploitation, but also to increase understanding of relevant authorities on trafficking for labour exploitation in general. It is hoped that the paper will represent a starting point for further research and monitoring of the phenomenon in BiH, and serve as a background for the drafting of the next State Action Plan for Combating Trafficking in Human Beings upcoming in 2012. The need for such a tool was triggered by an increasing number of victims of labour exploitation, a phenomenon also recognized by the State Co-ordinator for Combating Trafficking in Human Beings.² To provide a context for addressing the issue of human trafficking, the paper first describes the relevant international standards pertaining to trafficking in human beings, forced labour and slavery. It details standards enshrined in the relevant documents of the OSCE, the United Nations (UN), the Council of Europe (CoE), the European Union (EU) and the International Labour Organization (ILO). Trafficking for labour exploitation takes different forms and targets different victim profiles than trafficking for sexual exploitation. In this paper, focus is given to the specific features of labour exploitation, emphasizing the need to recognize the vulnerabilities of potential victims and facilitate their identification.

The paper primarily addresses trafficking for the purpose of labour exploitation as it applies in Bosnia and Herzegovina (BiH). In this context, the most prominent

1 Within the project entitled “*Strengthening the Response of Domestic Institutions to Trafficking in Human Beings for the Purpose of Labour Exploitation in Bosnia and Herzegovina*,” was generously supported by the Permanent Delegation of Finland to the OSCE.

2 State Action Plan for Combating Trafficking in Human Beings www.msb.gov.ba/anti_trafficking/dokumenti/planovi/?id=3878

problem is begging, mostly seen in Roma communities. as a consequence of more complex economic and social circumstances in BiH. The data available point to a number of cases of organized begging wherein the perpetrators gain significant material benefit in an illegal manner.

The paper also includes an overview of labour, immigration and criminal law. In addition to international standards which prescribe that assistance and protection be given to victims of trafficking, the paper describes the national referral mechanism, which is a co-operative framework through which state actors fulfill their obligations to protect and promote the human rights of trafficked persons and co-ordinate their efforts in a strategic partnership with civil society.³ It also attempts to provide an overview of the referral mechanism for victims of labour exploitation.

Since the practical aspect of combating trafficking should not be neglected, case examples of identified or potential labour exploitation are included to illustrate the institutional response to human trafficking for labour exploitation. Finally, the paper looks at some outstanding issues that should be tackled by the authorities, and provides suggestions for solutions.

3 OSCE/ODIHR National Referral Mechanisms Joining Efforts To Protect The Rights Of Trafficked Persons: A Practical Handbook, available in English at www.Osce.Org/Odihr/13967

I. Introduction

Human trafficking is a serious form of human rights violation. It takes different forms that are often disguised and hidden from the public authorities. The room for deception may be attributed not only to the complex nature of the crime but also to the definitions given for the different forms of serious human rights violations (forced labour, slavery etc.). This is especially true of human trafficking for labour exploitation. According to recent International Labour Organization (ILO) estimates there are approximately 2.5 million victims of forced labour (including sexual exploitation) as a result of trafficking.⁴

Human trafficking seriously damages the lives of victims long after the exploitation is over. Trafficking, as an international phenomenon, knows no borders, nationality or religion. However, it was not until the twentieth century that trafficking in human beings was recognized as a serious violation of international law⁵.

In 2003, the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (Palermo Protocol),⁶ supplementing the United Nations Convention against Transnational Organized Crime (UNTOC) set forth in law a complex definition of human trafficking. The definition provided in the Palermo Protocol is detailed and multilayered, to encompass the changing nature of trafficking with regards to the profile of the victims and the *modus operandi* of the perpetrators.

In a recent regional development, the CoE Convention on Action against Trafficking in Human Beings (CoE Convention) expanded the protection of the Palermo Protocol to encompass internal trafficking. International standards clearly consider trafficking a violation of international norms and oblige States to take effective measures to prosecute traffickers, protect the victims and prevent trafficking.

Trafficking in human beings in BiH was initially identified after the 1992-1995 conflict, when a number of foreign victims came to light. The country was then characterized as both a transit and destination country. In 2003, BiH took legislative, institutional and operational measures to combat trafficking. These efforts were effective to some extent, but there is still much room for improvement. The complex constitutional structure in BiH and the necessity for effective inter-governmental co-operation makes combating trafficking a difficult task for the relevant institutions.

4 UN GIFT: Global Initiative to Fight Human Trafficking: The Facts, available at http://www.unglobalcompact.org/docs/issues_doc/labour/Forced_labour/HUMAN_TRAFFICKING_-_THE_FACTS_-_final.pdf

5 For more discussions on trafficking as a violation of international law, see: *The International Law of Human Trafficking* by Anne T. Gallagher, 2010, Cambridge University Press 32 Avenue of the Americas, New York, ny 10013-2473, USA

6 The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, was adopted by General Assembly resolution 55/25. It entered into force on 25 December 2003, available at: <http://www2.ohchr.org/english/law/protocoltraff.htm>.

Given that labour exploitation is less visible than other forms of trafficking, effective prevention requires co-ordinated efforts and improved responses by all actors in the system. This includes the early identification of undeclared work and the taking into account of migrant perspectives when tackling the issues of labour exploitation. In this regard, labour inspections are a valuable resource that may contribute to the proper identification of potential victims of trafficking for labour exploitation.

II. Trafficking in human beings for the purpose of labour exploitation: international standards

1. Legislative overview

1.1. United Nations Convention against Transnational Organized Crime and its Protocols

Trafficking in human beings is recognized as a violation of international law and its constituent elements are enshrined in relevant international instruments. The first comprehensive definition was provided in the Palermo Protocol supplementing the United Nations Convention against Transnational Organized Crime (UNCTOC)⁷ where it was stated that:

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

The Palermo Protocol obliges states to criminalize the conduct if committed intentionally and obliges them to set up effective measures for the prevention of trafficking and the protection of victims.

The definition recognizes labour exploitation as a form of trafficking. It could be argued that the definition of trafficking in the Palermo Protocol encompasses only situations where the crime occurred within organized criminal activity and is

7 The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, was adopted by General Assembly resolution 55/25. It entered into force on 25 December 2003, available at: <http://www2.ohchr.org/english/law/protocoltraff.htm>.

transnational in character, as the definition is part of the UNCTOC which primarily focuses on transnational organized crime.

A definition of trafficking in human beings is included below in the matrix of the elements of the offence:

Trafficking in persons (TIP) – matrix of the elements of the offence

Action		Means		Purpose	
Recruitment		Threat or use of force		Exploitation of the prostitution of others	= Trafficking in Human Beings
Transportation		Other forms of coercion		Other forms of sexual exploitation	
Transfer		Abduction		Forced labour	
Harbouring		Fraud		Slavery or other slavery like situations	
Receipt of persons	+	Deception	+	Servitude	
		Abuse of official position		Organ removal	
		Abuse of a position of vulnerability		Etc.	
		Giving or receiving of payments or benefits to achieve the consent of a person having control over another person			

Source: United Nations Office of Drugs and Crime (UNDOC): Anti-human trafficking manual for criminal justice practitioners, Module 1: Definitions of trafficking in persons and smuggling of migrants.

1.2. Council of Europe Convention

Since the adoption of the Palermo Protocol, the phenomenon of trafficking changed and the adoption of more detailed and comprehensive documents was needed. The Council of Europe (CoE) Convention⁸, as the first European treaty in this field, is a comprehensive document focusing mainly on the protection of victims of trafficking and the safeguarding of their rights. It also aims to prevent trafficking and to prosecute traffickers. In addition, the CoE Convention provides for the creation of an effective and independent monitoring mechanism capable of controlling the implementation of the obligations contained in the CoE Convention. This monitoring mechanism is

8 CoE Convention on Action against Trafficking in Human Beings was adopted by the Committee of Ministers on 3 May 2005, *ICETS No. 197*, available at: http://www.coe.int/T/E/human_rights/trafficking/PDF_Conv_197_Trafficking_E.pdf,

the Group of Experts on Action against Trafficking in Human Beings, also known as GRETA.

The definition of trafficking in human beings is provided in Article 4 of the CoE Convention. The authors of the CoE Convention decided to fully integrate the definition as stipulated by the Palermo Protocol. However, the CoE Convention clearly recognizes that “internal trafficking” may occur in the territory of a single state and the victims may be citizens of that country. The definition also provides that trafficking does not have to be connected to organized crime.

1.3. Organization for Security and Co-operation in Europe Commitments and Action Plan to Combat Trafficking in Human Beings

The implementation of the standards expressed in the CoE Convention are reflected also in the OSCE Commitments relating to combating trafficking in human beings, in particular the OSCE Action Plan to Combat Trafficking in Human Beings.⁹ These commitments, affirming the primary responsibility of the participating States to address trafficking in human beings and tasking the OSCE’s institutions, structures and field operations in clearly defined areas, constitute a comprehensive framework for combating the problem.

The OSCE has a well-developed institutional capacity and a proven track record in providing effective assistance to the participating States in the implementation of their anti-trafficking commitments. Concrete actions include helping to establish effective and inclusive national referral mechanisms, as well as improving the process of victim identification and ensuring that they are provided with support and protection. The OSCE Action Plan contains far-reaching recommendations for participating States on the best ways and means to implement the various anti-trafficking commitments, as well as precise tasks for the OSCE bodies to assist the participating States in this endeavour. The implementation of the Action Plan remains a long-term obligation for all OSCE bodies.

With regard to labour trafficking, the relevant provisions are contained in the Decisions of the Ministerial Council,¹⁰ which encourages the participating States to combat trafficking in human beings for labour exploitation in a more proactive manner and provides a wide ranging set of commitments to combat this form of exploitation.¹¹

9 In 2003, the OSCE Ministerial Council endorsed the OSCE Action Plan to Combat Trafficking in Human Beings and established the OSCE Anti-Trafficking Mechanism, OSCE PC.DEC/557, 24 July 2003, available at: <http://www.osce.org/pc/42708>

10 OSCE Decision No. 14/06 Enhancing Efforts to Combat Trafficking in Human Beings, including for Labour Exploitation, through a comprehensive and proactive Approach, MC.DEC/14/06 as of 5 December 2006 and OSCE Decision No. 8/07 on Combating Trafficking in Human Beings for Labour Exploitation, MC.DEC/8/07 as of 30 November 2007.

11 See Article 6 of the Decision No. 14/06 and Decision No. 8/07 in its entirety.

1.4. European Union framework to combat Trafficking in Human Beings

The EU also has a well developed anti-trafficking framework which follows international and regional progress in this field. Although BiH is not formally obliged to comply with the relevant EU law at this stage of the accession process, it is expected that it will establish a corresponding institutional and legislative framework on its path to EU integration.

More rigorous prevention, tougher penalties for traffickers and better protection for victims are the key aims of a new EU Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims (EU Directive).¹² The new EU Directive applies to trafficking within the sex industry or for labour exploitation in, for example, construction work, farming or domestic service. The EU Directive also emphasizes that several hundred thousand people are trafficked into or within the EU each year. Many victims are exploited for prostitution (43 per cent, overwhelmingly women and girls), or for labour exploitation (32 per cent).

The new EU Directive lays down minimum rules for defining criminal offences and sanctions for traffickers and introduces common rules for crime prevention and protection for victims. The EU Directive seeks to create an environment that dissuades traffickers while at the same time guarantees assistance and protection for victims of trafficking, especially children. The text takes a broader view of what constitutes trafficking in human beings than the previous EU framework decision of 2002 (which it replaced) and includes additional forms of exploitation.

“Exploitation” includes, as a minimum, exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude, the exploitation of criminal activities, or the removal of organs. The definition also covers trafficking in human beings for illegal adoption or forced marriages. “Exploitation of criminal activities” means exploitation of a person to commit, for example, pick-pocketing, shop-lifting, drug trafficking and other crimes that are subject to penalties and involve financial gain.

