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**DISAPPEARED PERSONS AND THE RIGHT TO BE CONSIDERED ALIVE
- THE CURRENT STATE OF PLAY IN THE WESTERN BALKANS -**

The search for a disappeared person should be conducted under the presumption that he or she is alive. This golden rule has been recognized and incorporated in the main human rights instruments and the soft law dealing with the combating enforced disappearances, but also in those relevant for the search for persons missing in or in relation to arm conflicts. This principle has a multiple influence and tackles as the right of a missing person to be searched, as an obligation to search for him/her. It also has a significant influence on and constitutes a framework for exercising a various property and a social welfare rights of family members of a disappeared person. Considering this and taking into account a gross number of persons who still missing in or in relation with the armed conflicts in Former Republic of Yugoslavia, author explores on how this principle is incorporated in the relevant legislation of the Western Balkans countries. Triggered by the ongoing processes aimed at development of the Serbian Law on Missing Persons, this paper also analyses how this principle should be incorporated in a new law, based on the identification of the existing legal gaps and the comparative legislation in the Region.

Keywords: missing persons, disappeared persons, search for disappeared persons, the right to be searched, Western Balkans

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1. Introduction

The disappearance of a person opens a dark circle of uncertainty. This uncertainty goes far beyond the unknown fate of the missing person and the lack of information about the circumstances of the disappearance. It directly affects the lives of family members, relatives and other people close to the missing person. It causes stress, pain, suffering and emotional imbalance. Furthermore, such a situation results in the legal vacuum, since, to say it simply, being dead or alive has legal consequences. Therefore, disappearance of a person, also results in various problems related to the daily functioning of the family, in terms of the property management, providing material and financial security, child care and access to various forms of social support and protection.

When a disappearance of a person occurred under the circumstances associated to the armed conflicts or internal violence, abovementioned issues get a new dimension, which has been properly recognized in fundamental rules of international humanitarian law and human rights law. This applies as in terms of the obligation of the states to prevent persons from going missing in situations of armed conflict or internal violence, as in terms of the obligation to conduct immediate and effective search in order to find a missing person and not to left his/her family in dark about their fate. Additionally, the families of missing persons should be provided with an adequate protection, assistance and support. All of this may not be preconditioned by any rule and/or the procedure which requires family members to declare a missing person dead in order to exercise their rights.

Therefore, the right to be consider alive until the fate and whereabouts are clarified has the double nature- it is, at the same time, the right of the missing person him/herself, but also the right of his/her family members and relatives. Initially recognized through the general humanitarian law instruments, this right has been further elaborated through the human rights instruments aimed at the prevention and combating enforced disappearances. Furthermore, reflected in the national legislations, this right has been adjusted to and applied so far in various regional contexts.

2. Western Balkans and the issue of missing persons

Two decades have passed since last armed conflicts in the ex-Yugoslav region. Armed conflicts in the former Socialist Federal Republic of Yugoslavia (hereinafter: ex-YU) were characterized by grave, large-scale and systematic violations of international humanitarian law. According to estimates by various organizations during the wars in Slovenia (June-July 1991), Croatia (1991-95), Bosnia and Herzegovina (1992- 1995), in

Kosovo and Metohija and during the bombing of the Federal Republic of Yugoslavia (1999), as well as in the Former Yugoslav Republic of Macedonia, (February-August 2001) - more than 130,000 people lost their lives, with civilians accounting for the majority of them. (Kolaković-Bojović & Tilovska-Kechegi, 2019)

It is estimated that about 40,000 people went missing in the armed conflicts in the former Yugoslavia. 35,007 cases were reported to the International Committee of the Red Cross (hereinafter: ICRC), and according to the data of this organization from December 2020, 10,006 people are still listed as missing in the region, of which 1,642 in AP Kosovo and Metohija, 1,979 in Croatia and 6,385 in Bosnia and Herzegovina. (Report on the Work of the Commission for Missing Persons for 2020)

