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WRONGFUL REMOVAL OF CHILDREN

Considering a seriousness of the wrongful removal of children, but also its actuality in various forms, cultural, socio-economic and political contexts, this paper shed a light on the existing gap between the status of this phenomenon as a subject of international human rights instruments and still insufficient level of awareness of the main national stakeholders and academic community across the World. The author analyses the background of recognition of the wrongful removal of children by international treaties, but also the main aspects of this phenomenon. Among others, the author addresses this issues from the angle of guaranties provided by the International Convention for Protection of all Persons from Enforced Disappearance and the Convention on the Rights of the Child in the light of the right to the truth and personal identity. The last, but not the least, author discussing the relevant provisions of the Serbian penal and civil legislation that deal with wrongful removal of children.

Keywords: *children, right to truth, right to personal identity, enforced disappearance*

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1. Introduction

Without any doubt, the unlawful removal of children “is every parent’s nightmare”¹ (Finan, 1994:1007) It changes the identity and life attitudes of children unlawfully removed from their parents and the destiny of the whole family. The circumstances and modalities of child removal are changing throughout of time influenced by overall social, cultural and political climate. Consequently, the need for organized reaction (at the national, regional or global level) on this phenomenon is framed by its causes, seriousness and diffusion in certain period of time. Sometimes, intensity and prevalence of the problem in particular region is so high to require global reaction. This was the case with the wrongful removal of children in the context of enforced disappearances in Latin America. However, even a more than four decades since this phenomenon was detected as a widespread and recognized as a ground of the right to know the truth and personal identity, it is still out of deserved focus of academic community, especially European one. In parallel, this phenomenon is still not well known within the police, judicial, prosecutorial, health and social care systems, even in those countries which, by ratifying key international instruments that recognise the wrongful removal of children (hereinafter: WRC) as a serious crime, have committed themselves to build their normative framework, but also institutional capacity in a way that ensures prevention and effective investigation of wrongful removal of children.

The reasons for this can be traced both- to the fact that the trigger to recognise the wrongful removal of children as a problem and practice that drew the international community’s response was the situation in Latin America during the 1970s and 1980s, and the fact that the ratification of international instrument resulting from these reactions (The International Convention for Protection of all Persons from Enforced Disappearance², hereinafter: Convention on enforced disappearances, CED), most often in European countries, are not accompanied by adequate training of the target groups involved in the prevention and investigation of wrongful removal of children, but neither with the appropriate raising awareness activities to shed a light on the nature of this phenomenon.

¹ Finan, C. L. (1994) Convention on the Rights of the Child: A Potentially Effective Remedy in Cases of International Child Abduction, *Santa Clara Law Review*, 34/3, 1007-1038.

² International Convention for the Protection of All Persons from Enforced Disappearance, adopted on 20 December 2006 during the sixty-first session of the General Assembly in resolution A/RES/61/177

Contrary to issue of children unlawfully removed from parents in the context of enforced disappearance, where international reaction on burning problem (more or less regionally located) resulted in the adequate response in terms of adoption of international instruments, but not followed by universal approach in terms of ratification³, an international community seems to be much more dedicated to the issue of unlawful removal of children from one parent by other one.⁴ This shows the lack of awareness of the numerous treats coming from the growing competences and complexity of the social care system as well as increased involvement of various state agents in parental and custody issues that open the room for abuse and build the “modern bureaucracy” environment for unlawful removal of children.

Therefore, in this paper, we will focus on wrongful removal of children associated with enforced disappearances as well as on the “border line cases” in the context of unlawful removal of children by state authorities who breach legal competences and procedures within the social care system.

2. International Community response to wrongful removal of children associated with enforced disappearances

2.1. The Background

More than four decades past since the first public demonstration of the organization so called *Madres de Plaza de Mayo* in the Plaza de Mayo (Buenos Aires, Argentina) in 1977. Mothers whose children were taken by military regime and grandchildren born in prison or camps were adopted soon after being born, drew the attention of the international public to the issue of wrongful removal of children. They persistently petitioned successive political regimes for information about the fate of their children and for the prosecution of those responsible for their disappearance. Some of them even refused financial and memorial reparation and requested symbolic one- the truth, official

³ CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION- The Hague Convention (*Concluded 25 October 1980*). On the July 19th 2019 the total number of contracting parties was 101. See: <https://www.hcch.net/en/instruments/conventions/status-table/?cid=24>, last accessed on September 9th 2019.

⁴ Article 3 of the Hague Child Abduction Convention⁴ stipulates that the removal or the retention of a child is to be considered wrongful where – a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. The rights of custody mentioned in sub-paragraph a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

acknowledgement, retributive justice and the reappearance of those disappeared. (Moon, 2012:7-9) It is estimated that between 10.000 and 30.000 of persons disappeared in Argentina between 1976 and 1983 (period so called “the dirty war) depending of the sources (national institutions or independent bodies).⁵ Approx. 10% of all missing were pregnant women (Brockhus, 2014:3)⁶ Children born in captivity were adopted or sold and mostly never met their parents. As reaction to this, the organisation *Madres de Plaza de Mayo* grown up into the *Grandmothers de Plaza de Mayo*, the movement of mothers whose children gave a birth in captivity and grandmothers of wrongfully removed children. They were asking for the truth and whereabouts of those children.

