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CRIMINAL LAW ASPECTS OF INTERNATIONAL CHILD ABDUCTION*

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As a complex and expanding global problem, international child abduction causes many legal consequences. Although the Convention on the Civil Aspects of International Child abduction, adopted in 1980, sets the grounds for cooperation of relevant state authorities in order to provide prompt return of the abducted child to the state of his or her habitual residence and protect his or her best interests, numerous other issues such as criminal liability of parents, protection of child's rights and protection of right to family life, arise therein. The authors of this paper highlight different etiological and legal aspects of international child abduction and discuss the link between this phenomenon and other similar offences such as: abduction, human trafficking, trafficking in minors for adoption and domestic violence with special focus on Serbian legislation. The authors also point out the most disputable issues regarding international child abduction in the practice of European Court of Human Rights and key dilemmas in practical implementation of national and international frameworks for its prevention.

KEY WORDS: *international child abduction / case law / European Court of Human Rights / Convention on the Civil Aspects of International Child abduction / return of children*

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1. INTRODUCTION

Globalization and worldwide intensification of migrations have led to the increase in the number of transnational marriages and relationships in many countries (Yamaguchi, Lindhorst, 2016: 16), as well as partnerships and wedlock, single parent families. Some socio-demographic studies (Frank, Wildsmith, 2005; Hill, 2004) indicate that international migration could contribute to a higher divorce rate (Caarls, Mazzucato, 2015: 127). First of all, a potentially stressful life event such as moving across international borders might increase the likelihood of divorce (Boyle et al., 2008). Also, stricter migration policies are making family migrations more complicated, which causes a more frequent geographical separation of families, forcing them to face the challenges when it comes to arranging family life transnationally (Caarls, Mazzucato, 2015: 127). Nowadays, most countries make divorce possible, and the divorce procedure is generally becoming less complicated. Consequently, more children are entrusted to one of the parents, which might lead to international child abduction (Varadi, et al., 2016: 286).

The parent who has been deprived of his or her parental right on the basis of court decision may in some cases unlawfully abduct or detain the child and take or keep the child at the location other than the country of child's habitual residence. Apart from the parent deprived of parental right, one of the relatives, a member of a criminal group, a private detective or some other person acting on the behalf of the parent may also appear as the abductor (Milošević, 2008: 8). When committed by one of the parents, child abduction is most commonly the result of the intention to restore broken family relationships and to start living with the child in the same household. Even if the initial intention of the abductor in these cases may seem good, he or she may undergo criminal liability for detainment of minor. However, if the abductor intended to extort money or other illegal financial gain, to "sell" the child for the purpose of adoption, prostitution, forced labor or to exterminate a particular national, racial or religious group, he or she will bear criminal liability for other criminal offences such as abduction, human trafficking and trafficking in minors for adoption etc. (Milošević, 2008: 8). In some cases, international child abduction may be committed as an attempt to escape from family violence that the child and the abductor have previously been exposed to. For example, Yamaguchi and Taryn discuss a situation where a battered mother, who has fled across international borders trying to protect herself and her children from family violence, could be considered responsible for unlawfully removing (i.e. abducting) her children, whereas the children could be returned to the left-behind parent in the other country (Yamaguchi, Lindhorst, 2016: 17).

Grave and harmful psychological, social and financial consequences of all the aforementioned incidents for both – the child as well as the left-behind parent, initiated the development of transnational legal agreements addressing the problems that rise upon the dissolution of international relationships (Uchida, 2013). One of the most important international agreements pertinent to these issues

is The Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980 (hereinafter: the Hague Convention). Since the number of contracting parties to the Convention is currently 97¹, it is considered one of the most effective agreements of the Hague Conference on Private International law (Varadi, et al., 2016: 286). Former Socialist Federal Republic of Yugoslavia ratified the Hague Convention in 1991² and the Republic of Serbia became the State Party to the Convention as one of its successors³.