After a years of the work to resolve cases at the national level, Supported by International Commission on Missing Persons (hereinafter: ICMO), Western Balkans authorities in charge of the search for persons missing due to conflicts in this region, adopted the Framework Plan for resolving the issue of missing persons from the conflict in the former Yugoslavia (2018), the process of search and the processes related to the rights of the families to know the whereabouts of their missing family members and relatives is now fostered by institutionalized regional cooperation, it was previously operated, mainly, on the basis of the bilateral agreements.¹ This has been done under the scope of the Berlin Process, which addresses the issue of transitional justice and victims' rights, through two of the six initiatives covered by this mechanism, i.e. through the initiatives Rule of Law and Regional Cooperation Good Neighbourly Relations. (Sofia Declaration, 2018) The extent to which the EU recognizes the importance of these issues is most evident from the final declarations of the EU-Western Balkans summits held in 2018 and 2019 in Sofia, London (Western Balkans Summit, 2018) and Poznan, which address in detail the need for individual commitment to improve the legislative and institutional framework and practice in accordance with relevant international standards, but also their mutual cooperation in the field of war crimes prosecution, victims' rights and the search for missing persons and good neighbourly relations.

Above-described mechanisms has significantly contributed to the raising awareness of the general public on the issue of missing persons, but also foster the processes of the adoption of the national legislation dedicated to this issue. In this process, the WB States face a various challenges, starting from a need to achieve a large number of international

¹ The full list of the protocols is available at: <http://www.kzn.gov.rs/latinica/dokumenta.php>, last accessed at August 10th 2020.

standards, but also to avoid further regional conflicts through ensuring equal rights to all persons missing under the same circumstances associated to the armed conflicts. One of those challenges appears to be addressing the right to be considered alive until the fate of a missing person has been ascertained.

3. International standards which proclaim the right to be considered alive

Even prior to the explicit incorporation of the right to be considered alive in the international humanitarian law and human rights instruments, the basis to maintain this assumption has been developed through the provisions of the Articles 32-33 of Additional Protocol I to the Geneva Convention (hereinafter: AP-I)² and the Articles 136-141 of the Fourth Geneva Convention (hereinafter: GC-IV)³, which provide for an obligation of the States to facilitate enquiries made by members of families dispersed as a result of the conflict so as to help them restore contact and bring them together. (International Committee of the Red Cross, 2007)

Therefore, a reunion of the disappear person with his/her family has been set up a priority. All the other obligation of the states are prescribed as a secondary, to be implemented if a disappeared person has been found dead. This clearly shows that an intention was to oblige the states to uphold presumption that a disappeared person is alive, until it has been found dead. Defined like this, this obligation of the states, addresses the right of the disappeared person to be searches under the presumption that he/she is alive, but also the right of the family members to uphold this presumption until their family member is found alive or dead, without being forced to give up the search and declare their family member dead after a certain period of time. To bridge the legal gap/vacuum in meantime, states should develop a mechanism based on the declaration of absence in order to deal with the civil status, property/assets and social protection issues. This interim period can be a in the function of the check the circumstances of the disappearance and the ability to investigate it. In the event the person is found alive, the certificate of absence should be annulled and the legal status of the person and his/her rights fully re-instituted. (International Committee of the Red Cross, 2007)

In addition to the above-mentioned general provisions of the Geneva conventions and the Additional Protocols, such guaranties have been explicitly incorporated in the several

² Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977.

³ IV Geneva Convention Relative to The Protection of Civilian Persons in Time of War of 12 August 1949.

international instruments, mostly developed as a reaction of the international community on the practice of enforced disappearances across the world .

In 1992, it was adopted Declaration on the Protection of All Persons from Enforced Disappearance. (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) 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. (Kolaković-Bojović, 2019) The Declaration recognizes the very nature of any act of enforced disappearance as an offence to human dignity (Kolaković-Bojović & Grujić, 2020) and incorporates the presumption that missing person is alive in the art. 20 when ruling the search for wrongfully removed children. (Kolaković-Bojović, 2019)

A much detailed approach to this issue is incorporated in the International Convention for the Protection of All Persons from Enforced Disappearance, adopted in 2006 which represents the UN treaty of the new generation, focused on the narrow scope of human rights, built on developments made under the universal treaties of the first generation designed to protect basic human rights⁴, where the secret detention has been already prohibited. (Turanjanin & Kolaković-Bojović, 2018) This instrument, even still hasn't been globally ratified, has been ratified by Bosnia and Hercegovina, Montenegro and Serbia and sighed by North Macedonia, while Croatia has not made any steps to access the Convention. (Kolaković-Bojović, 2017) So, it is highly relevant in the region.