Consequently, in 1978 The UN General Assembly adopted the Resolution 33/173⁷, in which it expressed concern about the reports from various parts of the world relating to enforced or involuntary disappearances, as well as about the anguish and sorrows caused by those disappearances, and called upon Governments to hold law enforcement and security forces legally responsible for excesses which might lead to enforced or involuntary disappearances of persons.

2.2. Legislative response

In 1992 it was adopted Declaration on the Protection of All Persons from Enforced Disappearance.⁸ In the Declaration, the General Assembly expressed the deep concern that in many countries, often in a persistent manner, enforced disappearances occur, in the sense that persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law. For the first time, in the article 20 of the Declaration, unlawful removal of children

⁵ Report of the Working Group on Enforced or Involuntary disappearances- Addendum-Mission to Argentina January, 5th 2009, UN Doc, A/HRC/10/9, Add. 1, par. 9.

⁶ Brockhus, D. (2014) The Living Disappeared and their “True Identity”, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2447361, last accessed on September 5th 2019.

⁷ Resolution 33/173 of 22 December 1978 adopted by the UN General Assembly, available at: <http://www.worldlii.org/int/other/UNGA/1978/169.pdf>, last accessed on September 9th 2019.

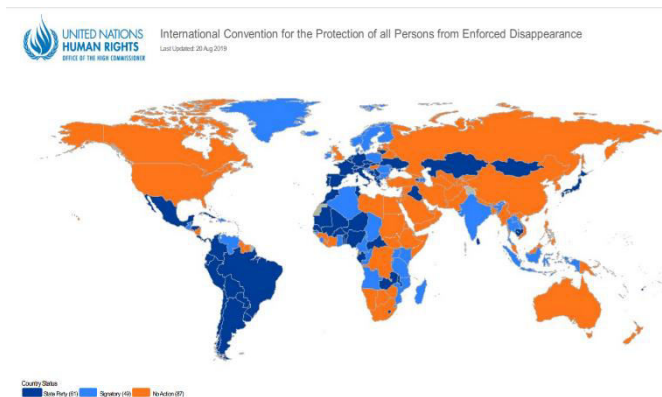
⁸ Declaration on the Protection of All Persons from Enforced Disappearance, adopted by General Assembly Resolution A/RES/47/133 at the 92nd plenary meeting 18 December 1992, available at: <https://www.ohchr.org/en/professionalinterest/pages/enforceddisappearance.aspx>, last accessed on September 9th 2019.

associated with enforced disappearances was recognised as an autonomous, serious crime. The above mentioned article obliged states to prevent and suppress the abduction of children of parents subjected to enforced disappearance and of children born during their mother’s enforced disappearance, and to devote their efforts to the search for and identification of such children and to the restitution of the children to their families of origin. In parallel with introduction of WRC, the Declaration recognised and guarantee the right to the true identity through the request that adoption procedures for such children could be annulled and altering or suppressing documents attesting to their true identity, punished as an extremely serious offence.

From both documents, especially from the Declaration, it is easy to conclude that enforced disappearances and wrongful removal of children were recognised as a widespread and serious problem in various parts of the world. Considering this, the adoption of the International Convention for the Protection of All Persons from Enforced Disappearance in 2006, followed by establishing the Committee on Enforced Disappearances, was expected to be a final trigger to achieve universality in recognition and incrimination of the WRC all over the world. However, the number of ratifications has not grown as expected.

Even at the first glance on the map illustrating the current situation in regard of ratification of the Convention on enforced disappearances, it is easy to conclude that universal coverage remains priority in terms of promotion of ratifications, but also the more or less uniform coverage in various parts of the World.

Picture 1: International Convention for the Protection of All Persons from Enforced Disappearance- signature and ratification status



So far, 61 states have ratified the Convention, 49 states signed it and 87 states have not made any actions in this regard. When it comes to the geographical allocation of ratifications, the highest level of dedication is still in the Central and South America, West Africa and Europe. Reasons for the highest ratification rates in those regions are associated with the historical background of dictatorships and conflicts that resulted in, among others WRC (Central and South America, West Africa), but also with a human rights protection heritage in Europe. Anyhow, despite the OHCHR efforts to double number of ratification until 2020⁹, the enforced disappearances and WRC are still widespread considered to be “the Latin America issue”. Such a prejudice is closely associated with above described background of enforced disappearances, but also with the lack of knowledge of the Convention’s provisions.