The new EU Directive sets maximum EU-wide penalties of at least five years’ imprisonment. Only in highly extenuating circumstances may judges impose lower sentences. Sentences of up to ten years’ imprisonment may be imposed if there are specific aggravating circumstances. These aggravating circumstances include cases where children are exploited, criminal organizations are involved, the victim’s life is endangered or serious violence is used. Instigating, aiding, abetting or simply attempting to commit such an offence is also punishable.

12 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 replacing Council Framework Decision 2002/629/JHA, available at: <http://ec.europa.eu/anti-trafficking/download.action?nodeId=9c9ba3cd-794b-4a57-b534-ad89effac575&fileName=Directive+THB+L+101+15+april+2011.pdf&fileType=pdf>

Where legal persons are involved, sanctions should include criminal or non-criminal fines and could also include, for example, exclusion from entitlement to public benefits or aid, temporary or permanent disqualification from engaging in commercial activities, and judicial supervision or the temporary or permanent closure of establishments.

Member States should also ensure that the instruments and proceeds of these crimes are confiscated. They are also “encouraged” to use them to support help and protection for victims, including compensation.

Victims should receive accommodation, material assistance and, where necessary, medical treatment, including psychological assistance, counselling and information. Legal counselling and legal representation should be free of charge where the victim lacks sufficient financial resources. Victims of trafficking should also have access to witness protection programmes and to compensation schemes. Assistance and support should be provided “before, during and for an appropriate time after criminal proceedings,” irrespective of a victim’s willingness to act as a witness. A requirement not to prosecute or impose penalties on victims is explicitly stated in the text.

The new EU Directive criminalizes knowingly using the services of a trafficked person. This provision has the potential to have a strong preventive effect by discouraging demand. This criminalization could include employers of legally-staying third-country nationals and EU nationals, as well as buyers of sexual services from any trafficked person, irrespective of their nationality.

Within five years, the European Commission must submit a report assessing the impact of existing national laws that make it a crime to use services “which are the objects of exploitation of trafficking in human beings”. This report will be accompanied, if necessary, by appropriate proposals.

The text also provides for the appointment of an Anti-Trafficking Co-ordinator, who would contribute to Commission reports on the progress made in the fight against trafficking in human beings.

2. Forced labour: notion and definition

While there is a recent strong commitment to combat trafficking for labour exploitation and forced labour as one of its forms, the relevant international instruments mentioned above do not define forced labour. It is therefore necessary to invoke the definition from the ILO who adopted Convention No. 29 in 1930. Article 2(1) of ILO Convention No.29 defines forced labour as *“all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.”*

ILO Convention No.29’s definition of forced labour focuses on the exaction of involuntary labour through coercive means. In essence, the definition predisposes

that the work is not voluntary and that labour is conducted under the threat of coercion. The penalty within the meaning of this definition does not have to be a “sanction” but may take the form of other penalties such as the loss of privileges and benefits. It is clear that the definition also encompasses physical abuse and death threats to the victims and members of their family. The threat may be psychological and the most common is the threat of reporting them to the police. This, naturally, has an enormous influence on the person who is illegally residing in the country where the forced labour occurs.

In 1957, the ILO supplemented Convention No.29¹³ with the Abolition of Forced Labour Convention, ILO Convention No.105,¹⁴ which provides for the immediate and complete eradication of forced labour in specific circumstances. Article 1 imposes an obligation on ratifying States to suppress the use of forced labour where it is used for political purposes, purposes of economic development, as a means of labour discipline, as a punishment for strike action or as a means of discrimination. ILO Conventions No.29 and No.105 are collectively referred to as the “*ILO Forced Labour Conventions*.”

Together they represent the key international instruments concerning the abolition and control of forced labour and apply to work or service exacted by governments, public authorities, private bodies and individuals. It should be stressed that not all forms of forced labour are prohibited under the ILO Forced Labour Conventions. Article 2(2) of ILO Convention No.29 sets out certain exemptions which otherwise would have fallen under the definition of forced or compulsory labour. Those exemptions relate to compulsory military service, normal civic obligations, prison labour, emergencies and minor communal service.

13 Text of the Convention available at: <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C029>

14 Text of the Convention available at: <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C105>

Identifying forced labour in practice

Lack of consent to (involuntary nature of) work (the “route into” forced labour)	Menace of a penalty (the means of keeping someone in forced labour)
<ul style="list-style-type: none"> • Birth/descent into “slave” or bonded status • Physical abduction or kidnapping • Sale of person into the ownership of another • Physical confinement in the work location – in prison or in private detention • Psychological compulsion, i.e. an order to work, backed up by a credible threat of a penalty for non-compliance • Induced indebtedness (by falsification of accounts, inflated prices, reduced value of goods or services produced, excessive interest charges, etc.) • Deception or false promises about types and terms of work • Withholding and non-payment of wages • Retention of identity documents or other valuable personal possessions 	<p>Actual presence or credible threat of:</p> <ul style="list-style-type: none"> • Physical violence against worker or family or close associates • Sexual violence • (Threat of) supernatural retaliation • Imprisonment or other physical confinement • Financial penalties • Denunciation to authorities (police, immigration, etc.) and deportation • Dismissal from current employment • Exclusion from future employment • Exclusion from community and social life • Removal of rights or privileges • Deprivation of food, shelter or other necessities • Shift to even worse working conditions • Loss of social status

Source: ILO; A Global Alliance Against Forced Labour Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and rights at Work, 2005

There is a distinction in the constitutive elements between slavery and forced labour. The concept of ‘ownership’ makes the two sets of practices distinct¹⁵ because this element is central to any case of slavery. In comparison, forced labour “does not include a concept of ownership, it is clear that the practice imposes a similar degree of restriction on the individual’s freedom – often through violent means, making forced labour similar to slavery in its effect on the individual.”¹⁶ Weissbrodt further suggests that:

[T]he circumstances of the enslaved person are crucial to identifying what practices constitute slavery, including:

- (i) The degree of restriction of the individual’s inherent right to freedom of movement;
- (ii) The degree of restriction of the individual’s personal belongings; and

15 Weissbrodt D & Anti-Slavery International, “Abolishing Slavery and its Contemporary Forms”, HR/PUB/O2/4, 2002, available at: <http://www.antislavery.org/homepage/resources/Weissbrodt%20report%20final%20edition%202003.pdf>

16 *ibid*

- (iii) The existence of informed consent and full understanding of the nature of the relationship between the parties.¹⁷

The distinction between slavery and forced labour is relevant for the purposes of legal qualification but, in practice, does not carry any consequences since both conditions are recognized as exploitative. Forced labour can be seen as the minimum common denominator upon which cases of trafficking can be recognized¹⁸.

The ILO definition of trafficking focuses on cases of forced labour; it is labour right oriented. On the other hand, international documents (including the Palermo Protocol) describe forced labour as an integral part of trafficking. Determination of forced labour may not be an easy task since ILO Convention No. 29 does not provide a precise definition or constituent elements. On the other hand, recognition of trafficking is conditioned by the identification of forced labour. The useful indicator is coercion, still a broad and open concept.

Weissbrodt suggests, referring to the *travaux préparatoires* of the Palermo Protocol, that coercion exists in “any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved.”¹⁹ Experiencing loss of control over one’s life comes as a general indicator of the existence of coercion and forced labour.

Useful criteria are crucial to the design of an effective strategy to combat trafficking in human beings for the purpose of labour exploitation. Annex 1 of this paper provides the list of ILO indicators for the identification of forced labour that may be useful in identifying trafficking for labour exploitation.²⁰

2.1. Migrant workers

In order to fully understand the phenomenon of trafficking for labour exploitation, issues related to migrant workers must be detailed. Undeclared work has a strong connection to migration since, in many cases, migrant workers are recruited into some sort of illegal work. Unregulated status makes migrants vulnerable and subject to lower level labour standards.

17 Ibid

18 Trafficking in Human Beings: Methodology Package: Produced by Iveta Bartunkova, Anti-Slavery International, Audrey Guichon and Christien Van Den Anker, p. 12 Centre for the Study of Global Ethics, University of Birmingham.

19 General Assembly, *Travaux Préparatoires*, A/55/383/Add.1, at para. 63, quoted in Weissbrodt D, supra note 11, at footnote 109.

20 The ILO suggests six indicators of forced labour: “ i. Threats or actual physical harm to the worker. ii. Restriction of movement and confinement, to the workplace or to a limited area. iii. Debt bondage: where the worker works to pay off a debt or loan, and is not paid for his or her services. The employer may provide food and accommodation at such inflated prices that the worker cannot escape the debt. iv. Withholding of wages or excessive wage reductions, that violate previously made agreements. v. Retention of passports and identity documents, so that the worker cannot leave, or prove his/her identity and status. vi. Threat of denunciation to the authorities, where the worker is in an irregular immigration status.”

The “United Nations Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families” defines migrant worker as follows:

The term “migrant worker” refers to a person who is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.

These workers migrate either within countries or across borders for employment purposes. The realities of labour migration often mean that, in practice, distinctions between migrant and trafficked workers are difficult to establish. If a migrant worker is coerced to work they become trafficked. In any case in which the migrant workers are coerced and trafficked, they can benefit from the protective measures enshrined in binding international standards²¹ as the victims of trafficking.

Migrant workers are generally at more risk of being trafficked simply due to the fact that they are seeking employment in another country under conditions that are often restrictive and unfavourable. Economic globalization has produced the demand for a cheap labour force especially for difficult and dangerous jobs within the host country.

Debunking Common Trafficking Myths (US Trafficking in Persons Report 2009)

Initial Consent:

A person may agree to migrate legally or illegally or take a job willingly. But once that work or service is no longer voluntary, that person becomes a victim of forced labour or forced prostitution and should accordingly receive the protections contemplated by the Palermo Protocol. Once a person’s work is recruited or compelled by the use or threat of physical violence or the abuse or threatened abuse of the legal process, the person’s previous consent or effort to obtain employment with the trafficker becomes irrelevant. A person may agree to work for an employer initially but later decide to stop working because the conditions are not what they agreed to. If an employer then uses force, fraud, or coercion to retain the person’s labour or services, the employer becomes a trafficking offender and the employee becomes a victim.

21 Please see Palermo Protocol and CoE Convention.

In April 2008, this type of misplaced reliance on a worker's initial consent led to the deportation of three Thai victims from a European country because, according to the head of the anti-trafficking police unit in that country, the victims had consented to the employment and had arrived voluntarily in that country as guest workers. The victims in this case discovered their employment conditions were vastly different from what they expected when they initially accepted their jobs and travelled to Europe; further, their employers retained their passports, forced them to sometimes work without compensation, and threatened to turn them over to police if they did not work as they were told.

Prior Work History:

Previous employment choices also do not exclude the possibility that a person may be a victim of trafficking. Some government officials fail to identify victims of sex trafficking because they may have willingly worked in the sex industry prior to being trafficked. Law enforcement may fail also to identify victims of labour trafficking because they are migrant workers and may have previously worked in difficult conditions, either legally or illegally. Whether a person is a victim of labour trafficking turns on whether that person's service or labour was induced by force, fraud, or coercion.

Wage Payment:

Case law from U.S. criminal cases has established that payment of a wage or salary is not a definitive indicator that the labour or service is voluntary. If a person is compelled to labour through the use of force or coercion—including the use of nonphysical forms of coercion such as financial harm—then that work or service is forced, even if he is paid or compensated for the work.