While Article 2 of the Convention provides for the enforced disappearance as an autonomous, individual and continuous crime⁵, Article 5 of the Convention recognizes

⁴ This development was triggered by widespread practice of enforced disappearances during the second half of 20th century, mostly in South America.

⁵ Specific nature of an enforced disappearance and zero tolerance for this serious crime are reflected also in the definition of enforced disappearance contained in the article 2 of the Convention.

The Convention for the identifies the following elements in the definition of enforced disappearances:

- There is an arrest, detention, abduction or any other form of deprivation of liberty;

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.

Art. 24 (3) of the Convention stipulates that each State Party shall take all appropriate measures to search for, locate and release disappeared persons and, in the event of death, to locate, respect and return their remains. From this provision, it is obvious that the Convention takes the presumption that a disappeared person is alive. The same goes for Article 15 of the Convention, which provides for the obligation of the States Parties to cooperate with each other and shall afford one another the greatest measure of mutual assistance with a view to assisting victims of enforced disappearance, and in searching for, locating and releasing disappeared persons and, in the event of death, in exhuming and identifying them and returning their remains.

The Convention also recognizes an importance of overcoming of the legal gap caused due to uncertainty in terms of the fate of a disappeared person. Therefore, Article 24 (6) insists on the transitional mechanism and stipulates that “without prejudice to the obligation to continue the investigation until the fate of the disappeared person has been clarified, each State Party shall take the appropriate steps with regard to the legal situation of disappeared persons whose fate has not been clarified and that of their relatives, in fields such as social welfare, financial matters, family law and property rights.”

Finally, similarly to the Declaration, the Convention upholds this presumption also in relation to the children subjected to the wrongful removal. (Arts. 25 (2-3) ⁶

This specific, hybrid nature of the rights protected by the Convention results, among others, in very specific, multidisciplinary approach to combating and prevention of enforced disappearances, but also in specific approach of the Committee on Enforced

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- 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. (Kolaković-Bojović, *The Synergy Between Criminal Law and Medicine under the International Convention for the Protection of All Persons from Enforced Disappearance*, 2019)

⁶ This is of the great importance taking into account growing issue of missing children in the context of migrant wave. The lack of a comprehensive system of protection of unaccompanied migrant children seems to be an unresolved issue in all countries in the Balkans and, as EUROPOL's reports confirm, around 10,000 unaccompanied migrant minors have disappeared from the European system in 2016, which means that they cannot be provided with adequate protection in any European country. (Batričević & Kubiček, 2019)

Disappearances (hereinafter: CED)⁷ In order to develop a comprehensive guidelines for search for disappeared persons, CED has adopted Guiding principles for the search for disappeared persons in 2019. This document appears to be more that relevant for incorporation of the presumption that a missing persone is alive in the legislation, but also in practice. CED widened the scope of the Guiding Principles beyond the Convention, since they are based on the International Convention for the Protection of All Persons from Enforced Disappearance and other relevant international instruments and practices. They also take into account the experience of other international bodies and various countries around the world and good practices in searching effectively for disappeared persons. They identify mechanisms, procedures and methods for carrying out the legal duty to search for disappeared persons. (Committee on Enforced Disappearances, Guiding principles for the search for disappeared persons, 2019)

The Guiding Principles finally established the presumption that a disappeared person is alive as a backbone of the whole document, but also a milestone of the search process. Hence, Principle 1 stipulates that “the search should be conducted under the presumption that the disappeared person is alive, regardless of the circumstances of the disappearance, the date on which the disappearance began and when the search is launched.” This approach is indirectly incorporated in the principle 2, which provides for the obligation to respect a human dignity as the presumption of life is on the force as in respect of human remains.

Finally, the jurisprudence of the European Court of Human Rights (hereinafter: ECtHR) could be used a solid ground to develop a national legislation and practices in the field. Namely, ECtHR took the position that, “in the context of disappearances, having regard to the fact that a disappearance is a distinct phenomenon, characterized by an ongoing situation of uncertainty and unaccountability in which there is a lack of information or even a deliberate concealment and obfuscation of what has occurred and that this situation is very often drawn out over time, prolonging the torment of the victim’s relatives with the additional distinctive element of subsequent failure to account for the whereabouts and fate of the missing person gives rise to a continuing situation. Thus, in such cases, the procedural obligation will, potentially, persist as long as the fate of the person is