2.3. Wrongful removal of children in armed conflicts

Having in mind the above mentioned approach associated with wrong perception of the WRC associated with enforced disappearances as isolated phenomenon typical for several regions, it is important to emphasize that the WRC in the context of armed conflict, as an especially serious and widespread crime should be used as an additional argument to foster ratification process and. To illustrate this, it is important to mention that, according to the official UN data (Mazurana & Carlson, 2006:1-2) in the period 1990-2006, there have been over 60 armed conflicts in 48 locations, and with the exception of four of these conflicts, all were intrastate conflicts. Of the 60 armed conflicts, more than 1,000 conflict-related fatalities per year were recorded in 57 of them. In the period 1996-2006, 2 million children have been killed in situations of armed conflict, 6 million children have been permanently disabled or injured, over 14 million children have been displaced, and *over 1 million have been orphaned and separated from their parents.*

As rapporteurs witnessed, during armed conflict, girls are subject to widespread and, at times, systematic forms of human rights violations that have mental, emotional, spiritual, physical and material repercussions. These violations include illegal detention with or without family members, abduction and *forced removal from families and homes, disappearances*, torture and other inhuman treatment, amputation and mutilation, forced recruitment into fighting forces and groups, slavery, sexual exploitation, increased exposure to HIV/AIDS, and a wide range of physical and sexual violations, including rape, enforced pregnancy, forced prostitution, forced marriage and forced child-bearing.

⁹ See: <https://www.youtube.com/watch?v=rrwqu9z0MNw>, last accessed on August 24th, 2019.

(Mazurana & Carlson, 2006:1-2) Contrary to girls, wrongfully removed boys are more likely to be exposed to recruitment for combat.

Considering the all of these it is obvious that seriousness and the widespread nature of the wrongful removal of children in armed conflicts, require the more intensive cooperation and development of a mechanisms aimed at awareness raising and promotion of the relevant international instruments in the field- on the first place the International Convention for the Protection of All Persons from Enforced Disappearances.¹⁰

3. Convention of the Rights of the Child as a framework for understanding and implementation of the CED

Adoption of the International Convention for the protection of all persons from enforced disappearance shaded a new light on the wrongful removal of children. As we earlier mentioned, the official recognition of the need to incriminate WRC in the Convention was associated with the widespread, sometimes even a systematic, wrongful removal of children was applied during some dictatorships in 20th century¹¹ as a modality of revenge to political opponents and also as a way of intimidation. (Kolaković-Bojović, 2019: 394) However, there is no doubt that the only acceptable approach to interpretation and implementation of the art. 25 of the International Convention for the protection of all persons from enforced disappearance is to interpret its provisions in the context of guaranties provided by the Convention of the Rights of the Child (hereinafter: CRC).

The Convention sanctions these serious practices in the art. 25 that recognizes two main types of wrongful removal of children:

¹⁰ The initiative than needs to be mentioned is that, in November 2018, the Special Representative opened the United Nations Liaison Office for Children and Armed Conflict (Europe) in Brussels, tasked with enhancing cooperation with European Union institutions and member States and covering relations with the Human Rights Council and other Geneva-based mechanisms and institutions, as well as non-governmental organizations. The Liaison Office provided briefings and trainings on children and armed conflict to experts from the European External Action Service, as well as to human rights and gender advisers from Common Security and Defence Policy missions of the European Union. (See ref. above) In addition to this, intensive and continuous dialogue between Special Representative and UN Treaty Bodies. in April 2019, the Special Representative signed a memorandum of understanding with the European Parliament to establish a framework of cooperation on children and armed conflict. See: Report of the Special Representative of the Secretary General for Children and Armed Conflict, United Nations doc. A/74/249, 29 July 2019, available at https://www.un.org/ga/search/view_doc.asp?symbol=A/74/249&Lang=E&Area=UNDOC, last accessed on September 2019.

¹¹ See: Franceze, C. (2017) Balancing justice and peace: a historical and hypothetical exploration of justice during spain's post-franco transition from dictatorship to democracy, Temple International & Comparative Law Journal, Vol. 31 Issue 2, p497-519.

- The wrongful removal of children who are subjected to enforced disappearance;
- The wrongful removal of children whose father, mother or legal guardian is subjected to enforced disappearance or children born during the captivity of a mother subjected to enforced disappearance.

In order to clarify this provision of the art. 25, par 1(a) it is important to analyze them in the context of the definition of enforced disappearance from the arts. 2 and 5 of the Convention, but also in the context of the *definition of the “child”* from the article 1 of the CRC which defines that, for the purposes of this Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

The art. 2 of the Convention on enforced disappearances identifies the following elements in the definition of enforced disappearances:

- There is an arrest, detention, abduction or any other form of deprivation of liberty;
- That conduct is carried out by agents of the state or by persons or groups of persons with the authorization, support or acquiescence of the state;
- The conduct is followed either by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person;
- The objective result of the conduct is that the disappeared person is placed outside of the protection of the law.