The Convention is applied in the cases of wrongful removal or retention of a child across international borders. According to Article 3, the removal or retention of a child is wrongful if it represents 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. Besides, it is required that at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised if the removal or retention had not occurred. The Convention may be applied to any child under the age of sixteen, who was habitually resident in a Contracting State immediately before any breach of custody or access rights (Article 4). This represents a serious problem since the Convention on the Rights of Child⁴ defines a child as "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier" (Article 1), which means that the Hague Convention cannot be applied on children between the age of 16 and the age of 18.

The Convention is neither aimed to provide uniform rules in cases of conflicts between different laws, nor to set rules regarding conflicts between different spheres of competences. On the contrary - it represents an instrument of international cooperation (Ponjavić, Vlašković, 2014: 46). The key goal of the Convention is to secure the prompt return of wrongfully removed or retained children and to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in other Contracting States (Article 1). This is achieved by the application of appropriate measures and the most expeditious procedures available, in order to secure the implementation of the objectives of the Convention within their territories (Article 2). For that purpose, each Contracting State is obliged to designate a Central Authority to discharge the duties imposed by the Convention (Article 6). Central Authorities are expected to co-operate with each other as well as

¹ Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Contracting States - status table, available at: <https://www.hcch.net/en/instruments/conventions/status-table/?cid=24>, accessed: 20.06.2017.

² Zakon o ratifikaciji Konvencije o građanskopravnim aspektima međunarodne otmice dece, Službeni list SFRJ-Međunarodni ugovori, br. 7/1991.

³ Convention of 25 October 1980 on the Civil Aspects of International Child Abduction - Status Table, available at: <https://www.hcch.net/en/instruments/conventions/status-table/?cid=24>, accessed: 15.09.2017.

⁴ Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990, available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>, accessed: 15.09.2017.

to promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to accomplish other aims of the Convention (Article 7).

The subject of this paper includes various etiological and legal aspects of international child abduction as well as the analysis of the link between this phenomenon and other criminal offences that may include the elements of forceful removal or retention of child such as: abduction, human trafficking, trafficking in minors for adoption and domestic violence, with focus on current legislation of the Republic of Serbia. The subject also comprises the analysis of the practice of European Court of Human Rights pertinent to the issue of international child abduction with the intention to highlight key problems when it comes to practical implementation of national and international legislative frameworks for its prevention.

The purpose of this paper is to highlight criminal law aspects of international child abduction, with special focus on the situations covered by the Hague Convention, as well as to draw a comparison between this phenomenon and other related criminal offences in Criminal Code of the Republic of Serbia. Moreover, the authors of this paper point out key criminal law issues related to the prevention and sanctioning of international child abduction.

2. CONTROVERSIAL ISSUES IN CASE LAW OF EUROPEAN COURT OF HUMAN RIGHTS

In the area of international child abduction the obligations, imposed, on the Contracting States by Article 8 of the European Convention on Human Rights (hereinafter: ECHR) must be interpreted in the light of the requirements of the Hague Convention. According to Article 8 of ECHR – Right to respect for private and family life- Everyone has the right to respect for his private and family life, his home and his correspondence. There must be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.⁵ In this respect, Article 8 of ECHR imposes on the domestic authorities a particular procedural obligation when assessing an application for a child's return. In this case, the courts must not only consider arguable allegations of a "grave or serious risk" for the child in the event of return, but must also make the grounds on which the applicant's claim for return of the child is based. Therefore, in the case *X v. Latvia* (no. 27853/09) the Court concluded that there had been a violation of Article 8 of the ECHR since the Latvian courts had refused to take into consideration an

⁵ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, available at: <http://www.refworld.org/docid/3ae6b3b04.html>, accessed: 23.6.2017.

arguable allegation of a "serious risk" for the child related to her return to Australia.⁶ In the case *K.J. v. Poland* (no. 30813/14) the Court considered that the Polish courts had not taken into account the conclusions exposed in an expert report made by psychologists when estimating that the child's return to the United Kingdom with her mother would not have a positive impact on the child's development. The report, however showed that the child, who had adapted easily, was in good physical and psychological health, was emotionally attached to both parents and perceived Poland and the United Kingdom on an equal footing.⁷ In the case *Phostira Efthymiou and Ribeiro Fernandes v. Portugal* the Court stressed out that in the case of ordering the child's return to country of habitual residence in the decision-making process under domestic law it must be estimated the situation in state where it should be returned as well as the risk to the child in case of separation from its parent.⁸