⁷ The Committee on Enforced Disappearances (CED) is the body of independent experts which monitors implementation of the Convention by the States Parties. All States parties are obliged to submit reports to the Committee on how the rights are being implemented. States must report within two years of ratifying the Convention. The Committee examines each report and addresses its concerns and recommendations to the State party in the form of “concluding observations”. See more at: <https://www.ohchr.org/EN/HRBodies/CED/Pages/CEDIntro.aspx>, last accessed on April 15th 2019.

unaccounted for; the ongoing failure to provide the requisite investigation will be regarded as a continuing violation. This is so, even where death may, eventually, be presumed.” (Varnava and Others v. Turkey (GC), §148, 2009)

4. The right to be considered alive and the national legislation in the Western Balkans

As earlier said, in addition to the mechanisms established through the Framework plan, the most of Western Balkan’s countries decided to adopt a national legislation to deal with the issue of the people missing in/or in relation to the arm conflicts on the ex-YU territory.

Such a decision goes in favor the further regulation of the search processes in line with the presumption that the disappeared person is still alive could be found in Principle 3. of the Guiding Principles, which stipulates that the search should be governed by a public policy. Namely, the Principle 3 recognizes the importance of developing “a comprehensive public policy on disappearances, particularly in contexts where disappearances are frequent or on a mass scale.” The par. 3 of the same principle incorporates the presumption of life as a milestone of such public policy, saying that the specific public policy on searches should be built on the basis of States’ obligations to search for, locate, release, identify and return the remains, as appropriate, of all disappeared persons. It should take into account the analysis of the various forms and criminal patterns of disappearances in the country. So, searching for and finding a disappeared person alive is the primary goal.

In addition to the above-mentioned standards, a more concrete guidelines for developing a national public policy on missing persons and to incorporate the right to be considered alive, could be found in the International Committee of the Red Cross, Guiding Principles / Model Law developed to support development of the national legislation in the field. According to this document, Missing persons should be presumed to be alive until their fate has been ascertained. “The foremost right of a missing person is that of search and recovery. Within his/her right to life and security, a missing person has the right to have a thorough investigation conducted into the circumstances of the disappearance until a satisfactory conclusion can be drawn as to his/her fate.” (International Committee of the Red Cross, 2007) Therefore, there are solid, comprehensive and concrete starting point for the Western Balkans countries to develop their own legislation in the field.

4.1. Republic of Croatia

According to the Framework Plan, as EU Member State, Croatia has an advisory role on missing persons issues that are pertinent to EU accession of other MPG members. The same document underlines that the Republic of Croatia, as a full-ledged member of the European Union that has achieved international standards in the process of the search for missing persons, will support implementation of the Framework Plan with its participation in the work of MPG. (Framework Plan to Address the Issue of Persons Missing from Conflicts on the Territory of the Former Yugoslavia, 2018, p. 5) However, Croatia has adopted the Law on Persons Missing in the Homeland War⁸, dedicated to the rights of missing persons and their families in 2019, six years since its became the EU Member State and almost a year after the signature of the Framework Plan.

It is important to mention that the scope of the Law is limited to the two categories of missing persons:

- The Croatian citizens missing in the armed conflicts or in the connection of armed conflicts (Homeland War);
- Foreign citizenship who has the status of a Croatian veteran of the Homeland War and who at the time of disappearance did not have a registered permanent or temporary residence in the territory of the Republic of Croatia.

Hence, other persons missing in the armed conflicts or in the connection of armed conflicts have been excluded from the protection of the Law. Furthermore, the presumption of life of a missing person has been incorporated in a bit limited way. Namely, Article 6 of the Law stipulates that “persons missing in the Homeland War are presumed to be alive until the place of burial of the missing person is found or until the missing person is declared dead in accordance with the regulations governing the declaration of a missing person as dead and proof of death. So, there is presumption of a life, but without considering an option that a missing person could be found alive. Differently, Article 7 recognizes as the fundamental right of family members of a person missing in the Homeland War or a person killed in the Homeland War for whom the burial place is unknown to enable them to find out the place of residence or residence of the missing family member or to find his remains for permanent care. Therefore, the possibility to find a missing person alive is there adequately incorporated. In the same manner, Article 27 stipulates that “search activities shall cease when the requested person

⁸ Law on Persons Missing in the Homeland War, Official Gazette 70/19.

or his remains are found” but also underlines that a declaration of a missing person dead, does not prevent the search process from continuation. Such a solution allows the family members of a missing person to deal with a property and social protection issues without authorities stop searching for their missing family members.