According to art. 5 of the Convention, the widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law.

These provisions of the Convention streamline the general provision of the art. 37(b) of CRC which stipulates that States Parties shall ensure that no child shall be deprived of his or her liberty unlawfully or arbitrarily. “The arrest, detention or imprisonment of a child

shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.”¹²

In addition to this, the Convention recognises as punishable the falsification, concealment or destruction of documents attesting to the true identity of the children subjected to enforced disappearances. Within the scope of the right to the true identity the Convention introduces an obligation of Each State Party to take the necessary measures to search for and identify those children and to return them to their families of origin, in accordance with legal procedures and applicable international agreements. When it comes to the right to the true identity, its very nature should be understood in light of the articles 7 and 8 of the CRC. Namely, the art. 7, par. 1, stipulate that the child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents, while art. 8, par 1, prescribes that the States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference. Par. 2 of the same article, introduces the obligation of the State Parties to, where a child is illegally deprived of some or all of the elements of his or her identity, provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

Also, Convention introduces obligation of the States Parties to assist one another in searching for, identifying and locating the children subjected to enforced disappearances. This obligation corresponds to the article 11, of CRC which stipulates that States Parties shall take measures to combat the illicit transfer and non-return of children abroad and promote the conclusion of bilateral or multilateral agreements or accession to existing agreements.

Convention promotes the best interests of the children as the main principle that needs to be follow in enabling child victims their right to preserve, or to have re-established, their identity, including their nationality, name and family relations as recognized by law, or to review the adoption or placement procedure, and, where appropriate, to annul any

¹² In addition to this, the same article of CRC provides that (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances; (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

adoption or placement of children that originated in an enforced disappearance. (art. 25, pars. 4-5)¹³ This principle derives from “the best interest of the child” as a main, horizontal principle introduced by the art. 3 of the CRC which frames “all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies.” This principle is additionally emphasized in the art. 21 of CRC which should be used for interpretation of the art. 25, pars 4-5 of the Convention which deals with the system of adoption. According to the aforementioned art. 21 of CRC, the system of adoption shall ensure that the best interests of the child shall be the paramount consideration. Considering this, the State Parties shall: (a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child’s status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary; (b) Recognize that inter-country adoption may be considered as an alternative means of child’s care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child’s country of origin; (c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption; (d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it; (e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

An importance of the right to the true identity was confirmed by the UN General Assembly Resolution on the Rights of the Child A/RES/73/155¹⁴ which “urges all States parties to intensify their efforts to comply with their obligations under the Convention on the Rights of the Child to **preserve the identity of children**, including their nationality, name and family relations, as recognized by law, to protect children in matters relating to birth registration, family relations and adoption or other forms of alternative care, recognizing that every effort should be directed to enabling children to remain in or swiftly return to the care of their parents or, when appropriate, other close family members and that, where alternative care is necessary, family and community-based care

¹³ See more in: Sunga, R.A. (2012) *On Locating the Rights of Lost*, 45 J. Marshall L. Rev. 1051-1120.

¹⁴ UN General Assembly Resolution on the Rights of the Child A/RES/73/155, 17th December 2018, par. 8-9.

should be promoted over placement in institutions.” Accordingly, the Resolution “recalls every child’s right to be registered immediately after birth, to a name, to acquire a nationality and to recognition everywhere as a person before the law, as set out in the Convention on the Rights of the Child and the International Covenant on Civil and Political Rights, respectively, reminds States of their obligation to ensure the registration of the birth of all children without discrimination of any kind, including in the case of late birth registration, calls upon States to ensure that birth registration procedures are universal, accessible, simple, expeditious and effective and provided at minimal or no cost, and recognizes the importance of birth registration as a critical means of preventing statelessness.”

3.1. Wrongful removal of children in case of emergency

The special attention CRC pays to the issue of removal of children from their parents due to necessity for the best interest of the child. As earlier mentioned, in the environment of growing competences and involvement of the state authorities in the family life and relations, a clear rules and procedures needs to be established to prevent from abuse.

No doubt that abused children should be protected from their abusers. Protection, in turn, often requires that children be physically separated from their natural guardians, who either are guilty of abuse themselves or house the abusers. (Brown, 2004:913-914) While aforementioned is not in question, the conditions, limits and procedures that should be followed by judges, enforcement officers and social workers should be well defined and properly implemented in order to prevent a harmful discretion of state agents. In attempt to investigate the likelihood that child will be injured in future, sometimes is not easy to define the borderline between abuse of official duty and incorrect assessments resulting in wrongful removal of a child from his/her parent or, likewise, leave children in harm’s way. (Littell & Shlonsky, 2010:5)¹⁵ A special attention should be pay on the situations where, due to situation of emergency, a state authorities omit to acquire permission of court and/or to follow procedure prescribe by law in order to ensure due process of law. This situation could be well illustrated by *Duchesne v. Sugarman* case from 1973, where court find violation of the due process of law made by the omission of competent