Since the passage of time can have irremediable consequences for the relations between the children and the parent who does not live with them, securing the prompt return of children is not only one of the goals of the Hague Convention but also an important practical measure. However, since the child's best interests do not always coincide with those of the father or the mother, the decisive issue is how to establish a balance between the competing interests – those of the child and those of the two parents or of other persons that are considered custodians of the child in accordance with the law or decision of relevant state body. Although the child's opinion must be respected, his or her opposition does not necessarily prevent the return. When identifying the child's best interests, the court has to take into consideration the reports made by social workers and psychologists, because children could be seriously suffering due to the lack of contact with both parents. For example, in the case of *Bianchi v. Switzerland* alienation between father and very young son, which had lasted for almost two years, had caused the complete break-off in their contact. That could not be considered in the child's best interests. In addition, the court has to take into account the child's best interests, understood as child's immediate reintegration into the environment he or she is familiar with.⁹ Therefore, the objectives of prevention and immediate return must correspond to the best interest of the child in each specific situation. The latter is evaluated in the light of the rules and exceptions provided by the Hague Convention.

According to Article 8 of the Hague Convention "any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the

⁶ Case of *X v. Latvia* no. 27853/09, Grand Chamber judgment of 26.11.2013, available at: <https://lovdata.no/static/EMDN/emd-2009-027853.pdf>, accessed: 23.6.2017.

⁷ Case of *K.J. v. Poland*, no. 30813/14, Judgment (Merits and Just Satisfaction) of 01.03.2016., available at: [http://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-161002%22\]}](http://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-161002%22]}), accessed: 23.6.2017.

⁸ Case of *Phostira Efthymiou and Ribeiro Fernandes v. Portugal* no.66775/11, Judgment of 01.06. 2015, available at: [http://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-150793%22\]}](http://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-150793%22]}), accessed: 23.6.2017.

⁹ Case of *Bianchi v. Switzerland* no.7548/04, Judgement of 22.6.2006., available at: [http://hudoc.echr.coe.int/eng-press#{%22itemid%22:\[%22003-1714296-1797156%22\]}](http://hudoc.echr.coe.int/eng-press#{%22itemid%22:[%22003-1714296-1797156%22]}), accessed: 23.6.2017.

Central Authority of any other Contracting State for assistance in securing the return of the child". Also, in accordance with Article 10 of the Hague Convention, "the Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child". However, these rules are not applied in some cases, enumerated in the Hague Convention.

The first exception is related to the question whether judicial or administrative authority should order the return of the child to the state of his or her habitual residence if the child has settled in a new environment after wrongful removal or retention by one parent. According to Article 12, if at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is staying, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child. After the expiration of the period of one year of the commencement of the proceedings, the judicial or administrative authority shall also order the return of the child, unless it is demonstrated that the child is now settled in his or her new environment. Settlement implies not only a physical relationship with the community, but also emotional security and stability of the child in new environment and the expectation that the child will stay there in the future (Ponjavić, Vlašković, 2014: 46). Therefore, the difference between these two situations is that in the first case the authority concerned shall order the return of the child, whereas in the second case, it shall conditionally order the return of the child only if there is evidence that the child is now settled in his or her new environment. Another issue is whether after the expiration of the period of one year of the commencement of the proceedings and provided evidences about the settlement of the child in his or her new environment the judicial or administrative authority could order the return of the child. According to the Hague Convention they could not do it, but the question is whether such treatment of the authorities would be in accordance with best interest of child in each case. There is an opinion that in each case the authorities shall decide at their discretion and order the return of the child if it would not be in accordance with best interest of child (Ponjavić, Vlašković, 2014: 45). Depending on the circumstances, it seems that it would be unfair in context of child's best interest. Therefore, in this case authorities should request child's opinion about its return in state where it had habitual residence, and if they find that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views, then child's return should be definitely rejected. However, the authority concerned on the return of a child is not bound by child's opinion. Therefore, if it is proven that the child's objection for returning to the country of habitual residence is the result of the influence of the parent whom the child took away, its opinion will not be respected (Ponjavić, Vlašković, 2014: 43-44).

