



COMMENTS AND PROPOSALS FOR AMENDMENTS TO THE DRAFT LAW ON THE RIGHTS OF THE CHILD AND THE PROTECTOR OF THE RIGHTS OF THE CHILD

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Introduction

In line with their efforts to establish an institutional system for the protection of children in Serbia that would be as adequate as possible, the Autonomous Women's Center, ASTRA and Group 484 prepared the comments and proposals for amendments and supplements to the Draft Law on the Rights of the Child and the Protector of the Rights of the Child, submitted during the public debate to the Ministry of Labour, Employment, Veteran and Social Affairs.

In drafting the proposals and comments, we were guided by:

- our twenty years' experience in providing assistance to children who are victims of domestic violence and other criminal offences of gender-based violence, human trafficking, multiple discrimination, and refugee, migrant and asylum-seeking children;
- ratified Convention on the Rights of the Child;
- Concluding observations of the Committee on the Rights of the Child on the combined second and third periodic reports of Serbia;¹
- ratified UN Convention relating to the Status of Refugees;
- ratified UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- ratified UN Convention on the Elimination of All Forms of Discrimination against Women;
- UN Protocol against the Smuggling of Migrants by Land, Sea and Air;
- General recommendation of the UN Committee on the Elimination of Discrimination against Women No 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women;²
- ratified ILO Convention 182 on the Worst Forms of Child Labour;
- ratified Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention);³
- UNHCR Guidelines on International Protection: Gender-Related Persecution;⁴
- General Protocol on Protection of Children from Abuse and Neglect;
- General Protocol for Action and Cooperation of Institutions, Bodies and Organisations in the Situations of Violence against Women within the Family and in Intimate Partner Relationship;
- other relevant documents of the United Nations, European Union and Council of Europe, and valid laws and by-laws of the Republic of Serbia.

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¹ Adopted by the Committee at its 74th session (16 January – 3 February 2017).

² Available only in English on the website of the UN Committee on the Elimination of Discrimination against Women:

<<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N14/627/90/PDF/N1462790.pdf?OpenElement>>.

³ RS Official Gazette – International Treaties, No 12/2013.

⁴ UNHCR Guidelines for international protection, Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 2002.

⁵ Special comments on Articles 26, 29, 32, 37, 41, 42, 43, 44, 48, 66, 68 and 104.

⁶ Special comments on Articles 26, 34 and 75.

⁷ General comments, and special comments on Articles 3, 6, 23, 27, 50, 51, 60, 71, 72 and 75.

PROPOSALS AND COMMENTS

General comments

Substantive provisions

A general comment relating to the adoption of the Law on the Rights of the Child relates primarily to the question of whether such a single law is necessary in the first place, and whether it is possible to codify all norms concerning the rights of the child in a single law. In terms of the need and justifiability of adopting such law, we underline that the proposer notes that “*such law, which in one part defines and regulates all rights of the child, and in the second part the instruments of protection, promotion and improvement of the rights of the child, does not exist in any country*”⁸. Therefore, the question can be asked as to what are the decisive reasons for Serbia to be an exception. However, the regulation of the rights of the child in such way, with an attempt at detailed regulation, poses serious risks to legal certainty, given that some of the proposed solutions contravene already existing laws.⁹ On the other hand, if this law regulates in an identical manner the issues already regulated by other laws, it is possible to ask the question of the purposefulness, duplication of identical norms, i.e. introduction of very similar provisions in different laws. The Draft Law also introduces some new terms and expressions, such as the *collision representative, asylum-seeking child* etc., which have not been explained and which, although resembling the existing ones, are not as such envisaged by other laws – for instance, the Family Law, Law on Asylum and Temporary Protection. Therefore, if there is justified interest in the adoption of a single legal act to regulate the matter of the rights of the child, it is necessary to harmonise the legal terminology of the Draft Law with valid regulations, so as to avoid confusion and wrong interpretations in implementation.