Source: The US Trafficking in Persons Report, June 2009. This Report and subsequent updates are available at: www.state.gov/g/tip

2.2. Forms of forced labour

2.2.1. Bonded Labour

One form of force or coercion is the use of a bond, or debt, to keep a person under subjugation. This is referred to in law and policy as “bonded labour” or “debt bondage” also recognized in the Palermo Protocol as a form of exploitation for trafficking. Workers around the world fall victim to debt bondage when traffickers or recruiters unlawfully exploit an initial debt the worker assumed as part of the

terms of employment. Workers may also inherit debt in more traditional systems of bonded labour.

2.2.2. Forced labour and debt bondage among migrant labourers

The vulnerability of migrant labourers to trafficking schemes is especially disturbing as the population is sizeable in some regions. There are three potential contributing factors:

1. abuse of contracts;
2. inadequate local laws governing the recruitment and employment of migrant labourers; and
3. intentional imposition of exploitative and often illegal costs and debts on these labourers in the source country, often with the support of labour agencies and employers in the destination country.

Abuses of contracts and hazardous conditions of employment do not in themselves constitute involuntary servitude. But the use or threat of physical force or restraint to keep a person working may convert a situation into one of forced labour. Costs imposed on labourers for the “privilege” of working abroad can make labourers vulnerable to debt bondage. While the costs alone do not constitute debt bondage, when they become excessive and involve exploitation by unscrupulous employers in the destination country, they can lead to involuntary servitude.

2.2.3. Involuntary Domestic Servitude

A unique form of forced labour is that of involuntary domestic workers, whose workplace is informal, connected to their off-duty living quarters, and not often shared with other workers. Such an environment is conducive to exploitation since authorities cannot inspect private property as easily as they can inspect formal workplaces. In some countries, large numbers of local children, often from less developed rural areas of the country, labour in urban households as domestic servants. Some of them may be vulnerable to conditions of involuntary servitude. Foreign migrants, usually women, are recruited from less developed countries to work as domestic servants and caretakers in more developed locations. But many of these places do not provide domestic servants the same legal protections that they provide for foreign workers in other sectors.

Without protections, foreign workers may have fewer options for seeking help when faced with their employer’s threat or use of force. If they are confined to a home, either through physical restraint or through the confiscation of identity and travel documents, they may find it very difficult to reach out to NGOs or public authorities for assistance due to lack of awareness and fear of their employers. This high degree of vulnerability necessitates a strong response from law enforcement and need for victim protection when domestic servants are found in conditions of involuntary

servitude in a home. Those domestic servants who choose to escape from abusive employers are sometimes termed “runaways” and seen as criminals, though they should be considered possible victims of trafficking.

2.2.4. Forced Child Labour

Most international organizations and national laws recognize that children may legally engage in light work. However, the worst forms of child labour should be eradicated. The sale and trafficking of children and their entrapment in bonded and forced labour are among the worst forms of child labour. Any child, who is subject to involuntary servitude, debt bondage, peonage, or slavery through the use of force, fraud, or coercion, is a victim of human trafficking regardless of the location of that exploitation. Indicators of possible forced labour of a child include situations in which the child appears to be in the custody of a non-family member who has the child perform work that financially benefits someone outside the child’s family and does not offer the child the option of leaving.

3. International Labour Organization - Indicators for Trafficking in Human Beings

The definition of human trafficking given in the Palermo Protocol is complex. It should therefore come as no surprise that jurists and lawmakers continue to debate certain issues surrounding the definition. There has been, for example, considerable debate as to whether trafficking must involve some movement of the trafficked person, either within or across national borders, together with the process of recruitment, or whether the focus should be only on the exploitation that occurs at the end. A further issue has been whether trafficking for the purposes of exploitation necessarily involves coercion.²²

On some of these issues, the 2007 International Labour Organization (ILO) General Survey²³ provides some useful clarification. One is the concept of voluntary offer for work or service, and how constraint and coercion can be imposed. An external constraint or indirect coercion interfering with a worker’s freedom to “offer himself voluntarily” may result not only from an act of the authorities, but also from an employer’s practice, for example, where migrant workers are induced – by deception, false promises and retention of identity documents – or forced to remain at the disposal of the employer. Such practices represent a clear violation of ILO Forced

22 ILO, “The Cost of Coercion: Global Report under the Follow-Up to the ILO Declaration on Fundamental Principles and Rights at Work”, 2009, available at: http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_106230.pdf

23 International Labour Conference 96th Session, 2007 Report III (Part 1B): General Survey concerning the Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105)

Labour Conventions. However, neither the employer nor the State is accountable for all external constraints or coercion existing in practice.²⁴

As is also observed in the General Survey, the Palermo Protocol on trafficking has important implications for interpreting the concept of consent in a work or service relationship. It contains a qualifying provision to the effect that the consent of a victim of trafficking to the intended exploitation is irrelevant if means of coercion such as the threat or use of force, abduction, fraud, deception, abuse of power or of a position of vulnerability, are used, each of which definitely excludes voluntary offer or consent. As the means of coercion are not in any case relevant in the case of children, the question of consent does not arise.

Of practical importance are the ILO indicators,²⁵ since trafficking for labour exploitation and forced labour can be very difficult to identify in practice. The purpose of these indicators is to serve as a tool for labour inspectors as they attempt to ascertain whether a worker should be considered a victim of trafficking (whether or not the case has been prosecuted as such). The same set of indicators may be used as a guide for national statistical offices in their attempts to produce national estimates, particularly in countries of origin when interviewing a representative sample of returned migrants.

There are *four sets of operational indicators* for adult and child victims of trafficking for labour and sexual exploitation. Each set is a structured list of indicators relevant to the following dimensions of the trafficking definition²⁶:

- **Deceptive recruitment** (or deception during recruitment, transfer and transportation): 10 indicators
- **Coercive recruitment** (or coercion during recruitment, transfer and transportation): 10 indicators
- **Recruitment by abuse of vulnerability**: 16 indicators
- **Exploitative conditions of work**: 9 indicators
- **Coercion at destination**: 15 indicators
- **Abuse of vulnerability at destination**: 7 indicators

24 Sam Maher for the Clean Clothes Campaign: *False Promises: Migrant Workers in the Global Garment Industry*, 2009

25 The methodology used to reach consensus on the indicators of human trafficking is called the Delphi method. The objective of the Delphi methodology is to produce a result based on consensus from a wide group of experts. In the present context, this involved two successive electronic surveys of experts in the fight against human trafficking: a first survey in April 2008 to collect indicators from the expert group; and a second one in July 2008 to establish a rating of the indicators. Experts were selected from the 27 EU Member States from police, government, academic and research institutes, NGOs, international organizations, labour inspectorates, trade unions and judiciaries.

26 See Annex 1. International Labour Organization: Indicators of Trafficking of adults and children for labour exploitation

Within each set, each indicator is qualified as *strong*, *medium* or *weak*. However, a single indicator can be strong for children and at the same time be medium for adults, or strong for sex exploitation and weak for labour exploitation. For each potential victim, each of the six dimensions of the trafficking definition is assessed independently from the others. The result of the assessment is positive if the dimension is present for the potential victim, negative if not. In order to be assessed as positive, a dimension must include at least:

- Two strong indicators, or
- One strong indicator and one medium or weak indicator, or
- Three medium indicators, or
- Two medium indicators and one weak indicator.

After an assessment is done for each dimension, the final analysis involves combining the six elements to identify the victims of trafficking. In the case of children, in accordance with the Palermo Protocol, the presence of deception and coercion is not necessary for the existence of the criminal offence of trafficking in human beings. The mentioned indicators serve to facilitate the process of identification of the victims of human trafficking for the purpose of labour exploitation.²⁷

27 Operational indicators of trafficking in human beings: Results from a Delphi survey implemented by the ILO and the European Commission, 2009, available at: http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_105023.pdf

III. Bosnia and Herzegovina: Framework for Combating Trafficking in Human Beings

Bosnia and Herzegovina took legislative and operational measures to enhance its capacities for combating trafficking in human beings. In order to comply with international standards, BiH ratified the UNCTOC and its protocols, including the Palermo Protocol. In 2008, BiH also ratified the CoE Convention, obliging itself to ensure full compliance of legislative and other measures deriving from these instruments.

BiH also ratified the following ILO Conventions:

No. 29, the prohibition of forced labour;

No. 97, migration for the purpose of employment (revised);

No. 105, abolishment of forced labour; and

No. 142, migrant workers (additional provisions).

International standards oblige BiH to full compliance, not just in terms of legislative conformity and implementation, but also in terms of ensuring the institutional and operational capacity to prosecute and prevent trafficking, including trafficking for labour exploitation. These same measures must also ensure the identification and protection of victims.

1. Co-ordinating Mechanism: State Co-ordinator on Anti-Trafficking in Human Beings and Illegal Migration in Bosnia and Herzegovina

In 2003 the BiH Council of Ministers issued a Decision establishing a single State level body responsible for the co-ordination of anti-trafficking related activities.²⁸ A State Group comprising of representatives from all ministries involved in anti-trafficking activities was formed, headed by the State Co-ordinator.²⁹ Three subgroups for protection, prevention and prosecution were established to further co-ordinate efforts, and a dedicated group dealing with the trafficking of children was established. Liaison Officers from all BiH law enforcement structures were selected

28 In July 2003, the Council of Ministers issued a Decision on the Procedures and the Manner of Co-ordinating Activities on Anti-Trafficking in Human Beings and Illegal Migration in BiH and the Establishment of the function of the State Co-ordinator for BiH

29 According to the available information, the State group is not currently functional.

thus creating a line of direct communication with all police agencies.³⁰ Links with international organizations were quickly established as well.³¹

To improve co-operation between actors, the Operational Plan for 2008-2012 (part of the State Action Plan 2008-2012)³² foresees the establishment of a separate Department within the BiH Ministry of Security,³³ to provide expert technical and administrative support to the State Group and all other agencies involved in the implementation of the Action Plan.³⁴

In accordance with the State Action Plan for Combating Trafficking in Human Beings and Illegal Migration, the Office of State Co-ordinator for Combating Trafficking in Human Beings and Illegal Migration, in co-operation with the Ministry of Human Rights and Refugees, established in 2008 a mechanism for monitoring the implementation of the minimum standards of protection for victims of trafficking and their care by various agencies. The four regional monitoring teams – Banja Luka, Mostar, Tuzla and Sarajevo- ensure continuous evaluation of the quality of services provided by the professionals and the relevant institutions, particularly with regard to the quality of services provided to the victims of trafficking.

However, despite the initial success of establishing a comprehensive co-ordination mechanism, the functioning of the established bodies represents a serious issue for concern. The State Group, as one of the main policy level mechanisms, is not operational anymore, nor are the three subgroups. This places the whole burden of co-ordination onto the State Co-ordinator and his understaffed section within the BiH Ministry of Security.

30 State Information and Protection Agency (SIPA) <http://sipa.gov.ba/en/uvod.html> Border Police <http://www.granpol.gov.ba/Home.aspx>, entity and cantonal MOIs, as well as BD Police Links to FBiH and cantonal MOIs can be found at the following website: http://www.fup.gov.ba/joomla/index.php?option=com_content&task=section&id=13&Itemid=82, the website of RS MOI is http://www.mup.vladars.net/index_lt.htm, the website of BD police is <http://www.bdcentral.net/Vlada/Members/policija>

31 More information available at: ODIHR and Council of Europe, Review of Legislation Pertaining to Combating Trafficking in Human Beings in BiH, Opinion-Nr : 127/2009 (MA), available at: www.legislationonline.com

32 Full name of the report is “Action Plan for Combating Trafficking in Human Beings in BiH 2008-2012”. The unofficial translation into English is available at: <http://www.anti-trafficking.gov.ba/?otvori=dokumenti&kat=1&lang=eng>

33 Website of the Ministry: http://www.msb.gov.ba/home/index.php?option=com_frontpage&Itemid=1&lang=en

34 State Action Plan, p. 20.

2. National Action Plans and Operational Plans

Taking into account the severity of the situation and the importance of undertaking comprehensive and co-ordinated measures to suppress the phenomenon of trafficking in human beings, the Council of Ministers adopted the first Action Plan for Combating Trafficking in Human Beings in 2001. The first State Action Plan was directed at the creation of an adequate legislative framework and building of institutional capacities, as well as the development of an appropriate mechanism for the protection of victims of human trafficking.