Article 13 of the Hague Convention introduces three exceptions allowing the judicial or administrative authority of the requested State not to order the return of the child if the person, institution or other body which opposes its return proves: a) that the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had

consented to or subsequently acquiesced in the removal or retention; b) that there is a grave risk that the return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation; or c) that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his or her views.

In the context of the exception made by Article 13 clause a, the problem appears when it comes to proving the fact that the person, institution or other body having the care of the person of the child had consented to or subsequently acquiesced in the removal or retention. It is logical that this parent would claim that he or she had not consented to or subsequently acquiesced in the removal or retention, because otherwise he or she would not have even initiated the procedure for returning the child. Therefore, the main dilemma is the interpretation of tacit consent or subsequent agreement with child's removal or retention. The real intention can be determined by estimating the parent's behavior, whereas the burden of proof is on the parent who has abducted the child (Kovaček- Stanić, 2012: 87).

Despite of the exceptions under clause c of Article 13, in the case *Rouiller v. Switzerland* the Court held that there had been no violation of Article 8 of the ECHR and considered that the Hague Convention did not grant a child the freedom to choose where he or she wished to live. Because of that, the Court stated that the arguments given by one of the children for wanting to stay in Switzerland were not sufficient to justify the application of one of the exceptions to a child's return prescribed by Article 13 of the Hague Convention. In addition, the Court emphasized that these exceptions had to be interpreted strictly.¹⁰

The last exception, regulated under Article 20 of the Hague Convention, prescribes that the return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms. This particular rule is concerned only with the principles accepted by the law of the requested State, either through general international law and treaty law, or through internal legislation. Consequently, the return of the child could be refused on the basis of this article if it was confirmed that the fundamental principles of the requested State concerning the subject-matter of the Convention did not permit it. Hence, it would not be sufficient to show merely that the return would be incompatible, even manifestly incompatible, with these principles. The reference to "the fundamental principles of the requested State" makes it clear that the reference is not related to international conventions or declarations protecting human rights and fundamental freedoms ratified or accepted by Contracting States. It is rather related to the fundamental provisions of the law of the requested State in such matters. Secondly, such principles must neither be invoked any more frequently, nor may their invocation be more readily admissible than they would be in their application to purely internal matters. Therefore, it should be emphasized that this exception, like the others, was

¹⁰ Case of *Rouiller v. Switzerland*, no. 3592/08, Judgement of 22.7.2014., available at: [http://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-145714%22\]}](http://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-145714%22]}), accessed: 23.6.2017.

intended to be restrictively interpreted and applied (The Office of Children's Issues, 2017:22-23).

3. THE NEXUS BETWEEN CRIMINAL CHARGES AND THE HAGUE CONVENTION

Criminal charges can be considered a powerful tool to achieve the child's safe return. However, they can also have the opposite effect and jeopardize the return of the child. Although the Hague Convention deals only with the civil aspects of international child abduction, criminal proceedings against the abductor in the country of the child's habitual residence may affect the return proceedings under the Hague Convention. In the cases involving international child parental abduction, there are three aspects to consider in cases including criminal charges: a) the position of the abductor, b) the position of the parent whose child had been abducted by the other parent and c) the position of the abducted child. Firstly, the position of the abductor is complex and depends on the fact whether he or she agrees to return the child voluntarily. In the case of voluntary return of child, the States should facilitate the provision of necessary travel documents if the taking parent might need travel documents to re-enter the State of the child's habitual residence together with the child. Otherwise, criminal lawsuits filed by the affected parent would only lead to further complications and obstruct either voluntary return or the return ordered by a tribunal of the state where the child is being withheld wrongfully. Secondly, the position of parent whose child had been abducted by the other parent should be observed from economical and emotional perspective. Economical costs may include expenses related to identifying the whereabouts of the child, submitting an application for the child's return to the court of the requested state, etc. On the other side, uncertainty to recover the child and the lack of, or reduced contact with the child cause considerable emotional distress. Finally, the position of an abducted child comprises the risk of serious emotional and psychological issues with long-lasting consequences. Namely, the child is often taken from familiar environment and suddenly isolated from other family members, friends and classmates (Nuria González Martín, 2014: 380-385).