4.2. Bosnia and Herzegovina

The authorities in BiH has adopted the **Law on Missing Persons (LMP)**⁹, which regulates the entitlements to family members of missing persons. Namely, art 1 of this Law defines the scope of the law to determinates the principles for the improvement of the search process, the definition of a missing person, the manner of keeping central records, exercising social and other rights of family members of the missing persons, as well as other issues related to the search for missing persons from Bosnia and Herzegovina and in Bosnia and Herzegovina.

The presumption that a missing person is alive is not explicitly prescribed by the LMP, but it has been implicitly incorporated in the Article 3 (Right to know) which stipulates that the family members of a missing person have a the right to find out about the fate of missing family members and relatives, their place of residence, or, if they are dead, the circumstances, cause of death and place of burial, if such a place is known, and to obtain mortal remains. Therefore, the initial presumption is that a missing person is alive. In the same manner is the provision of Article 9 which rules the termination of the status of a missing person

The status of a missing person shall cease on the day of identification, and the procedure for searching for a missing person shall be concluded. The same provision obliges the authorities not to suspend the in the case when the missing person has been declared dead his remains have not been found. However, this provision should be read in the context of the Article 2(7) which defines what the identification means in the sense of this law, saying that “an identified missing person is a person who is trusted within the identification process determines that the mortal remains found correspond to a particular person in natural or inherited or biological characteristics or the missing person appears alive.” Therefore, the LMP recognizes the both scenarios (when missing person is found alive or dead), but presents them in the wrong order, from the stand point of the presumption that a missing person is alive.

⁹ Law on Missing Persons, Official Gazette of BiH, No 50/04.

Articles 11-12 determinates the entitlement to financial support as a non-transferable personal right. The monetary compensation may not be used at the same time as the other basis for subsistence, while beneficiaries may choose to use a more favorable right, even after the end of the procedure identification or declaration of a missing person as dead. Therefore, the rights of the family members of a missing person (including search and the financial support are not preconditioned by the declaration of death. However, the situation is a bit different when it comes to the right of a missing person to be considered alive, since according the Article 27, three years after the entry into force of the Law, persons registered as missing in the period from 30. April 1991 to February 14, 1996, and whose missing status was verified within the Central records of missing persons of Bosnia and Herzegovina, are to be considered dead and this fact will be officially recorded in the death registers. Hence, the search for them will continue, but without upholding presumption that they are alive.

4.3. Temporary Institutions in Priština (Kosovo and Metohija)

In 2014, the temporary authorities in Priština, have adopted Law No. 04 / L-23 on Missing Persons¹⁰ in order to regulate the status of the persons missing during the armed conflicts or in relation to them, by the end of 1990's. Article 5 of the Law guarantees the right of the family members of a missing person to be informed about the fate of missing persons, including the place where they were found or died, the circumstances of their death, the place of their burial, if known, and also the right to take over their remains. The law also rules the rights of family members regarding the legal status of missing persons (Article 6) and provides for the preserving of the civil status of the spouse of a missing person until the identification of the remains of the missing person is performed and until the death certificate is issued, or the missing person is declared dead by the court according to the Law on Non-contentious Procedure. This provision obviously intended to incorporate the presumption of life of a missing person. However, it missed to include the option to find the missing person alive a possible (and primary desirable) outcome of the search.

The Law also intends to rule the position of the family members of a missing person in terms of the property rights and stipulates that "a member of the family of a missing person may request in the competent court of the last place of residence of the missing person to take over the authorization for temporary management of the property of the missing person. The court may issue that authorization if the request is in the best interests

¹⁰ Law No. 04 / L-23 on Missing Persons Official Gazette of The Republic of Kosova 16/14.

of the missing person.” This means that a declaration of a dead is not required as a necessary prerequisite for a temporary resolving a property issues. In addition to this, “a family member of a missing person, who can prove his material dependence on the income of the missing person, may apply to the competent court of the place of residence of the missing person, to make a payment taken from the missing person's property to meet family needs.”