The second State Action Plan³⁵ broadened the goals laid down by the previous plan and introduced new goals in the areas of supporting the framework, prosecution of human traffickers, protection of victims and victim-witnesses, prevention and international co-operation. The third State Action Plan, for the period 2008-2012 adopts the same approach and is also based on a detailed assessment of the situation and trafficking trends in BiH. It also incorporates a series of goals directed towards more efficient co-operation regionally.

The analysis of the implementation of the previous State Action Plans shows some positive developments in combating trafficking in human beings. In particular, the development of institutional capacities, improved legal and regulatory framework, increased prevention activities, good results in prosecution and the development of standards of protection for victims of trafficking, and finally, developed channels and mechanisms for international co-operation. Noteworthy is the fact that progress is very much reliant upon external donor funds as the BiH budget foresees funds only for the functioning of the Department and direct assistance to the trafficking victims. Such a situation can hardly be seen as a viable and sustainable solution for the ever changing face and patterns of trafficking in human beings.

However, as in most countries, trafficking in human beings remains present in BiH, changing its patterns and adapting to new circumstances. There is a need for continuing activities directed at combating human trafficking, through institutionalization and further strengthening of co-ordination structures, improvement of assistance to victims, more efficient prosecution of human traffickers, as well as comprehensive responses aimed at suppression of the phenomenon.

3. Legislative Framework in Bosnia and Herzegovina

As mentioned earlier in the text, BiH ratified the UNCTOC and the Palermo Protocol as well as the CoE Convention. These instruments impose strong obligations that are described in detail in previous chapters. BiH has also ratified ILO Conventions No. 29, the prohibition of forced labour; No. 97, migration for the purpose of

35 Second Action Plan for 2005-2007, adopted by the Council of Ministers in 2005

employment (revised), No. 105, abolishment of forced labour, and No. 142, migrant workers (additional provisions).

The ILO Conventions oblige State parties to prevent forced or compulsory labour in any form. The States also agree that they cannot “*impose or allow the imposition of forced or compulsory labour for the benefit of natural persons, companies or associations.*” In practice, this means that States must adopt laws that ensure punishment of natural persons who force others to work against their own will.

These ILO Conventions also grant protection to registered migrant workers and States are obliged to provide for all migrants “*treatment no less favourable than that enjoyed by the nationals [of the given state].*” This is very important for the protection of victims of trafficking in persons, as many victims enter the country lawfully and only later find that they are forced to perform work other than what was agreed, finding themselves victims of exploitation. Therefore, provisions to protect this category of migrants should be applied effectively to the category of victims of trafficking in persons.

3.1. Criminal Legislation in Bosnia and Herzegovina

3.1.1 Trafficking related offences

In BiH, trafficking in human beings is defined as a separate criminal offence in the Criminal Code of BiH (CC BiH). In 2003, when the CC BiH was enacted, it included the definition of trafficking pursuant to the Palermo Protocol. Recent amendments to the CC BiH³⁶ ensure State level compliance with the CoE Convention and provide a comprehensive definition of trafficking in human beings. The CC BiH also provides for related criminal offences such as the offences of Establishment of Slavery and Transport of Slaves,³⁷ International Procuring in Prostitution³⁸ and Smuggling of Persons.³⁹

Due to the competencies provided in the Constitution of BiH with regard to criminal legislation, defining trafficking does not end at the State level. BiH has four separate criminal jurisdictions, each with its own criminal code. The Criminal Codes of the Federation of BiH (CC FBiH) and Brčko District (CC BD) contain the criminal offence of “enticement into prostitution” yet the offence, as such, is not in line with the requirements of the CoE Convention regarding the elements necessary for the definition of human trafficking. This offence is restricted to prostitution as the

36 CC BiH Official Gazette of BiH No. 3/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, 32/07, 8/10).

37 CC BiH, Article 185

38 CC BiH, Article 187

39 CC BiH, Article 189

exploitative purpose and has no reference to other forms of exploitation.⁴⁰ Similarly, the Criminal Code of Republika Srpska (CC RS) contains the offence of trafficking for the purpose of prostitution. The definition is not in line with the requirements of the CoE Convention⁴¹ since it restricts the exploitative purpose to prostitution; it also does not recognize the vulnerable position of persons under 18 years of age and requires that means used for exploitation are employed in order for the offence to exist.⁴²

Thus, the offence of trafficking of human beings as a separate offence is provided only in the CC BiH and not in the criminal codes at entity or BD level. Trafficking in human beings for the purpose of labour exploitation is prescribed as a criminal offence only in this piece of legislation, which provides for punishment that may not be less than three years of imprisonments. A higher sentence is provided for if this conduct involves children, organized crime, abuse of position and grave bodily injury or death.

3.1.2 Labour related offences

Protection of labour rights is also ensured through criminal legislation at the entity level. The relevant provisions include Article 226 of the CC RS (Violation of Fundamental Rights of Employees): Article 280 of the CC FBiH (Breach of Rights Arising out of Employment) and Article 274 of the CC Brčko District (Violations of Labour Relations Rights). These criminal offences may be committed by any person who intentionally breaches the laws, bylaws or collective agreements on: the entering into or terminating of contracts of employment; wages or other remuneration; working hours; vacation or leave; the protection of women, young and disabled; overtime or night work. The breaching of which denies or restricts the rights of the employee.

In classifying the violations of the rights of workers as criminal offences, the legislation affords the highest level of protection from the State, obliging legal and natural persons to fully comply with the labour law, under threat of sanction.

In order to commit the abovementioned offences, the perpetrator needs to violate specified rights i.e. rights prescribed in separate pieces of legislation (predominantly the labour laws of the entities and BD). The criminal offence only exists if an act is committed and the offence is determined by its consequences. The consequences being the complete denial or restriction of labour rights. In practice, this means that means that a breach of the law that did not result in deprivation or restriction of rights

40 More elaboration on the compliance of BiH legislation with the CoE Convention can be found at: ODIHR and CoE, Review of Legislation Pertaining to Combating Trafficking in Human Beings in BiH, Opinion-Nr: 127/2009 (MA), available at: www.legislationonline.com

41 ODIHR and Council of Europe, Review of Legislation Pertaining to Combating Trafficking in Human Beings in BiH, Opinion-Nr: 127/2009 (MA), available at: www.legislationonline.com

42 CC RS, Article 198

would not constitute a criminal offence. Intent to commit the offence is a necessary element while the attempt itself is not punishable.

BiH criminal legislation provides for the protection of workers and their rights either through legislation preventing the violation of labour rights or through the scope of trafficking for labour exploitation. The trafficking provision comes into play if other constituent elements are found (act, means and purpose). The qualification of the offence will depend on the factual circumstances of every single case but institutions should be aware of the interconnection between the two. Special attention should be given to the issue of consent or lack thereof during the evaluation of the case in order to properly identify a case of trafficking for labour exploitation. In the case of children (persons under 18 years of age) the issue of means used for exploitation is not necessary.

3.1.3 Access to compensation

Damages compensation to the victims of criminal offences represents an important pillar for access to justice. An equally important aspect of compensation is the right to be informed of the opportunity to seek compensation and the means to access this in a particular criminal justice system. International standards recognize the importance of compensation and provide an obligation for the State to ensure that there are opportunities for the victims to receive compensation for damages.⁴³ These standards regard access to information and legal assistance to victims as equally important to effectively exercise the right to compensation.

BiH criminal legislation at all levels provides for victims of trafficking to file a damages compensation claim in criminal proceedings as one of the forms of compensation.⁴⁴ The injured party is defined as “a person whose personal or property rights have been

43 Article 6, paragraph 6 of the Palermo Protocol states: “Each State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered”. The corresponding provision of the Organized Crime Convention, in article 25, paragraph 2, requires that at least some “appropriate procedures” are established to provide access to compensation or restitution. See also Article 15 – Compensation and legal redress of the CoE Convention that proscribes that each Party shall ensure that victims have access, as from their first contact with the competent authorities, to information on relevant judicial and administrative proceedings in a language which they can understand. They will also provide, in its internal law, for the right to legal assistance and to free legal aid for victims under the conditions provided by its internal law while each Party shall provide, in its internal law, for the right of victims to compensation from the perpetrators. Paragraph 4 provides that: “Each Party shall adopt such legislative or other measures as may be necessary to guarantee compensation for victims in accordance with the conditions under its internal law, for instance through the establishment of a fund for victim compensation or measures or programmes aimed at social assistance and social integration of victims, which could be funded by the assets resulting from the application of measures provided in Article 23”.

44 See OSCE Mission to BiH leaflet and template on damages compensation claims available at: http://www.oscebih.org/documents/osce_bih_doc_2010122713020999eng.pdf

threatened or violated by a criminal offence.”⁴⁵ Pursuant to the relevant provisions, the court shall decide upon the damages compensation claim within the criminal proceedings, if it would not considerably prolong such proceedings.⁴⁶ Thus, this decision is at the discretion of the court, which evaluates in every case whether a damages claim would considerably prolong the criminal proceedings. Such a claim may pertain to reimbursement for material and non-material damages, recovery of items, or annulment of a particular legal transaction.

The injured party does not have to make the decision to file a damages compensation claim at the beginning of the proceedings. According to the law, the claim may be submitted no later than the end of the main trial or sentencing hearing before the court.⁴⁷ Damages compensation claims in criminal proceedings may be filed with the Prosecutor or the court. As regards the duties of the prosecutor and the court in relation to the establishment of legal facts, the prosecutor has a duty to gather evidence regarding damages compensation claims relevant to the criminal offence.⁴⁸ Additionally, the prosecutor or the court shall question the suspect or the accused in relation to the facts relevant to the petition.

The court decides upon the claim and the possibility to propose mediation exists. The proposal for mediation can be initiated before the completion of the main trial by the injured party or the accused (and the defence attorney). The court may award the injured party the claim in its entirety or partially and refer the injured party to civil proceedings for the remainder of the claim. Furthermore, the law provides that if there is no information presented in the criminal proceedings that warrant an entire or partial award, the injured party shall be referred to civil proceedings to pursue the claim.⁴⁹ If the court reaches an acquittal verdict, the injured party shall be informed of the possibility of pursuing the claim within civil proceedings⁵⁰.

The injured party may file a separate civil lawsuit for compensation for damages (material and non-material). Analysis of the trafficking cases before the courts in BiH shows that the court rarely decides upon damages compensation claims in criminal proceedings, regardless of the complexity of the claim. In most of the cases, the injured party is referred to civil proceedings; the number of filed civil lawsuits by injured parties was not officially available. Although the CoE Convention provides for the obligation to establish a mechanism that would ensure compensation from

45 See Article 20 p. h) of the Criminal Procedure Code of BiH (“Official Gazette” of BiH, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09) and corresponding articles of the entity and BD criminal procedure codes.

46 The provisions on the damage compensation claim are contained in Chapter XVII of the CPC BiH please see Article 193 and ensuing articles.