4. CHILD'S ABDUCTION IN CRIMINAL CODE OF THE REPUBLIC OF SERBIA

Abduction of a child, defined as every human being below the age of eighteen in accordance with Article 1 of the Convention on the Rights of the Child ¹¹, has numerous connections with other criminal offence prescribed in Criminal Code of

¹¹ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <http://www.refworld.org/docid/3ae6b38fo.html>, accessed: 20.06.2017.

the Republic of Serbia.¹² Depending on the circumstances, Criminal Code of the Republic of Serbia treats this modality of child abduction either as an aggravated form of criminal offence of Abduction, prescribed by Article 134 or as an independent criminal offence entitled Detainment of Minors, regulated under Article 191. In some cases, Detainment of Minors can be closely interconnected with the elements of criminal offence of Domestic violence, which is incriminated by Article 194 and Trafficking in Minors for Adoption, which is regulated under Article 389.

4.1. Abduction of a Minor

In Serbian legal system, abduction is classified within Chapter XIV of the Criminal Code, dedicated to criminal offences against human and citizen's rights and freedoms. Basic form of abduction (regulated under Article 134 Paragraph 1) is committed by a person who by using force, threat, deceit or otherwise removes or holds another with some of the following intents: 1) to extort money or other property gain either from that person or from another person, 2) to coerce that person or another person to do something or to refrain from doing something or 3) to coerce that person or another person to endure something. Criminal Code of the Republic of Serbia is familiar with four aggravated forms of abduction, and one of them occurs if the abducted person is a minor (Article 134 Paragraph 3).

4.2. Detainment of Minors

Detainment of Minors represents an independent criminal offence, prescribed by Article 191 of the Criminal Code of the Republic of Serbia. This criminal offence is systematized within Chapter XIX of the Criminal Code, which is dedicated to criminal offences against marriage and family. In its basic form, criminal offence of Detainment of Minors exists if the perpetrator unlawfully: a) detains or abducts a minor from a parent, adoptive parent, guardian or other person or institution entrusted with care of the minor or b) prevents the enforcement of decision granting custody of a minor to a particular person (Article 191, Paragraph 1).

Detention refers to the situation when the minor has already stayed with the perpetrator, who then refuses to hand him over to the person or institution he or she has been entrusted to. This can be accomplished either by preventing the minor from leaving or by making him or her to stay, but without the use of force, coercion or deprivation of liberty. Abduction (in the narrow sense) i.e. detaining means that the perpetrator has taken the minor from a certain place or person where or with whom he or she has been staying previously. If the age of the abducted minor suggests that he or she is capable of making decisions, the abduction is committed by influencing the minor's will, but must not include any form of coercion.

¹² Criminal Code of the Republic of Serbia, Official Gazette of the Republic of Serbia, No. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014 and 94/2016.

Otherwise, criminal offence of coercion regulated under Article 135 of the Criminal Code would be committed. This does not imply that the minor should absolutely agree with the abduction, but simply indicates that only some milder forms of coercion, deceit or deception may be applied. The fact that he minor has made his or her own decision to abandon the person he or she has previously been living with and to stay with the other person excludes the grounds for criminal liability of that other person. Namely, detaining of the minor comprises other activities apart from mere agreement, such as refusing to hand over the minor to the person or institution who has custody of him (Stojanović, 2016:596).