When it comes to the presumption of life as the right of a missing person, Article 7 of the Law stipulates that the search for a missing person shall be deemed to be completed when the missing person is found or his remains are identified. Also, according to the Law, the search for a missing person shall not be interrupted even if the missing person is declared dead according to the Law on Non-contentious Procedure. The search for a missing person shall continue until the fate, or if it is possible to determine the location of the person reported missing, has been established, and until the family and relevant authorities have been adequately informed. Therefore, the presumption that a missing person is alive is well incorporated.

5. The right of a disappeared person to be considered alive and the national legislation of Serbia

By the adoption of the Law on the rights of veterans, military invalids, civilian invalids of war and members of their families (hereinafter: LoRVMICWMF) in early 2020, a new legislative framework for acquiring status of civilian victim of war for the family members of a missing person has been introduced to replace the procedure earlier ruled by the Law on the Rights of Civilian Invalids of War¹¹ of 1996. The law brings a wide scope of social benefits grounded in the fact that a person has suffered damage in the context of an armed conflict, but without establishing the direct causal link between a crime against humanity committed and a damage suffered. The LoRVMICWMF also recognized the rights of the family members of a missing person, providing them a status of the family members of civilian victims or civilian invalids of war. Namely, according to article 27 of the same Law, a family member of a civilian war victim or invalid is considered a member of the family of a deceased civilian war invalid, if they lived together in a joint household for at least one year before death. The circles of family members are limited to:

¹¹ Law on the Rights of Civilian Invalids of War (“Official Gazette of the RS”, No. 52/96).

1. a spouse or a person who lived in an extramarital union with a civilian war invalid or a civilian victim of war and had a common child together.
2. a child born in or out of wedlock and an adopted child,
3. a child in law who was supported by a civilian war invalid, i.e., a civilian victim of war;
4. a parent or adoptive parent, who was supported by a civilian war invalid, i.e., a civilian victim of war;
5. stepfather and stepmother, who were supported by a civilian war invalid, i.e., a civilian victim of war.

Upon acquiring the status, victims become entitled to monthly cash benefits, subsidized public transport passes, health care, costs for care assistance and funeral costs. (art. 32 of the LoRVMICIWMF) The extent of the right and an amount the monthly cash benefit for the family members of a victim are determined by the damage a victim suffered, but also by various social characteristic of the family members associated with the status of vulnerability.

The competent authority for rendering decision on the status of civilian victims of war is the local municipals/self-governments (the first instance) and the Ministry of Labor, Employment, Veterans, Social Affairs (MoLEVSA) as a second instance.

While listing the documents which need to be submitted by applicant (family member of a missing person)¹², LoRVMICIWMF requires, among others, to submit a declaration of death. This declaration/certificate could be issued to the family members as a result of a procedure for the declaration of missing person dead and proof of death, according to the Law on Non-contentious proceedings.¹³ This law (art. 57, par. 1(d)) provides that, among others, persons who disappeared during the war in connection with the events of the war, and about whose life there was no news for a year from the day of the cessation of hostilities, may be declared deceased. A proposal for declaring a missing person dead can

¹² “For beneficiaries of rights - family members of killed, deceased and missing soldiers, military invalids, civilian war invalids and civilian victims of war: certificates of education of children; decision of the competent body on incapacity for work, i.e. finding and opinion of the competent medical commissions; death certificate; certificate of circumstances of death, death or disappearance; decision of the competent body on declaring the missing person dead; a certificate on the time spent in the war, i.e. armed actions, as well as on the time spent on military service, i.e. in military educational institutions; final decision on the recognized property according to the regulations in the field of veteran-disability protection.”

¹³ Law on Non-contentious proceedings, “Official Gazette of the SRS”, No. 25/82 and 48/88 and “Official Gazette of the RS”, No. 46/95 - other law, 18/2005 - other law, 85/2012, 45/2013 - other law, 55/2014, 6/2015 and 106/2015 - other law)

be submitted by any person who has a direct legal interest in it, as well as by the public prosecutor. (Article 58)

Basically, this means that the family members of missing people are not considered as civilian victims of war until a declaration of death is issued (Article 177), which is not in line with art. 24, par. 6 of the UN CPPED and prevents a numerous potential family member of the victims of enforced disappearances to access the social protection measures. They are supposed to choose between the upholding a presumption that their family member is alive and the right to access some social benefits.