47 See Criminal Procedure Code, Article 195

48 See Criminal Procedure Code, Article 197

49 See Criminal Procedure Code, Article 198

50 *Ibid*, para 3.

the State through, for example, a compensation fund or alternative mechanism, BiH did not develop any alternative mechanisms apart from the above described procedures.⁵¹

3.2. Protection of workers and prohibition of forced/compulsory labour

3.2.1. Legislative framework – Labour laws

BiH does not have a single Labour Law. Labour relations are regulated in the labour laws of the entities and BD. Labour laws prescribe the preconditions that exclude labour exploitation, such as prohibition of discrimination. Any person seeking employment, as well as a person who becomes employed, shall not be discriminated based on their of race, colour, sex, language, religion, political or other opinion, ethnic or social affiliation, financial situation, birth or any other circumstances, membership or non-membership in a political party, membership or non-membership in a trade union, physical/physical or mental disabilities, education, working conditions and requirements, cancelling of the employment contract and other issues deriving from employment.

Labour laws also provide strict conditions for the signing of contracts, minimum salaries and special protection provisions for minors and women. They also place restrictions on working hours, ensure the right to work in a safe environment, and provide protection at work and the right to both paid and unpaid leave.

Labour related rights encompass the rights of unemployed persons and social security. The relevant provisions regulating the status of these persons may be found in laws on employment services and social security measures for unemployed persons in FBiH and RS.⁵² These laws allow for the establishment of employment institutions in the entities. The BiH Employment Agency was established by the Law on Labour and Employment in BiH.⁵³ This Agency is responsible for the co-ordination of employment of BiH workers abroad in co-operation with the entity and BD employment services (Article 6 (i)). The provisions provide the framework for matching the supply with the demand on the labour market.

The relevant legislation provides for the prohibition of forced labour. Any contract that is signed, respecting the provisions of the labour laws, guarantees a safe working environment, respect for rights and mitigates the vulnerability of employees to become victims of forced labour and/or trafficking for labour exploitation.

51 ODIHR and CoE, Review of Legislation Pertaining to Combating Trafficking in Human Beings in BiH, Opinion-Nr : 127/2009 (MA), available at: www.legislationonline.com. p. 67-68.

52 FBiH Law was enacted in 2001 (FBiH OG No 41/01) and amended in 2005 (FBiH OG No 22/05) while in RS relevant provision may be found in RS OG No 54/05 – consolidated version, 64/06 RS OG No 38/00, 85/03.

53 (BiH OG 21/03 amended by the Law published in BiH OG 43/09)

3.2.2. Institutional framework: labour inspectorates

The labour inspectorates are responsible for monitoring and ensuring the proper implementation of labour laws in the country. ILO Convention No. 81 on Labour Inspection⁵⁴ provides that labour inspection must protect the working conditions of all type of workers, while ILO Convention No. 150 on Labour Administration⁵⁵ recommends extending the functions of labour administration to include informal workers.

In practice, as relevant international research shows, labour inspectors face numerous difficulties.⁵⁶ Apart from being poorly equipped in terms of material and human resources, they face difficulties in determining the locations of hidden companies or illegal workers, ascertaining the facts regarding contracts, working hours and salaries, and social security contributions. Labour inspectors may also encounter foreign workers without valid work permits. According to the same research, issues related to irregularities in the employment contracts of migrants represent the greatest number of inspection visits and sanctions in the annual reports of most inspectorates.⁵⁷

Trafficking in human beings and forced labour is usually suppressed through the criminal justice system, at the same time the valuable and complementary role of labour inspectors is sometimes neglected. Implementation of labour laws and enforcement through labour inspections and courts can be an additional way to combat trafficking and forced labour. In this regard, labour inspectors are a valuable starting point, in the best position to provide early warning before trafficking occurs and forced labour conditions become more severe. Similarly, with regards to access to workplaces and workers, labour inspectors may have easier access than police or prosecutors. Despite all of this, labour inspectors are still not included in the National Referral Mechanism in BiH.

The institutions in BiH that may be in the position to fulfil this role are the labour inspectorates organized at entity and BD levels. In FBiH, the Inspectorate for Labour Inspection is an organizational unit of the Directorate for Inspection Affairs of FBiH while cantonal inspections are conducted by the Cantonal Administrations for Inspection.⁵⁸ Labour inspection controls the implementation of the laws and, in particular, ensures protection of workers during employment, workers' social

54 See Article 3 of the Convention available at: <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C081>

55 See Article 7 of the Convention available at: <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C150>

56 See: ILO: Labour inspection and labour administration in the face of undeclared work and related issues of migration and trafficking in persons: Practices, challenges and improvement in Europe towards a labour inspection policy Budapest October 2009, available at: http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---lab_admin/documents/genericdocument/wcms_116069.pdf

57 Ibid.

58 Law on Inspections of FBiH, OG 69/05

security, the legality of employment contracts, the employment of foreigners and special protection for children.⁵⁹

The Labour and Labour Protection Inspection within the RS Inspectorate controls the implementation of labour related laws.⁶⁰ Their competences include supervision over the implementation of the laws that regulate workers' rights and their protection. In particular, rights related to the establishment of employment relations, the signing and implementation of contracts, salaries and other contributions, working hours, holidays, termination of contract, and other rights prescribed by the relevant laws.⁶¹

In BD, the relevant provisions on labour inspection are contained in the Law on Inspections of BD.⁶² Labour Inspection controls the implementation of the provisions related to the signing and termination of employment contracts. It regulates employer obligations, unemployment rights and conducts other activities prescribed by law.⁶³ All of these pieces of legislation prescribe in detail the status of labour inspectors, the manner of conducting inspections on site and the measures that are at the disposal of the inspectors if they note certain irregularities.

3.3. Immigration- Institutional and Legislative Framework

The demand for cheap labour has developed at the same time as security concerns have led to stricter border controls and the closure of frontiers. This has led to a situation where there is a need for a cheap, migrant labour force that is not matched with adequate migration laws.⁶⁴ Countries that do not address the existence of these activities, and let this underground economy develop, will be a preferred choice for traffickers and migrant workers alike (pull factor).⁶⁵

3.3.1 Institutional framework

In the former Yugoslavia, Bosnia and Herzegovina had a geographically central position within the country and did not have the capacities or the experience to manage migratory movements. After the war, agencies responsible for migration control slowly emerged. Today, the main body mandated with the implementation of policies on immigration and asylum is the BiH Ministry of Security and it is competent to conduct procedures and organize the provision of services in relation

59 See Article 33 of the Law on Inspections of FBiH

60 Law on Inspections of RS, OG 74/10

61 See Article 26 of the Law on Inspections in RS.

62 Law on Inspections of BD, OG 24/08 and 25/08

63 See article 75 of the BD Law on Inspections

64 Proposals for open borders have been made as a response to these problems. See for example, Ahyter T, *Open Borders*, Pluto Press, 2000. The context of the EU's open space is also of particular relevance

65 See, Van Liemt G, "Human Trafficking in Europe: an Economic Perspective", *ILO Working Paper*, June 2004, at p.4

to the movement and stay of foreigners.⁶⁶ The BiH Border Police, an administrative organization within the BiH Ministry of Security with operational independence, is a BiH level agency mandated to conduct police tasks related to the surveillance and control of BiH borders and other tasks stipulated by the Law on Border Police of BiH. The agency competent to regulate issues of migration management within the country is the Service for Foreigners' Affairs. The Service for Foreigners' Affairs was created in 2006, taking over the duties of "inspectors for foreigners" from the local police; it is an administrative organization within the BiH Ministry of Security, with operational independence.

3.3.2 Legislative framework

The main piece of legislation governing issues of immigration and asylum is the 2008 BiH Law on the Movement and Stay of Foreigners and Asylum.⁶⁷ Article 8 of this Law prohibits discrimination against aliens on any grounds, including: gender or sex, race, colour of skin, language, religion, political and other opinion, ethnic and social origin, affiliation with a national minority, property status, status acquired by birth, or other status. The Law provides that the Ministry is responsible for ensuring special protection and assistance to victims of trafficking in human beings for the purpose of their rehabilitation and repatriation into their country of habitual residence or country of admission.⁶⁸

The Law also provides for the possibility of granting temporary residence on humanitarian grounds to an alien who has been a victim of organized crime and/or trafficking in human beings. It provides protection and assistance for their rehabilitation and repatriation into the country of their habitual residence, or a country which will admit the alien if this person does not fulfil the general conditions for the granting of temporary residence.⁶⁹ In cases where the presence of the alien is required for court proceedings and/or in cases where the alien co-operates with authorities for the purposes of revealing criminal offences and offenders, or if he/she has been a victim of organized crime and his/her presence in BiH is essential for the conducting of court proceedings, temporary residence may also be granted.

Article 11 prescribes the obligation to obtain a work permit when an alien intends to reside in BiH for the purposes of paid employment. The permit is issued by an authority in charge of foreigner employment affairs in accordance with the provisions

66 The issuing of visas, entry conditions, crossing of the state border, residence and international protection are regulated by the BiH Law on the Movement and Stay of Aliens and Asylum (Official Gazette of BiH No. 36/08), Decision on Visas (Official Gazette of BiH No. 100/08), Rulebook on issuing visas for long-term stay (D visa) and procedures while issuing such visas (Official Gazette of BiH No. 104/08) and Rulebook on the Entry and Stay of Foreigners (Official Gazette of BiH No. 81/08) All caps in titles.

67 Law on Movement and Stay of the Foreigners and Asylum (Official Gazette of BiH no. 36/08)

68 Ibid, Article 56

69 Ibid, Article 54 (l) (a)

of this Law or other laws in BiH regulating the issues of work by foreigners, unless differently specified in this Law or an international agreement which provides that no work permit is required for specific types of work. The provisions of this Article make an exemption regarding aliens with recognized refugee status or status of subsidiary protection in BiH.

The Law provides that work permits may be issued to a foreigner upon the request of the employer, where the issuance of the permit is within the competence of the authority for matters of foreigner employment of the FBiH, RS or BD. Work permits shall be issued for a specific post and/or for a specific type of job and may not be issued for a period longer than one year.⁷⁰

The number of work permits is restricted by an annual quota set by the Council of Ministers, in accordance with migration policy and taking into account details of the labour market from the BiH Ministry of Civil Affairs.⁷¹ However, the Law provides for the possibility to issue work permits independently from established quotas to specific categories of foreigners.⁷² The Law prohibits the employer from concluding the employment contract or other relevant contract with a foreigner prior to issuance of the temporary residence permit. The employer is also obliged to provide a copy of the contract to the Ministry immediately or not later than three days from the conclusion of the contract.⁷³

3.3.3. Employment of foreigners

Provisions contained in the BiH Law on the Movement and Stay of Aliens and in the BiH Constitution stipulate that issues pertinent to immigration will be regulated at BiH State level; however, the employment of foreigners is regulated at entity and BD level. The relevant framework includes the FBiH Law on Employment of Foreigners,⁷⁴ the Law on Employment of Foreigners and Stateless Persons of the RS⁷⁵ and the Law on Employment of Foreigners of BD⁷⁶.

The FBiH Law on Employment of Foreigners was enacted in 1999 and has not been amended. This FBiH Law provides that a work permit can be issued to a foreign national provided that he/she has a permanent residency/temporary residency permit in BiH and that the employment bureau does not have in its register other persons who meet the terms and conditions of employment. The work permit is issued by the employment service; the labour inspection is mandated to supervise

70 Ibid, Article 77

71 Ibid, Article 78

72 Ibid, Article 79

73 Ibid, Article 81

74 Official Gazette of the Federation of BiH, No. 8/99

75 Official Gazette of the RS, No. 24/2009

76 Official Gazette of BD No. 15/09, 19/09 and 20/10

the implementation of this law. Furthermore, labour inspection has the authority to prohibit a foreigner from working. Since the Law on Employment of Foreigners was never harmonized with the BiH Law on Movement and Stay of Aliens, the procedure for issuing a work permit does not correspond to the enacted legislation at BiH level. In the absence of the Law, the FBiH Employment Service and the cantonal services enacted the procedure for issuance of work permits, in line with the BiH Law on Movement and Stay of Aliens, thus overcoming the legal vacuum created by the lack of FBiH Law.⁷⁷

On the other hand, in 2009 the RS adopted the Law on Employment of Foreigners and Stateless Persons that corresponds to the Law on the Movement and Stay of Aliens and Asylum. This Law prescribed that a work permit may be issued by a branch office of the RS Employment Service at the request of the employer. The annual quota, under this Law, is determined by the Employment Service, with the consent of the RS Government. The issuance of a work permit is conditional to the non-existence of a person who fulfils the employer's conditions in the registry of unemployed persons. The RS Inspectorate controls the implementation of this law.