¹⁵ Littell, J. H. & Shlonsky, A. (2010) Toward Evidence-Informed Policy and Practice in Child Welfare, available at: https://repository.brynmawr.edu/cgi/viewcontent.cgi?referer=https://scholar.google.com/&httpsredir=1&article=1038&context=gsswr_pubs, last accessed on August 19th 2019

authorities to ensure parental consent or court authorization when removed two children from mother temporary placed to the hospital.¹⁶

Article 9, par. 1. of the Convention stipulates, as a general principle, that the States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. This general provision is further specified in a way that “such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child’s place of residence.” It is important to mention that the Convention guaranties participation of all interested parties in any proceedings related to separation of children from their parents to make their views known. Also, the CRC emphasises in the par. 4 of the same article that “where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child.”¹⁷

4. Wrongful removal of children and Serbian legislation

Republic of Serbia was among the first countries that ratified the Convention on Enforced Disappearances within the initial few years after its adoption.¹⁸ However, an important measures to establish necessary legal guaranties and procedures to keep all children under the protection of law have been undertaken even before the ratification in order to comply with the provisions of the Convention of the Rights of the Child.¹⁹

¹⁶ *Duchesne v. Sugarman*, 566 F.2d 817 (2d Cir. 1977) Decided Sep 28, 1977

¹⁷ States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

¹⁸ For more about the compliance of Serbian legislation with the Convention, see: M. Kolaković-Bojović, (2017). The Incrimination of Enforced Disappearance in the Criminal Law of the Republic of Serbia. *Journal of Institute of Criminological and Sociological research*, 2017/1, 135-148.

¹⁹ “Official Journal of the SFRY – International Treaties”, No. 15/90 and “Official Journal of the FRY – International Treaties”, Nos. 4/96 and 2/97.

4.1. Wrongful removal of children and Serbian criminal law

The approach of Serbian authorities to the criminalisation of the WRC is mostly caused by their position regarding the incrimination of enforced disappearance as an autonomous crime in the Criminal Code (hereinafter: CC). Namely, based on the statement given by the Serbian delegation during the Constructive dialogue with the CED in 2015, that amendments to the Criminal Code are being prepared in order to introduce the offence of enforced disappearance, the Committee welcomed such a position and identified this reform step as a priority to be fulfilled before 2016.²⁰ However, even a four years later an enforced disappearance is not recognized as an autonomous crime, but it doesn't mean that is unpunishable. It may constitute the commission of criminal offences prescribed by the following provisions of the Criminal Code: Abduction (article 134, paragraph 3), Abduction of Minor (article 191), Change of Family Status (article 192), Human Trafficking (article 388, paragraph 3 and 9) and Trafficking in Minors for Adoption (article 389).

When it comes to WRC in form of enforced disappearances of children or WRC of children born in captivity whose parents are victims of e.d., the last four of above mentioned crimes are relevant:

Article 191 of the CC, **Abduction of Minor**²¹ stipulates in par. 1 that “Whoever unlawfully detains or abducts a minor from a parent, an adoptive parent, a guardian or another person, i.e. an institution entrusted with care of the minor, or whoever prevents enforcement of the decision granting custody of a minor to a particular person shall be punished with a fine or imprisonment of up to three years. Par. 2. of the same article prescribe that if the offence specified in paragraph 1 of this Article is committed against a new-born, the perpetrator shall be punished with imprisonment of six months to five years.²² It is very important to mention that par. Incriminates the situation where an abduction of a minor is committed for gain or other base motives, or the offence results in serious impairment of health, care or education of the minor, or where the offence is committed by an organized criminal group, when the perpetrator shall be punished with

²⁰ Committee on Enforced Disappearances, Concluded observations on the report submitted by Serbia under article 29, paragraph 1, of the Convention (CED/C/SRB/1) at its 124th and 125th meetings (CED/C/SR.124 and 125), held on 4 and 5 February 2015, par. 10.

²¹ It is important to mention that, despite the fact that the official translation of the CC use the term “abduction”, the adequate term (following the original, Serbian text of the law) should be “removal”.

²² According to the par. 3, Whoever prevents enforcement of the decision of a competent authority setting out the manner of maintaining of personal relationships of a minor with a parent or other relative shall be punished with a fine or imprisonment of up to two years.

imprisonment of one to ten years. It seems that this par. was the right place to prescribe responsibility of agents of the state or by persons or groups of persons with the authorization, support or acquiescence of the state. In this sense it is also important to mention that provision of the par. 5 could be criticized having in mind that it allows the court to remit punishment of a perpetrator of the offence specified in paragraphs 1, 2 who voluntarily hands over the minor to a person or institution having custody of the minor, or enables enforcement of the custody order (that is understandable and could be justified especially in situations where perpetrator is relative of family member), but it could not be considered as justified for cases prescribed in par. 4 of this Article.²³