Therefore, there is a need either to align the provisions of the Law on the rights of veterans, military invalids, civilian invalids of war and members of their families (article 177) with the relevant provisions of the UN CPPED (art. 24, par. 6) in terms of the status of family members of the victims of enforced disappearances who are still not considered as civilian victims of war until a declaration of death is issued, either to adopt a new law to rule the rights of the persons disappeared in/or in relation to the armed conflicts in ex-Yugoslavia and their families.

5.1. A new Law on the Missing Persons

In early 2021 Serbian Government has established the working group to develop a draft Law on Missing Persons. A few months later, an initial draft has been published addressing the comprehensive scope of the rights of the persons missing in, or in relation to the conflict in ex-Yugoslavia.¹⁴ As a basis for the draft the working group used the Guiding principles for the search for disappeared persons and reflected them, in details, as in the chapter of the law dedicated to the main principles, as in the section which regulate the rights of the missing persons and the members of their families. In addition to the right to be searched, the Law provides for the wide spectrum of the rights of the family members, starting from the right to be inform about the progress and the results of a search, through the monthly cash benefits, to the other social protective, assistance and support measures.

¹⁴ “In terms of this law: 1) Missing person is a person about whom the family has no news, and whose disappearance occurred during or in connection with the armed conflicts in the territory of the former Socialist Federal Republic of Yugoslavia (hereinafter: SFRY) in the period from 1 January 1991 to 31 December 1995 and in the territory of the Autonomous Province of Kosovo and Metohija (hereinafter: AP KiM) in the period from January 1, 1998 to December 31, 2000 (hereinafter: armed conflicts) and which was reported on the basis of reliable disappearance data.” (art. 2)

Assumption about the life of a missing person is ruled by the separate article (Article 3) which stipulates that a missing person shall be considered alive, until:

- he/she is found alive;
- the remains are identified;
- or until the missing person is declared dead in accordance with the regulation governing the declaration of a missing person as dead and proving death.

In order not to leave this presumption without legal effects, Art. 3, par. 2 provides that the rights of family members of a missing person or a person whose burial place is unknown shall not cease, in accordance with this Law, with the identification or declaration of the missing person as dead. Therefore, the draft law has introduced a kind of correctional mechanism in relation to the earlier mentioned requirements of the LoRVMICIWMF and the Law on Non-contentious proceedings, having in mind that, not just upholds the presumption that a missing person is alive, but also upholds exercising the rights of the family members even if a missing person has been declared dead.

The legal consequences of this right are also further incorporated in the other provisions of the draft law. Namely, Art. 4 of the draft law, which guarantees the right to truth, recognizes as the primary right of family members of a missing person, the right to enable them to know the place of residence or domicile of a missing family member, prior to the right to find and retrieve his remains for a dignified burial, as well as to be informed of the circumstances of disappearance or death.¹⁵

Furthermore, the draft Law (Art. 12) which rules the termination of the status of the missing persons, explicitly provides that the decision on the termination of the status of a missing person shall be rendered:

- When a missing person is found alive;
- After the surrender and dignified burial of identified mortal remains of a missing person or a mortally injured person for whom the place of burial is unknown.

¹⁵ In order to exercise the rights referred to in Article 4, paragraph 1 of this Law, the competent state bodies, institutions and organizations of the Republic of Serbia are obliged to provide available information to the family members of the missing person.

So, the draft Law once more assumes as primary, the scenario where a missing person is found alive. The same is incorporated in the Article 22 which rules the end of a search, and provides that the search ceases when the missing person is found alive or the found remains of a missing person or a deceased person for whom the place of burial is unknown are identified and handed over to family members in accordance with the provisions of this law.

6. Conclusions

Based on the above- presented findings, it is obvious that the right of a missing person to be considered alive has been recently significantly developed, as a he international level, as a the national level of the Western Balkans countries. Despite some inconsistencies, it could be said that this national legislations in this region incorporated the presumption that a missing person is alive prior it has been developed in detailed in the CED Guiding Principles for Search for Disappeared Persons in 2019. However, it should be noticed that ex-territorial nature of disappearances, in the contenxt of newly establsihed borders on Western Balkans in 1990's, requires a more uniform approach to this issue in he Region, to ensure that no missing persons or their family members are left behind, out of protection of law. One of the possible ways to do it so is to coprehensively incorporate the principle of non-discrimination in the national laws, to make them applicable on all persones disappeared in or in relation to the arm conflict in ex-Yugoslavia.

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