Similarly, in BD, the Law on the Employment of Foreigners was passed in 2009 and amended in 2010. The BD Employment Service supervises its implementation and issues work permits, with the condition that a person with the same qualifications is not in their unemployment registry.

Respecting the rights and obligations prescribed in the above legislation would help to ensure a regulated labour force market and mitigate trafficking risks. Foreign workers with regulated status and valid work permits expose themselves to less risk of becoming victims of trafficking while at the same time protect themselves from potential violations of their labour related rights.

4. National Referral Mechanism

Referral (national referral mechanism) - a co-operative framework through which state actors fulfil their obligations to protect and promote the human rights of trafficked persons, co-ordinating their efforts in a strategic partnership with civil society. A process whereby a presumed trafficked person is referred to specialized services and assistance (OSCE/ODIHR).

77 Available at: www.fzzz.ba/radne_dozvole

4.1. Rulebook on protection of foreign victims of human trafficking

The protection of foreign victims of human trafficking is primarily laid down in the BiH Law on the Movement and Stay of Foreigners and Asylum.⁷⁸ The Law provides for the right to temporary residence on humanitarian grounds, and also regulates special protection and assistance provided to the victims. The Rulebook on the Protection of Foreign Victims of Human Trafficking provides detailed rules on the treatment of victims of human trafficking who are not BiH citizens. The Rulebook on Foreign Victims also addresses the issue of temporary humanitarian residence permits for foreign victims of trafficking.

A victim of trafficking is entitled to temporary residence on humanitarian grounds of up to six months duration for the purposes of protection, recovery and return to the country of origin.⁷⁹ The humanitarian temporary residence permits granted to victims of trafficking can be renewed and extended.⁸⁰

Foreign victims of trafficking pursuant to the Rulebook have the following rights: adequate and safe accommodation; medical assistance; counselling and information, especially explanations of their rights and obligations in a language they understand; legal assistance during criminal and other procedures in which the victim accesses their rights; information on access to diplomatic-consular representatives of the countries of origin or usual residence; information on the opportunity and procedures for repatriation and different types of training and education depending on financial capabilities.

If a foreign victim is under 18 years of age, the Ministry for Security informs the competent authority for social protection issues on the need to appoint a temporary guardian who is obliged to represent the child's interest throughout the procedure until a final solution has been found. In practice this means that a Centre for Social Welfare appoints a guardian, who takes care of the child's best interests, actively assists the child, makes safety assessments and takes part in the collection of the documents necessary for organizing repatriation.

78 Law on the Movement and Stay of Foreigners and Asylum (Official Gazette of BiH no. 36/08), Articles 54, 56 and 58

79 Ibid, Article 54, paragraph 1, item a) and in relation to Article 52, Paragraph 5

80 BiH Law on the Movement and Stay of Aliens and Asylum Art. 52 par. 6; the Rulebook on Alien Victims, Art. 6 paras. 3 and 4

4.2. Rules on protection of victims and the witnesses-victims of human trafficking

The rules and procedures for direct assistance to BiH citizens who are the victims of human trafficking are defined in the Rules on Protection of BiH Victims and the Witnesses-Victims of Human Trafficking.⁸¹ These Rules, *inter alia*, set out principles and common operational standards pertaining to identification procedures, protection and assistance, and primary and secondary prevention activities.

While *informed consent* is necessary to assist an adult BiH victim, assistance and responsibility to assist a child suspected of being a victim of human trafficking, and who is a BiH citizen, is *automatically given* to all actors in the referral mechanism.⁸²

The Rules oblige any institution in BiH that believes or has information that a BiH national is subject to trafficking to promptly inform the BiH State Investigation and Protection Agency (hereinafter: SIPA) and the Prosecutor's Office of BiH. Notification of suspicion and/or information on trafficking in human beings can be delivered to any prosecutor's office or police department. The identification process is performed using a multidisciplinary approach and by data comparison and the synthesis of information about the case received from the authorized institutions in BiH and authorized organizations.⁸³

The relevant institutions are obliged to report to the competent agencies without delay on the identification and interview where the consent of the adult victim and mandatory presence of a temporary guardian is necessary.⁸⁴ Additionally, the Rules provide an option for the guardian to request free legal aid for the ward, physical protection that is granted in co-operation with local police and social protection⁸⁵. In the latter case, Social Welfare Centres (SWCs) are obliged to provide the victims with protective care and housing, financial assistance, counselling and therapeutic treatment, professional assistance by means of involvement in a re-socialization programme and protection of children.⁸⁶

The child victim and the witness victim are treated as children without parental care or with a neglected or unsupervised upbringing, regardless of the child's family status.

81 Rules on Protection of BiH Victims and the Witnesses-Victims of Human Trafficking (Official Gazette of BiH no. 66/07), Articles 6, 7, 10 and 15

82 Informed consent means that a victim has received all relevant information on their position and available forms of assistance, and has voluntarily agreed to be assisted.

83 Rules on the Protection of BiH Victims and the Witnesses-Victims of Human Trafficking (Official Gazette of BiH no. 66/07), Article 7

84 SIPA, Prosecutor's Office of BiH, relevant entity prosecutor's offices and the police

85 Rules on the Protection of BiH Victims and the Witnesses-Victims of Human Trafficking (Official Gazette of BiH no. 66/07), Article 12.

86 Ibid, Article 12.

The basic forms of protection established in the Rules are: physical protection, protection of privacy and identity, legal aid, social (education and re-socialization) and health protection, as well as the provision to victims and victim-witnesses of the elements necessary to provide appropriate individual protection and help.

Since the Rules do not differentiate between the type of exploitation and the gender of the victim, the same protection is granted to anyone who is identified to be a potential victim of trafficking. It is evident that the needs of male victims of labour exploitation may differ from the needs of female victims of sexual exploitation. It is difficult to assess the effectiveness of the referral mechanism on trafficking for labour exploitation in BiH because of the lack of official data on the application of the referral mechanism to the potential victims of labour trafficking.

IV. Instances of trafficking in human beings for the purpose of labour exploitation in Bosnia and Herzegovina

The following section will present several case studies from Bosnia and Herzegovina, and one from Croatia, which will serve to illustrate how labour trafficking manifests itself in practice. By way of background, it should be noted that a comprehensive study on the extent and forms of trafficking for labour exploitation has not been conducted in BiH. Still, a recent study exploring the issues of trafficking of adult men in Europe, which included BiH, reports that the most common abuses are long working hours, injuries and health issues, denial of medical care, poor living conditions, limited and poor quality food, low or no pay, detention and confinement and psychological, physical and sexual abuse.⁸⁷ The study also established that both men and women trafficked for labour are subjected to a wide range of similar abuse and exploitation although there is some research that claims that women are subject to more exploitative conditions or are more vulnerable to becoming victims of forced labour or trafficking than men.

The 2010 BiH Report of the State Co-ordinator for Trafficking in Human Beings indicates various forms of labour exploitation including begging, and forced labour in the agriculture and construction sectors.⁸⁸ The most prominent problem is begging, mostly identified in Roma communities, which the Report identifies as consequence of more complex economic and social circumstances in BiH. The Report also describes certain cases of organized begging where the organisers gain significant material profits in an illegal manner.

Presented below are cases that contain indicators of trafficking in human beings for labour exploitation. Despite indications of labour trafficking being on the rise, there are very few identified cases in BiH.

87 USAID: Trafficking of Adult Men in the Europe and Eurasia Region, September 2010

88 2010 Report was adopted by the BiH Council of Ministers in July 2011.

Example 1: Trafficking for labour exploitation

In 2007, the Court of BiH issued a convicting verdict against Z.A. for trafficking in human beings for the purpose of labour exploitation. This was the first verdict regarding trafficking for labour exploitation in BiH.

From August 2006 to 20 December 2006 in Trebinje, in order to acquire financial gain, Z.A. used a position of vulnerability of persons M.Z. and his common wife E.T., being unemployed and sick, and forced them to beg by taking them every morning in his blue vehicle, from Bileca, where they were using a rented apartment, to Trebinje, where they were begging in cafés, apartments, restaurants, markets and other locations. In this way he was taking them to other towns in the RS, Gacko, Foca and Zvornik, where each of them had to hand over their proceeds amounting to 100 KM to the suspects under the threat of physical abuse; thus in five months they earned total proceeds amounting to 4.000.00 KM, which they handed over to the suspect under the threat of physical force. Thus, by threat of use of force and benefiting from the vulnerability of the persons, with the intention of gain and for the purpose of exploitation he acted in an extremely inhuman and humiliating way,

Whereby

The suspect Z.A., has committed the criminal offence of Trafficking in Persons in violation of Article 186(1) of the CC of BiH

Z.A. was convicted for the criminal offence of trafficking in human beings for the purpose of labour exploitation and sentenced to six months imprisonment. The vehicle used for the commission of the criminal offence was confiscated; he was relieved from the obligation to pay the costs of criminal proceedings. This case presents a positive example of prosecution in BiH. When ILO indicators are applied, it is clear that the suspect used the vulnerability of the victims and their health conditions to involve them in forced labour, i.e. begging. Even though the begging alone is an illegal form of work defined as a misdemeanour in the relevant legislation in BiH, the prosecutor decided to take into account other elements of the offence and qualify this behaviour as human trafficking.

Example 2: Labour Exploitation of a Migrant

In another case, prosecuted before the Court of BiH, the accused A.A. was convicted of trafficking in human beings for the purpose of labour exploitation.

The facts show that A.A. during the period between 2006 and 2009, with occasional interruptions, in the territory of Posavina and Tuzla Canton used I.H., a Croatian national, and a person without a registered place of residence in BiH and unable to take care of himself, and provided a lodging for the aforementioned person in his house and he physically abused and exploited him by forcing him to go begging and perform difficult physical labour at waste dumps. With the view of acquiring unlawful proceeds, such as money from begging and the collection of secondary raw materials, primarily old iron (which I.H. had to bring every day over the cited period) the Accused sold him to B.Š. in August, by way of a pending debt for a car purchased in the previous period.

Hence, taking advantage of the person's helplessness he recruited and lodged a person for the purpose of exploitation, forced labour and other services.

Whereby

He committed the criminal offence of Trafficking in Persons, in violation of Article 186 paragraph 1 of the CC BiH.

The court pronounced a verdict based on a plea bargain and sentenced the accused to 11 months imprisonment - suspended for three years. Regarding the decision on the pronounced criminal sanction, the court took into account the confession contained in the plea bargain, co-operation with the prosecutor and the fact that the accused was in a poor financial situation, unemployed and that he had no previous convictions. This case illustrates the vulnerability to trafficking of illegal immigrants.

In the verdict, the Court took into particular account the fact that the injured party, I.H., had permanent residence in the Republic of Croatia and therefore his appearance before the Court would be particularly aggravated or almost impossible. This was an additional argument for acceptance of the plea bargain. Due to the lack of information it is hard to make a definitive conclusion but it appears that the court believed that the above was a decisive factor when evaluating the plea bargain while at the same time there was no indication from the case file that the victim was offered any opportunity to testify.