In addition to the Abduction of a Minor, Article 192 of CC incriminates the **Change of Family Status**. This crime is committed by “Whoever by substitution, replacement or otherwise changes the family status of a child. (par. 1) In this case perpetrator shall be punished with imprisonment of six months to five years. In par. 2 of the same article is recognised responsibility of the doctor of the healthcare institution who proclaims a living new-born dead for the purpose of changing the family status. According to par. 3, “whoever commits the offence specified in paragraphs 1 and 2 of this Article for gain, through abuse of position, habitually engages in committing of such an offence or if the offence is committed by an organised criminal group, shall be punished with imprisonment of one to ten years. This paragraph brings the solution that is more adequate than the abovementioned par. 5 of the Art. 191 having in mind that it recognises a responsibility of those who commit this crime by abusing the office. However, this still does not cover situation where this crime is committed by persons or groups of persons with the authorization, support or acquiescence of the state, whose responsibility is covered only by par. 1.²⁴

In cases where WRC is followed with financial or other gain, such an act may constitute a Human Trafficking or Trafficking in Minors for Adoption.

Article 388 of the CC defines Human Trafficking as a crime committed by “whoever by force or threat, deception or maintaining deception, abuse of authority, trust, dependency

²³ According to par. 6 of the same Article, if the court pronounces a suspended sentence for offences specified in paragraphs 1 through 4 of this Article, the court may order the offender to hand over the minor within a set period of time to a person or institution having custody of the minor, or to comply with enforcement of the decision granting custody of the minor to a particular person or institution, i.e. the decision stipulating the manner of maintaining personal relationship between the minor and a parent or other relative.

²⁴ In addition to abovementioned, par. 4 stipulates that whoever by replacement or from negligence changes the family status of a child, shall be punished with imprisonment up to three months.

relationship, difficult circumstances of another, retaining identity papers or by giving or accepting money or other benefit, recruits, transports, transfers, sells, buys, acts as intermediary in sale, hides or holds another person with intent to exploit such person’s labour, forced labour, commission of offences, prostitution, mendacity, pornography, removal of organs or body parts or service in armed conflicts” and prescribes that perpetrator shall be punished with imprisonment of three to twelve years. (par. 1) The CC recognise the situation where this crime is committed against a minor where the offender shall be punished by the penalty prescribed for that offence even if there was no use of force, threat or any of the other mentioned methods of perpetration- with imprisonment of minimum five years. (par. 3) ²⁵ The CC incriminates habitual engagement in offences specified in paragraphs 1 and 3 of this Article and situations where the offence is committed by a group, when offender shall be punished with imprisonment of minimum five years. (par. 6) If the offence specified in paragraphs 1 to 3 of this Article, is committed by an organized group, the offender shall be punished with imprisonment of minimum ten years. (par. 7)²⁶

Trafficking in Minors for Adoption from the Article 389 of CC is applicable in situations where WRC results in adoption. According to this provision of the CC, “whoever abducts a child under sixteen years of age for the purpose of adoption contrary to laws in force or whoever adopts such a child or mediates in such adoption or whoever for that purpose buys, sells or hands over another person under sixteen years of age or transports such a person, provides accommodation or conceals such a person, shall be punished with imprisonment of one to five years.(par. 1) Qualified form of this crime is recognised in par. 2 in cases of habitual engagement in activities specified in paragraph 1 of this Article or if the offence is committed by a group, when offender shall be punished with imprisonment of minimum three years. If the offence specified in paragraph 1 of this

²⁵ (4) If the offence specified in paragraphs 1 and 2 of this Article resulted in grave bodily injury of a person, the offender shall be punished with imprisonment of five to fifteen years, and if a grave bodily injury of a minor had resulted from the offence referred to in paragraph 3 of this Article, the perpetrator shall be punished with imprisonment of at least five years. (5) If the offence specified in paragraphs 1 and 3 of this Article resulted in death of one or more persons, the offender shall be punished with imprisonment of minimum ten years.

²⁶ 8) Whoever knows or should know that the person is a victim of trafficking, and abuse its position or allow to another to abuse its position for the exploitation envisaged in paragraph 1 this Article, shall be punished with imprisonment of six months to five years. (9) If the offence specified in paragraph 8 of this Article is committed against a person for whom an offender knew or could have known to be a minor, the offender shall be punished with imprisonment of one to eight years. (10) Endorsement of persons to exploitation or establishing slavery or similar relation to it specified in paragraph 1 this Article, shall not affect the existence of crime specified in paragraphs 1, 2 and 6 of this Article.

Article, is committed by an organized group, the offender shall be punished with imprisonment of minimum five years. (par. 3)

With regard to forging, concealing or destroying documents, within the meaning of article 25, paragraph 1(b) of the Convention, the above mentioned actions may constitute the commission of the criminal offence of Forging a Document from article 355 of the Criminal Code, or the criminal act of Forging an Official Document from article 357 of the Criminal Code.