An aggravated form of Detainment of Minors exists if the offence is committed against a new-born child (Article 191 Paragraph 2). Another aggravated form of Detainment of Minors occurs in the following situations: a) if the abduction (either from Paragraph 1 or from Paragraph 2) is committed with the aim to acquire financial gain or with other dishonest intentions, b) if the offence results in serious impairment of health, care or education of the minor or c) if the offence is committed by an organized criminal group (Article 191 Paragraph 4). On the other hand, preventing the enforcement of the decision of a competent authority arranging the manner of maintaining of personal relationships between a minor and his or her parent or other relative is considered a specific and less severe form of Detainment of Minors (Article 191 Paragraph 3).

The Criminal Code is also familiar with the possibility to deliberate the perpetrator from the punishment if he or she voluntarily returns the minor to the person or the institution that has custody of the minor or enables the enforcement of the custody order (Article 191 Paragraph 5). After having decided to impose conditional sentence on the perpetrator of some of the forms of Detainment of Minors (Article 191 Paragraphs 1-4), the court may oblige the perpetrator: a) to return in a set period of time the minor to the person or the institution with custody of the minor or b) to enable the enforcement of the custody order or the decision by which the manner of maintaining personal relationships between a minor and his or her parent or other relative is established (Article 191 Paragraph 6).

Although Detainment of Minors may at first glance be perceived as a specific form of abduction, a more profound comparison shows that there is a substantial difference between these two criminal offences. To be more exact, these incriminations protect different values, and are committed by different activities. Abduction is committed with the intention to apply coercion against a certain person and includes the deprivation of liberty. On the other hand, even if the law is not explicit about this, it is generally accepted that Detainment of Minors is committed with the intention to take over the custody of minor from the person or institution that he or she has previously been entrusted to. This means that cases in which a minor was adopted for some other purpose, such as illegal adoption for example, or deprived of liberty or coerced to do or endure something would not be treated as Detainment of Minors in the context of Article 191 (Stojanović, 2016:595).

4.3. Trafficking in Minors for Adoption

In some cases, criminal offence of Trafficking in Minors for Adoption may also include the elements of child abduction. This criminal offence is systematized within Chapter XXXIV of the Criminal Code, dedicated to criminal offences against humanity and other rights guaranteed by international law. This criminal offence can be committed in several manners and one of its forms exists if the perpetrator abducts a person under the age of sixteen for the purpose of adoption contrary to the laws in force (Article 389 Paragraph 1). The reason why this criminal offence has been introduced to Serbian legislation is the fact that Human Trafficking, as regulated under Article 388, does not cover these specific forms of trafficking. Although some similarities can be distinguished between this criminal offence and an aggravated form of Abduction (committed against a minor) on one hand, and Detainment of Minors on the other, the key difference between them lays in the intention of the perpetrator, which, in case of Trafficking in Minors for Adoption, is the facilitation of adoption of the minor who is under the age of sixteen. It is disputable whether it is required that the minor has previously been abducted (i.e. taken or retained from his parents or custodians) in order to be "sold" for the aim of adoption. The purpose of this legal provision suggest that the most important thing is the fact that the adoption of such minor would be illegal, i.e. represent a violation of current legislative frameworks regulating the issue of adoption. Accepting this standpoint would provide space for criminal liability not only of the perpetrator who has abducted the child for the reason of illegal adoption, but of the parents who "sell" their children for that same cause (Stojanović, 2016: 1074).

4.4. Domestic violence in the context of international child abduction

Many international parental child abduction cases, involve severe allegations of domestic violence which can take many forms: physical or psychological abuse can extend to sexual, emotional and financial abuse; child abuse and/or partner abuse; single isolated incident or sustained and recurring pattern. Exception under clause b of Article 13 of the Hague Convention allows authorities not to return child to his habitual residence by demonstrating that the child would be, by being returned, in grave risk of harm. The first problem regarding this rule is how grave risk for child's return should be interpreted since the Hague convention does not define this term. Is it sufficient to evaluate only the objective situation (ex. civil armed conflicts in state where child used to have habitual residence) or we have to take also into consideration subjective circumstances of each case (ex. parental domestic violence against child) (Ponjavić, Palačković, 2012:56). It seems that the most acceptable approach would be the one that takes into consideration both: the objective situation and the subjective circumstances of each case. Precisely, prior to issuing judicial or administrative authority order for the return of the child, relevant authorities primarily have to take into consideration subjective circumstances and whether there is domestic violence. If it exists, the objective situation in the state where child habitually residents should represent only an additional factor for the rejection of

child's return. Another difficulty in this regard stems from the fact that it is not clear if there is domestic violence, since different states have different definitions of this term, which disable the unique application of the exception b of Article 13 of the Hague convention (Ponjavić, Palačković, 2012:54). Therefore, the goal is to distinguish, on the basis of the accepted definition of domestic violence, whether a behavior of a family member is permitted or constitutes illicit, violent behavior.