Example 3: Labour Exploitation – Child Begging

In the recent case of B.P. from Gradacac, the Court of BiH confirmed the indictment against one person for trafficking in human beings in its aggravated form.⁸⁹

Facts point to a minor girl, P.A., in a difficult financial situation. Her mother married B.P., her stepfather, who received her into his home. During that time the stepfather used her vulnerability and forced her to beg. The stepfather made a previous arrangement with two other persons (male and female) who lived in different locations to sell the girl to them. In return he received 400 BAM for her. The two persons took her, used her position and forced her into extramarital cohabitation with their son in the house where she was now residing. During that period the girl was also forced to beg and work on waste dumps. In her attempts to run away her stepfather always found her, physically and psychologically abused her and handed her back to the two persons to whom she was sold.

Whereby,

he committed the criminal offence of Trafficking in Persons, in violation of Article 186 paragraph 2 of the CC BiH.

The case involves child begging as one of the forms of labour exploitation. Forced child begging is seen as a form of exploitation and more recently has been considered a form of servitude and modern slavery. The most recent report, *Begging for Change*, published in April 2009 by Anti-Slavery International, looks at cases of forced child begging in Albania, Greece, Senegal and India.⁹⁰ The report provides a clear picture of the complex grooming and behaviour patterns that keep children locked in a cycle of exploitation when forced to beg for family members. Child begging is a phenomenon that burdens BiH society at large. The recent report by the Ombudsman Institution of BiH⁹¹ indicates the scale of the problem and possible ways to tackle it. It seems that the facts in this case corroborate the results of the above mentioned research. The application of a human rights based approach in this case would necessitate an individualized assessment of the needs of the victim with the interest of the child as a guiding principle in the provision of short- and long-term assistance.

89 Subsequent to researching this paper, the Court of BiH issued an acquittal verdict on 28 September 2011 in the first instance.

90 Anti-Slavery International, *Begging for Change*, April 2009

91 Human Rights Ombudsmen of BiH, 2010 Annual Report, available at: http://www.ombudsmen.gov.ba/materijali/publikacije/GI2010/Annual_Report2010.pdf

Example 4: Labour Exploitation – Adult workers abroad

In the case of over 600 workers from Serbia, BiH and Macedonia who were found in Azerbaijan in conditions which may amount to forced labour, there is still no indictment in BiH.⁹² The information presented here originates from a report prepared by the Serbian NGO ASTRA.

The Construction Company SerbAz Project Construction LLC (hereafter SerbAz) brought the workers to Azerbaijan on tourist visas to work on construction sites. The projects were funded by the government of Azerbaijan. Workers received only 2 to 3 USD per hour after being promised 6 to 7 in their original contract with the employer. In May 2009, their payments stopped altogether; they allegedly worked 12 hour days; lived in overcrowded and inadequate accommodation and were exposed to physical and verbal threats and punishments. At one point, the workers were forced to work 36 hours in a row.

Their freedom of movement was restricted; they needed permission to leave the houses where they stayed. They were not given medical assistance following accidents on the work site. Two migrant workers reportedly died. The workers were brought into Azerbaijan by a private recruitment agency that charged a fee of USD 600 per person and confiscated their passports, which were never returned. The majority of workers had personally paid for tourist visas. They were subsequently not issued residence or work permits which had been promised within 30 days of arrival and therefore resided illegally in Azerbaijan⁹³.

As stated earlier in this paper, exploitation may begin early in the process when potential migrants pay for visa services. Workers often pay for these and other services that are never received. This seems to be the case with the BiH workers. Many of them paid extra money to the recruiter for visas. However, they had to pay again for a tourist visa on arrival and, for the vast majority, the promised resident or work visas never materialized (Astra et al. 2009).

Workers also cited debt bondage as a common form of control and exploitation. Employers used interest rates to increase the debt, fines, infringements and inflated costs for accommodation, food, transport etc. Workers might also be charged with fines related to work, or, just as readily, for infringements related to other support or services provided by the employers, such as accommodation, as the quotes below indicate:

92 Never work alone Trade Unions and NGOs joining forces to combat Forced Labour and Trafficking in Europe Page 27

93 The information presented here is taken from the report produced by Serbian NGO Astra on the situation regarding the workers from Azerbaijan

Two workers used to work the night shift on the tin folding press. They brought in the material and got prepared for “winding” it, because they spent entire raw materials [sic]. At that moment, R. Lj. entered the workshop and saw them standing and talking. He instantly said that they were doing nothing, that they finished their shift and that they should leave the workshop right away and go home. He additionally fined them with USD 500 each. He told them to come to the morning shift the next day and that they would be reduced to assisting worker [sic], which is paid less. The two workers tried to get their old jobs back with the mediation of one of the chiefs, but R. Lj. immediately returned them to the assisting job, where they stayed until they returned home. (Astra et al. 2009, 15)

During his spare time, one of the workers went to sleep and left his clothes on the bed. Lipovac entered the dormitory and fined him with USD 50 for leaving clothes there, although there was no other place to put it. Another worker hung his shirt on the bed because there was no room in the closet, and was also fined USD 50. (Astra et al. 2009, 15)

The workers from Azerbaijan also state that they were heavily fined for breaking rules, even rules related to workers’ leisure time; in some cases, the actual rules changed so frequently they became arbitrary. Numerous other examples of fines were imposed on the workers from BiH employed in construction in Azerbaijan as the Table below illustrates:

Punishable Act	Fine
Failure to make the bed properly Leaving personal items in the dormitory Failure to take off shoes and put on slippers when entering the dorm Use of toilet outside the dorm	USD 50
Failure to produce a report at the end of working hours Using the toilet more than two times during the shift Jumping the queue during lunch at the canteen Stopping work for one minute Leaving the workshop one minute earlier (two minutes = 200 USD) Coming late from town or shops (including on days-off) Repeated use of forbidden toilets	USD 100
Gossiping about the company’s management	USD 200
Consuming alcohol outside working hours (even small amounts, i.e. 1 beer) Refusing an alcohol test Refusing overtime work Sleeping when it is not sleeping time Early termination of the “contract” Failure to obey the time specified in the “permit to leave the camp” Leaving the camp without a permit	USD 500

Source: Astra et al. 2009, 16

Many victims would rather stay in their exploitative situations than return home empty handed. For those who return home, many are desperate to go abroad again in search of work.⁹⁴ The Report alleges that Astra, an NGO in Serbia, found that the Serbian victims exploited in Azerbaijan were all anxious to go abroad again in search of employment.⁹⁵ However, Astra found that the men were interested in assistance in vetting such job offers and seemed to avoid those offers that appeared the most risky. The case presented here also points out the concerning fact that a large number of workers went to work abroad without informing the competent institutions. Such institutions would include the BiH Agency for Labour and Employment and the Ministry of Foreign Affairs. While the workers were not obliged by law to inform these institutions it would have been advisable for them to do so. However, the workers themselves were not aware of the risks of becoming victims of trafficking or forced labour. As it currently stands, none of the workers were identified as potential victims of trafficking in human beings thus none of them received assistance through the referral mechanism.

Example 5: Municipal Court Sarajevo – sexual and labour exploitation

In the case of S.A. the Sarajevo Cantonal Prosecutor raised the indictment for sexual intercourse with a helpless person pursuant to CC FBiH. The facts relate to events that occurred in April 2007: the accused approached the victim and, using her state of mental disability, offered her marriage and took her to his place of residence and had sexual intercourse with her on several occasions. He then took her to Mostar, for the purpose of begging, and kept her in the family house, and again had sexual intercourse with her. After he saw a warrant issued by the Cantonal MoI he returned her to her home.

The victim suffers from schizophrenia and has a mental condition that prevents her from understanding the consequences of her actions.

The inadequate legal framework in the FBiH is illustrated in this case; it did not recognize other purposes of exploitation apart from prostitution. The accused was not charged for enticement to prostitution as provided for in the FBiH Criminal Code since the facts indicate that he used the victim for his own purposes and did not exploit the victim to provide sexual services to other persons. By way of comparison, the previously cited Example 2 processed before the Court of BiH as a trafficking offence, differs from the case of S.A. only in the fact that the victim was male (in the former case) and there was no sexual intercourse element. In Example 2, as in the above mentioned example, the

94 Information gathered through interview conducted with a recently exploited man from BiH who returned home.

95 See ref. 68.

accused used the helpless position of the victim, physically abused him, forced him to beg and perform heavy works at garbage dumps.

One of the possibilities in such cases is to refer the case to the BiH Prosecutor's Office in order to adequately qualify the case and avoid a qualification that misrepresents the suffering of the victim. The overall legal qualification to be considered might include the criminal offence of trafficking in human beings in concurrence with sexual intercourse with a helpless person.

Example 6: Citizen of Bosnia and Herzegovina exploited in Croatia

S.B. is a young man from BiH. He experienced difficult living conditions and had engaged in heavy jobs since the age of twelve to survive. In 2008, he received a call from a friend to come to Croatia to tend sheep and other jobs when the need arose. A friend sent him 100 euro for travel expenses, money that S.B. needed to return afterwards. After two months of work S.B. did not receive the agreed salary. He decided to return home.

After a while, the friend contacted him and stated that he owed him additional money for the work that he did. He again sent him 100 euro for travel expenses after which S.B. decided to go to Croatia. Upon his arrival at the bus station the friend's brother was waiting for him, a fact that S.B. considered unusual. After a month his passport was confiscated and he did not receive money for the work carried out. He was under surveillance the whole time without any possibility to leave unaccompanied. He was accommodated in inhumane conditions with no electricity, water or toilet. Food was served on rare occasions. In time, he was physically and emotionally abused; he was severely beaten on several occasions.

Subsequently he decided to get his documents. A few days later he managed to retrieve the documents but not the money he had earned. The friend threatened to kill him when S.B. decided to report the case to police. After the police report he spent few months in a specialized shelter for adult victims of trafficking in human beings. After that, he was safely returned to BiH.

As the previous research⁹⁷ points out, migrant workers are particularly vulnerable to trafficking for labour exploitation. Even in situations where the migration process starts with legitimate recruitment, this does not preclude the fact that that a person may become a victim of trafficking. The recruitment took place through informal,

96 The facts of the case are taken from the publication: Trafficking in Human Beings in Republic of Croatia: Assessment with special focus on labour exploitation, International Centre for Migration Policy Development (ICMPD), 2010

97 USAID: Trafficking of Adult Men in the Europe and Eurasia Region, September 2010

friendly connections, where the victim needed to work for the money that was given for travel expenses. There was no formal contract or any document that confirmed the employment. These are all recognizable ways of recruitment. The threat of bodily injury or death is a commonly used means of coercion within the trafficking chain. Keeping the person in such conditions was ensured through the confiscation of travel documents.

Official statistics on trafficking victims show that most victims of human trafficking for labour exploitation in BiH come from neighbouring countries⁹⁸. The close geographic location, similar culture and language, and lack of strict border control should be taken into account; regional co-operation is crucial to combating these weaknesses. Also, the difficult economic and social situation in BiH may raise the number of individuals seeking employment outside of the country. These factors contribute to a large supply of inexpensive workers willing to accept less favourable working conditions. As no significant effort to safeguard workers and warn them of the possibilities of becoming victims of trafficking was identified, outreach to potential economic migrants needs to be improved.

98 State Co-ordinator for Combating Trafficking in Human Beings, 2010 Annual Report

V. Concluding remarks

Trafficking in human beings also for labour exploitation exists in BiH and authorities are obliged to take all necessary steps to prevent this crime, prosecute offenders and protect victims. The purpose of this paper was not to draw all-encompassing conclusions regarding the nature and extent of trafficking for human beings for labour exploitation.. However, below is a list of issues that should be considered as BiH goes forward in its fight against trafficking for labour exploitation.