Forging a Document (Article 355 of CC) foreseeing that “whoever makes a forged document or alters a real document with intent to use such document as real or uses a forged or altered document as real or obtains such document to use, shall be punished with imprisonment of up to three years. (par.1) More serious penalty, of three months to five years is prescribed if the offence is committed in respect of a public document, testament, bill of exchange, cheque, public or official record or other record that is kept under law, the offender shall be punished with imprisonment²⁷

Forging an Official Document (Article 357 of CC) stipulates that “an official who enters false data or fails to enter important data in an official document, record or file, or who certifies by his signature or official seal an official document, record or file with false content, or who with his signature or official seal enables another to produce an official document, record or file with false content, shall be punished with imprisonment of three months to five years.” The same penalty shall also be imposed to an official who in service uses a forged document, record or file as true, or who destroys, conceals or considerably damages an official document, record or file or makes it otherwise unusable. (par. 2) The par. 3 of the same Article foresees the responsibility of the responsible officer in an enterprise, institution or other entity who commits this offence.

Depending on the concrete circumstances, the WRC could be punishable as a some of crimes against official duty. Finally, when it comes to earlier mentioned WRC in armed conflicts, it is important to mention that Serbia introduce in the Article 371 of CC- Crimes against Humanity, the enforced disappearance as an action that can constitute the Crime against humanity, when committed in violation of the rules of international law, as part

²⁷ According to par. 3 of the same article, the attempt of the offence specified in paragraph 1 of this Article shall be punished.

of a wider and systematic attack against civilian population, punishable with imprisonment of minimum five years or imprisonment of thirty to forty years.

In relation to the **State obligation to ensure efficient and immediate search, in** cases of reports on disappearances of children, the police officers of the Ministry of Interior act with utmost urgency in accordance with the provisions on the Law on Police (Article 72), the Criminal Procedure Code (Article 225 paragraph 2 and Article 566)²⁸, the Rulebook on Police Powers (Articles 61–63), in compliance with both national and international norms and standards in respect of compliance with the rights of the child. The urgency of the procedure is ruled after the tragic murder of a previously missed minor Tijana Jurić.²⁹ According to the amendments, police are no longer waiting for 24 hours to pass, but are searching for a missing child immediately after reporting their disappearance. Prior to the adoption of the law, in the practice of police work, that period was 24 to 48 hours.

The last, but not least, significant efforts are being made to establish mechanisms to assist child victims in Serbia.³⁰

4.2. Wrongful removal of children and Serbian civil law

When it comes to obligation from the Art. 25 of the Convention to ensure the procedures in place to review and, if necessary, annul an adoption, taking into account the best interest of the child is the primary consideration as well as the views of the child in accordance with his/her age and maturity, it is important to emphasize that within the system of social and family legal protection and application of all forms of family legal protection of children without parental custody, especially in case of adoption, the rights

²⁸ “Official Journal of the FRY”, Nos. 70/2001 and 68/2002 and “Official Gazette of the RS”, Nos. 58/2004, 85/2005, 115/2005, 85/2005 – amended by other law, 49/2007, 20/2009 – amended by other law, 72/2009 and 76/2010.

²⁹ The Nearly a month after the tragedy, in August 2014, professors at the Belgrade Law School wrote a proposal to amend Article 72 of the Police Act, which stipulates the time of search for children and minors. That same month, Tijana’s father, Igor Juric, formally filed an initiative to change that member. About a year later, after peaceful protests in the squares, and tens of thousands of banners and messages from citizens “Why Tijana’s Law Was Not Adopted”, MPs adopted the bill at a session held on July 16, 2015. The amended article is symbolically called “Tijana’s Law”. See more at: <https://tijana.rs/fondacija/tijanin-zakon/>, last accessed on September 14th 2019.

³⁰ See more in: Kolaković-Bojović, M., Turanjanin, V., Tilovska-Kechegi, E. (2018) Support to Victims of Crime: EU Standards and Challenges in Serbia. In: G. Ilik & A. Stanojoska (Eds.) *Towards a Better Future: The Rule of Law, Democracy and Polycentric Development*, (pp. 125-135). Bitola: University “St. Kliment Ohridski” and Kolaković-Bojović, M. (2018) Child victims in Serbia: Normative Framework, Reform Steps and EU Standards. In: I. Stevanović (Ed.) *Thematic collection of papers of international significance / International scientific conference “Child friendly justice”*, (pp. 171-182). Palić 06-07 jun 2018. Belgrade: Institute of Criminological and Sociological research.

of the child established by the Convention on the Rights of the Child are complied with as well as all the rights of the child established by the national legal regulations and by the Family Law³¹ in particular.³²

In accordance with the provisions of the Law in all proceedings, including the proceedings for establishment and termination of adoption, everyone is under the obligation to act in the best interest of the child in all activities. The state is obliged to undertake all necessary measures to protect the child from neglect, from physical, sexual and emotional abuse and from every form of exploitation (article 6, paragraph 1 and 2 of the Law).