For example, in criminal legislation of the Republic of Serbia, domestic violence is considered a criminal offence against marriage and family, placed within Chapter XIV of the Criminal Code. Its basic form, (regulated under Article 194 Paragraph 1) is committed if the perpetrator endangers the tranquility, physical integrity or mental condition of his or her family member in some of the following ways: a) by using violence, b) by threatening to attack life or body or c) by insolent or ruthless behavior. One of aggravated form of domestic violence appears if it has been committed against a minor (Article 194 Paragraph 3).

Furthermore, the dilemma is whether domestic violence must be continuously performed or only one act of violence can be relevant? (Ponjavić, Palačković, 2012: 55). Although there is disagreement among authors on this issue, it seems that neither single act is sufficient nor continuously behavior is required in each case. Consequently, we represent the view that it is necessary to deliver a decision on the ground of specific circumstances of each case and by the nature of individual behavior. In addition, question is whether under term of grave risk for child's return falls only such situations which represent direct (ex. parental domestic violence against child) or also those with indirect risk for children (ex. domestic violence of one parent against another) (Ponjavić, Palačković, 2012: 57). Although there is some reason for restrictively interpretation of the term of grave risk by accepting the possibility of child's return in the case of domestic violence which is not directly oriented against child, because of the fact that "violent" parent would be deprived of its parental rights, precisely right to maintain contact with its child, authors support extensively interpretation. This is since domestic violence of one parent against another have an influence on child's life and safety and exposes the child to physical or psychological harm which should be interpreted as grave risk.

Finding an appropriate response to domestic violence is a serious challenge. Some experts consider mediation generally inappropriate in such cases, *inter alia*, because of the fact that victims of domestic violence often have difficulties in advocating their own interests when facing the abuser. On the other side, many experts argue that mediation should be applied in cases of domestic violence, provided that well-trained and experienced professionals are involved (Nuria González Martín, 2014: 394-396). It seems that the decision whether mediation is proper measure for overcoming the consequences of domestic violence should be made in each individual case. In some cases, it would represent a safety risk for the victims of domestic violence, while in others specific circumstances allow its application.

5. CONCLUSION – THE NEED TO MAKE A STEP FORWARD

The main objective of the Hague Convention is to secure the prompt return of children wrongfully removed to or retained in any Contracting State as well as to ensure that the rights of custody and of access to the law of one Contracting State are effectively respected in other Contracting States. However, the Hague Convention does not define some fundamental terms such as: habitual residence, grave risk, intolerable situation, an age and degree of maturity at which it is appropriate to take account of child's views etc. Therefore, the interpretation of these terms depends on internal rules and judicial practice of each Contracting State. These legal gaps and the differences between national legal systems endanger the efficiency and practical implementation of the Hague Convention and create problems related to the suppression and prevention of international child abduction.

In this context, taking account of child's views is an important condition for appropriate implementation of the Hague Convention, which, in accordance with article 12 of the Convention on the Rights of the Child and in light of its general comment No. 12 (2009) on the right of the child to be heard, should be strongly supported by relevant state bodies. That is the reason why, the Committee on the Rights of the Child encouraged Serbia to ensure that children's views are given due consideration, in the family, at schools, in the courts and in all relevant administrative and other processes. According to the Committee, Children's views should be concerned through, inter alia, the adoption of appropriate legislation, the training of professionals, the establishment of specific activities at schools and general awareness-raising (Committee on the Rights of the Child, 2017: 7).