According to the 2010 report of the State Co-ordinator for Combating Trafficking in Human Beings, the most predominant form of labour exploitation is child begging. In the past, the problem of children living and working on the street had not been classified as human trafficking. There are sporadic reports, observations, and media announcements about children working all day on the streets, and who receive their earnings however, a serious intervention by the competent institutions and services is missing.

Policy makers should consider:

1. Treating children living and working on the street as possible victims of trafficking. This is an issue for all competent institutions but mostly for the social welfare system. Children who beg generally do not go to school and are often abused by adults.
2. Improving outreach services directed at potential labour migrants to inform them of the risks and dangers of becoming victims of trafficking and provide practical information on what to do if they find themselves in such a situation.
3. Giving special attention to the individualized needs assessment of every victim, especially children and male adult victims of trafficking.
4. Including labour inspectors in national referral mechanisms, as well as in the appropriate monitoring bodies such as regional monitoring teams.

Since labour trafficking is less visible than other forms of trafficking, it is highly recommended that the relevant actors should have the ability and the capacity to identify possible cases of labour exploitation, to provide protection to the victims and to punish the perpetrators. Combating trafficking necessitates a multidisciplinary approach and co-ordination of efforts. In BiH the co-ordination mechanism is established and the competencies of the institutions are provided.

5. Enhancing and simplifying procedures in order to effectively tackle trafficking. In addition, more efforts and resources should be invested into the co-ordinating mechanism to make the system more responsive to the needs of the victims regardless of their gender, age or social status.

Since trafficking for labour exploitation involves violation of labour rights, it is necessary to raise the awareness of labour inspectors on the phenomenon of trafficking to enhance their capacity to identify and report possible victims of trafficking.

6. Addressing the different forms of labour exploitation in any strategic documents dealing with migration, labour rights and integration of foreign workers and their families. In addition to this, policy makers in the FBiH should consider passing a new Law on the Employment of Foreigners in compliance with the BiH Law on the Movement and Stay of Aliens thus providing a comprehensive and coherent legal framework.
7. Conducting more detailed research on the profile of victims and perpetrators and the specific features of labour trafficking.

The results of this paper do not indicate that organized crime is a prevalent form of human trafficking for labour exploitation in BiH. Based on the available information it seems that individuals are the most common perpetrators of this offence and the main aim is gaining financial means for themselves. Cases in BiH usually involve BiH citizens but occasionally persons from neighbouring countries are victims of trafficking. Only one case appears to have a transnational character involving perpetrators and victims from several countries. This paper did not identify any activities by the authorities to ensure the safety of migrant workers or provide information on the risks of becoming victims of trafficking.

While criminal legislation in BiH provides for the protection of workers through provisions on the violation of labour rights, the trafficking provision will only become relevant if other constituent elements of the crime are present. In any case, the final qualification will depend on the circumstances of every single case and the actors need to be aware of the connections between the two.

Practitioners should consider:

Paying special attention to the proper assessment of the consent or the lack thereof in identifying instances of trafficking for labour exploitation. As long as the crime occurs for an exploitative purpose (and by acts and means falling within the UNCTOC and the CoE Convention) the question of consent by the victim to exploitation becomes irrelevant. Besides, the component of means becomes superfluous when the victim of the crime is below eighteen years of age, as it is deemed that they have not reached a sufficient level of psycho-physical maturity.

An area of concern is the effectiveness of the referral mechanism for victims of trafficking for labour exploitation. Accessibility of assistance and legal aid seems to be a point of concern. A recent study⁹⁹ pointed to several factors that may contribute to the process of identification: workers deported as illegal migrants, gender bias and known types of victims (women and children for sexual exploitation). These factors should be taken into account in understanding why labour exploitation is less visible than other forms of exploitation.¹⁰⁰

99 USAID: Trafficking of Adult Men in Europe and Eurasia p. 7
100 UNODC Global report, page 51

Policy makers and practitioners should consider:

Exercising due caution in the qualification of the facts, provided that trafficking for the breach of labour rights are also provided as criminal offences. They should look into the constituent elements of labour related offences and trafficking to properly qualify the crime.

The data available for this paper did not indicate a high number of prosecuted cases of labour exploitation. This is due to due to offence qualification issues, as described throughout this document. Grey areas should be taken into account when evaluating the prevalence of labour exploitation. In theory it is difficult to make definite differences between trafficking for labour exploitation, forced labour and illegal employment or violation of labour rights. This is even harder in practice. In order for trafficking to exist under criminal legislation, apart from the establishment of forced labour as the purpose, it is also necessary to establish the act and the means as the constitutive element of trafficking. This, in practice, implies that even if there are some elements of forced labour there has to be an act of recruitment and means and the perpetrator has to have the intention to commit this specific offence.

Annex 1: International Labour Organization: Indicators

ILO: Indicators of trafficking of adults for labour exploitation

INDICATORS OF DECEPTIVE RECRUITMENT

Strong Indicator	Medium Indicators	Weak Indicator
<i>Deceived about the nature of the job or location</i>	<i>Deceived about conditions of prostitution</i> <i>Deceived about content or legality of work contract</i> <i>Deceived about family reunification</i> <i>Deceived about housing and living conditions</i> <i>Deceived about legal documentation or obtaining legal migration status</i> <i>Deceived about travel and recruitment conditions</i> <i>Deceived about wages/earnings</i> <i>Deceived through promises of marriage or adoption</i>	<i>Deceived about access to education opportunities</i>

INDICATORS OF COERCIVE RECRUITMENT

Strong Indicator	Medium Indicators	Weak Indicator
<i>Abduction, forced marriage, forced adoption or selling of victim</i> <i>Debt bondage</i> <i>Threats of violence against victim</i> <i>Violence on victims</i>	<i>Confiscation of documents</i> <i>Isolation, confinement or surveillance</i> <i>Threat of denunciation to authorities</i> <i>Threats to inform family, community or public</i> <i>Violence on family (threats or effective)</i> <i>Withholding of money</i>	–

INDICATORS OF RECRUITMENT BY ABUSE OF VULNERABILITY

Strong Indicator	Medium Indicators	Weak Indicators
–	<i>Abuse of difficult family situation</i> <i>Abuse of illegal status</i> <i>Abuse of lack of education (language)</i> <i>Abuse of lack of information</i> <i>Control of exploiters</i> <i>Difficulties in the past</i> <i>Difficulty in organizing travel</i> <i>Economic reasons</i> <i>False information about law, attitude of authorities</i> <i>False information about successful migration</i> <i>Family situation</i> <i>Personal situation</i> <i>Psychological and emotional dependency</i> <i>Relationship with authorities/legal status</i>	<i>Abuse of cultural/religious beliefs</i> <i>General context</i> <i>Difficulties in the past</i> <i>Difficulty in organizing travel</i>

INDICATORS OF EXPLOITATION

Strong Indicator	Medium Indicators	Weak Indicator
<i>Excessive working days or hours</i>	<i>Bad living conditions</i> <i>Hazardous work</i> <i>Low or no salary</i> <i>No respect of labour laws or contract signed</i> <i>No social protection (contract, social insurance, etc.)</i> <i>Very bad working conditions</i> <i>Wage manipulation</i>	<i>No access to education</i>

INDICATORS OF COERCION AT DESTINATION

Strong Indicators	Medium Indicators	Weak Indicator
<i>Confiscation of documents</i> <i>Debt bondage</i> <i>Isolation, confinement or surveillance</i> <i>Violence on victims</i>	<i>Forced into illicit/criminal activities</i> <i>Forced tasks or clients</i> <i>Forced to act against peers</i> <i>Forced to lie to authorities, family, etc.</i> <i>Threat of denunciation to authorities</i> <i>Threat to impose even worse working conditions</i> <i>Threats of violence against victim</i> <i>Under strong influence</i> <i>Violence on family (threats or effective)</i> <i>Withholding of wages</i>	<i>Threats to inform family, community or public</i>

INDICATORS OF ABUSE OF VULNERABILITY AT DESTINATION

Strong Indicators	Medium Indicators	Weak Indicator
–	<i>Dependency on exploiters</i> <i>Difficulty of living in an unknown area</i> <i>Economic reasons</i> <i>Family situation</i> <i>Relationship with authorities/legal status</i>	<i>Difficulties in the past</i> <i>Personal characteristics</i>

International Labour Organization: Indicators of trafficking of children for labour exploitation

The Palermo Protocol specifically states that, in the case of children under 18, there is no need to prove “the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability” in order to establish the crime of trafficking. Nevertheless, it was decided to retain the indicators of deception, coercion and abuse of vulnerability in order to analyse trafficking in children with harmonized tools within Europe.

INDICATORS OF DECEPTIVE RECRUITMENT

Strong Indicators	Medium Indicators	Weak Indicator
<i>Deceived about access to education opportunities</i> <i>Deceived about the nature of the job, location or employer</i>	<i>Deceived about conditions of work</i> <i>Deceived about content or legality of work contract</i> <i>Deceived about family reunification</i> <i>Deceived about housing and living conditions</i> <i>Deceived about legal documentation or obtaining legal migration status</i> <i>Deceived about travel and recruitment conditions</i> <i>Deceived about wages/earnings</i> <i>Deceived through promises of marriage or adoption</i>	–

INDICATORS OF COERCIVE RECRUITMENT

Strong Indicator	Medium Indicators	Weak Indicator
<i>Abduction, forced marriage, forced adoption or selling of victim</i> <i>Debt bondage</i> <i>Threats of violence against victim</i> <i>Violence on victims</i>	<i>Confiscation of documents</i> <i>Isolation, confinement or surveillance</i> <i>Threat of denunciation to authorities</i> <i>Threats to inform family, community or public</i> <i>Violence on family (threats or effective)</i> <i>Withholding of money</i>	

INDICATORS OF RECRUITMENT BY ABUSE OF VULNERABILITY

Strong Indicator	Medium Indicators	Weak Indicator
–	<i>Abuse of cultural/religious beliefs</i> <i>Abuse of difficult family situation</i> <i>Abuse of illegal status</i> <i>Abuse of lack of education (language)</i> <i>Abuse of lack of information</i> <i>Control of exploiters</i> <i>Difficulties in the past</i> <i>Difficulty in organizing travel</i> <i>Economic reasons</i> <i>False information about successful migration</i> <i>Family situation</i> <i>General context</i> <i>Personal situation</i> <i>Psychological and emotional dependency</i> <i>Relationship with authorities/legal status</i>	–

INDICATORS OF EXPLOITATION

Strong Indicator	Medium Indicators	Weak Indicator
<i>Excessive working days or hours</i>	<i>Bad living conditions</i> <i>Hazardous work</i> <i>Low or no salary</i> <i>No access to education</i> <i>No respect of labour laws or contract signed</i> <i>Very bad working conditions</i> <i>Wage manipulation</i>	–

INDICATORS OF COERCION AT DESTINATION

Strong Indicator	Medium Indicators	Weak Indicator
<i>Confiscation of documents</i> <i>Debt bondage</i> <i>Forced into illicit/criminal activities</i> <i>Forced tasks or clients</i> <i>Isolation, confinement or surveillance</i> <i>Threats of violence against victim</i> <i>Under strong influence</i> <i>Violence on victims</i>	<i>Forced to act against peers</i> <i>Forced to lie to authorities, family, etc.</i> <i>Threat of denunciation to authorities</i> <i>Threat to impose even worse working conditions</i> <i>Threats to inform family, community or public</i> <i>Violence on family (threats or effective)</i> <i>Withholding of wages</i>	–

INDICATORS OF ABUSE OF VULNERABILITY AT DESTINATION

Strong Indicator	Medium Indicators	Weak Indicator
–	<i>Dependency on exploiters</i> <i>Difficulties in the past</i> <i>Difficulty of living in an unknown area</i> <i>Economic reasons</i> <i>Family situation</i> <i>Personal characteristics</i> <i>Relationship with authorities/legal status</i>	–