The Family Law prescribes that a child who is able to form his/her own opinion has the right to free expression of this opinion. A child has the right to duly receive all information necessary to form his/her own opinion. Due attention must be given to a child's opinion in all issues concerning the child and in all proceedings where his/her rights are decided on, in accordance with the age and maturity of the child. A child who has reached the age of ten may freely and directly express his/her opinion within every court or administrative proceedings where his/her rights are decided on. A child who has reached ten years of age may address the court or an administrative body, by himself/herself or through another person or institution, and request assistance in realization of his/her right to free expression of opinion. The court and the administrative body shall determine a child's opinion in cooperation with a school psychologist or custody authority, family counselling service or other institution specialized in mediating family relations, and in the presence of a person that the child chooses himself/herself. The Family Law recognises the right to recognition of origin (Article 59), the right to living with parents (art. 60, par. 1) and the right of the child to identity (Article 59, par. 3).

In terms of the review and/or annulment of the adoption procedure. The provision of Article 107 of the Family Law prescribes that any adoption shall be null and void if all the conditions of its validity had not been fulfilled on the occasion of its establishment. Action for annulment of an adoption on the grounds of nullity can be initiated by the adopter, the adoptee, the parents or guardian of the adoptee, persons having legal interest in the annulment of the adoption, and the public prosecutor. The right to state the nullity does not expire. Action for annulment of an adoption on the grounds of nullity can be initiated by a person who has given a statement of consent to adoption under duress or in

³¹ “Official Gazette of RS”, no. 18/2005

³² See more at: <https://www.ljudskaprava.gov.rs/sr/node/162>, last accessed on September 14th 2019.

error, within one year from the day the duress ceased or the error was noticed (the deadline is preclusive). The judgment on the annulment of the adoption is delivered to the custody authority through which the adoption took place. The custody authority, on ground of the judgment, issues a ruling on the annulment of the ruling on the new entry of birth for the adoptee. Through this ruling, the first entry of birth for the adoptee automatically becomes valid again. After the termination of the adoption, the guardianship of the child is decided by the custody authority.³³

The Family law takes into account the best interest of the child and the child view of the adoption. Any adoption based on force or delusion shall be voidable (Article 108). Every adopted child has the right to review independently the documents on their adoption and the registry of births after the age of 15, under previous preparation: psychological consultation and support (Article 59). Adoption is established through a decision by the custody authority (administrative body), under the conditions prescribed by article 88 – 105 of the Law. Only a minor may be adopted. Minor after reaching the third month of life could be adopted, specifically: a child who has no living parents; child whose parents are unknown, or their residence is unknown; child whose both parents are fully deprived of parental right; child whose both parents are fully deprived of business capacity; child whose parents have granted consent to the adoption. Child who has reached 10 years of age and who is capable of reasoning has to consent to adoption.³⁴

Also, in compliance with international conventions, in particular with the Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption,³⁵ the bodies of Republic of Serbia do not carry out adoption procedures and adoption procedures for children from foreign countries, which would be implemented during immediate war danger or declaration of the state-of-war.

³³ Ibidem.

³⁴ The proceedings for the establishment of adoption are conducted by the custody authority, which issues a written ruling on the adoption, in accordance with the provisions of article 311 – 327 of the Family Law. The procedure may be initiated by the custody authority ex officio, by future adoptive parents and parents or guardian of the child.

³⁵ “Official Gazette of RS-International Agreements”, No. 13/2013-6

5. Conclusions

Having in mind historical background, variety of circumstances that can potentially serve as an environment for wrongful removal of children, seriousness of this crime and long term consequences for victims and family members, but also still insufficient recognition of the WRC on the global level, it is obvious that further actions are needed on multiple levels.

Considering importance of the Convention on enforced disappearances, one of the most important actions aimed at combating WRC is promotion of the universal ratification of the Convention. This step is a precondition of the introduction of the WRC in national criminal legislations all around the world and building of efficient normative and institutional mechanisms for combating WRC. Further awareness raising among enforcement agents, medical and social care personnel, as in countries that have ratified the Convention, as in those that are still not parties to the Convention is still needed in order to address challenges in practice. The special attention should be paid to WRC in armed conflicts, but also to WRC associated with abuse of official duties within health care, social care and system of education.

When it comes to Serbian legal and institutional system, despite the fact that Serbia was among first countries that ratified the Convention on enforced disappearances the penal legislation still slightly deviates from requirements given in the Convention. In parallel, contrary to the obligation from the Convention, specialised training on enforced disappearances and wrongful removal of children has not been introduced. This fact prevents from comprehensive and systematic approach to prevention and combating wrongful removal of children and contributes to the lack of understanding of this issue among those who are, according to the Constitution, allowed to apply the Convention directly, regardless the insufficient alignment of the national legislation with it.

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