One of the problems regarding the implementation of the Hague Convention arises from the fact that there are various different approaches to defining domestic violence in internal legal orders. Therefore, the unification of judicial practice in this field should be considered a necessary step forward to provide for efficient protection of the child's rights in cases of international abduction. Passing a domestic law on Civil Law Protection of Children from international child abduction represents an excellent example of how each state can ensure efficient functioning of domestic judiciary and facilitate the implementation of the Hague Convention.

The Republic of Serbia has taken the right path by creating Draft Law on Civil Law Protection of Children from Illegal Cross-Border Removal and Retention¹³. This Draft contained numerous provisions the aim of which was: to facilitate the organization of central executive authority, to set rules of civil judicial proceedings

¹³ Draft Law on Civil Law Protection of Children from Illegal Cross-Border Removal and Retention, available at: https://www.google.rs/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0ahUKEwio-OuYwtvUAhWD1RoKHT_EDVUQFggmMAE&url=http%3A%2F%2Farhiva.mpravde.gov.rs%2Fimages%2FDRAFT%2520Law%2520on%2520civil%2520protection%2520of%2520children%2520from%2520wrongful%2520cross-border%2520removal%2520and%2520retention_3.doc&usg=AFQjCNGNM3FppMibaucaYNEC9_tmx9d03Q, accessed: 26.06.2017.

and regulate the acting of other authorities and services in the Republic of Serbia in the application of the Hague Convention. In addition, Draft Law prescribed the definition of habitual residence, but also the age and the degree of maturity at which it would be appropriate to take into account the views of the child. Although it would represent a significant step forward when it comes to the implementation of the Hague Convention, this Draft has not yet been adopted by the Parliament. However, it should become a part of Serbian legal framework in the future, since it represents a powerful means for the protection of the child during the procedure under the Hague Convention, as well as for providing legal safety and efficient functioning of domestic judiciary.

Another means to improve the prevention and suppression of international child abduction would require changes of current criminal legislation, i.e. the provision of the Article 134 prescribing criminal offence of Abduction. Namely, this provision should be changed so that the abduction of a minor becomes a separate criminal offence instead of being a more serious form of Abduction. The need to minimize the risk of children's victimization as well as the necessity to provide criminal law protection of child's rights require separated prescribing of criminal offence entitled as "Child Abduction". This step would also be in accordance with the recommendations of Committee on the Rights of the Child regarding the elimination of all forms of violence against children (Committee on the Rights of the Child, 2017: 8), including international child abduction, which in some cases may also include elements of physical or mental violence and abuse.

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KRIVIČNOPRAVNI ASPEKTI MEĐUNARODNE OTMICE DECE

Kao kompleksan i na globalnom niovu sve više prisutan problem, međunarodna otmica dece povlači za sobom brojne pravne posledice. Iako Konvencija o građanskopravnim aspektima međunarodne otmice dece usvojena 1980. postavlja osnove za saradnju između nadležnih državnih organa kako bi se obezbedio povratak otetog deteta u zemlju njegovog ili njenog uobičajenog prebivališta i zaštitili njegovi ili njeni najbolji interesi, u takvim slučajevima se pojavljuju brojna druga sporna pitanja kao što je krivičnopravna odgovornost roditelja, zaštita prava deteta i zaštita prava na porodični život. Autori ovog rada iznose različite etiološke i pravne aspekte međunarodne otmice dece i razmatraju vezu između ovog fenomena i drugih sličnih krivičnih dela kao što su: otmica, oduzimanje maloletnog lica, trgovina ljudima, trgovina maloletnim licima radi usvojenja, nasilje u porodici i genocid, sa posebnim fokusom na krivično zakonik Republike Srbije. Autori takođe skreću pažnju na najspornija pitanja u vezi sa međunarodnom otmicom dece u praksi Evropskog suda za ljudska prava i ključne dileme oko praktične primena nacionalnih i međunarodnih okvira za njeno sprečavanje.

KLJUČNE REČI: međunarodna otmica dece / sudska praksa / Evropski sud za ljudska prava / Konvencija o građanskopravnim aspektima međunarodne otmice dece / povratak dece