Although it prescribes a large number of the rights of the child, obligations and bans, the Draft Law does not regulate the issue of sanctions, i.e. it does not envisage any penalty provisions in case of non-conformity, i.e. violation of provisions of the Law. For instance, the Draft Law does not regulate whether the offender will be punished, with what punishment and in what kind of a procedure if he violates the prohibition of the corporal punishment of the child, prescribed by Article 28 of the Draft Law. It should be borne in mind that the proposed solution in the Draft Law is not aligned with Section 37 d) of the Concluding observations of the Committee on the Rights of the Child on the combined second and third periodic reports of Serbia, in which the Committee urges Serbia to ensure that those who commit corporal punishment are brought before the competent administrative and judicial authorities.

Procedural provisions – procedure before the Protector of the Rights of the Child

Article 122 – transitional and final provisions, states that once the Law comes into effect, Article 6, paragraph 2 of the Law on the Protector of Citizens shall cease to be valid, but nothing is stated about the further validity of provisions of Article 25, paragraphs 1 and 2 of the Law on the Protector of Citizens, which read that any foreign or domestic natural or legal person (including a child – *authors’ remark*) may file a complaint with the Protector of Citizens. In case of violation of rights of the child, the complaint may be

⁸ Public debate about the Draft Law on the Rights of the Child and the Protector of the Rights of the Child, <https://bit.ly/316dwFT>, accessed on: 8 July 2019.

⁹ For more detail see *Individual comments*, p. 18.

submitted by his parent, i.e. legal representative on behalf of the juvenile, which implies that these provisions will remain in force, so that in case of violation of rights of the child, persons may file complaints with both protectors. Given the said, legal uncertainty and the conflict of competences (either positive or negative) may easily arise between the Protector of Citizens and the Protector of the Rights of the Child in addressing complaints about the violation of the rights of the child. This may also create confusion among citizens and make them "walk around" from one institution to the other, which are the features of bad administration. Furthermore, in procedural terms, the question is asked whether before addressing the Protector of Citizens, it is necessary, as a previous legal remedy, to first file a complaint about the violation of the rights of the child with the Protector of the Rights of the Child or vice versa, and whether, taking into account the basic principles of the legal order of the Republic of Serbia, it is possible to conduct two parallel procedures at the same time. Also, the question is asked whether the complainant, if dissatisfied with the procedure with one of the ombudsmen, can address the other ombudsman, and whether one ombudsman can thus examine the decisions of the other ombudsman, i.e. whether a relationship of mutual control of two independent bodies is thus established in an indirect way. In addition, confusion may arise in acting of administration bodies during and after the procedure of controlling the legality and regularity of their work since they can face the situation of having to comment on both ombudsmen in relation to the same case, with control procedures ending in different outcomes, and the question is asked how they should act in a concrete case. Given the said, the transitional and final provisions should clearly define the relationship and division of competences between the two ombudsmen, i.e. regulate their future cooperation and joint action in procedures conducted in relation to the same case.

In addition, it arises from the provisions of the Draft Law that the competences of the Protector of the Rights of the Child for acting upon complaints are significantly limited and practically reduced to an extremely small number of cases because, on the one hand, it is stated that the Protector of the Rights of the Child will not act until all available legal remedies are exhausted (Article 98), while on the other hand, it will not act upon the complaint if the procedure before the court in respect of the same matter has already been initiated or terminated with a final decision (Article 100). Given that in an early phase of violation, a complaint will be considered early because available legal means have not been used, while in later phases court proceedings will already be initiated in a large number of cases (e.g. court proceedings for marriage dissolution, visitation, entrusting the child, domestic violence, alimony, execution of court decisions etc.), we arrive at a very modest volume of complaints upon which the Protector of the Rights of the Child will be able to act, which is why the question is asked about the purpose of existence of a separate body which, already according to the letter of the Law, has a very limited scope of action in the cases of (potential) violation of the rights of the child, which is reduced to promotion and prevention rather than protection. This legal solution will be in full contravention of the recommendation of the Committee on the Rights of the Child¹⁰ to expedite the adoption of the Law on the Ombudsperson for the Rights of the Child to **specifically** deal with children's rights and ensure that such a body has a mandate to receive, **investigate and address complaints** by children in a child-sensitive manner. According to the stipulation of the Draft Law, a very small number of received complaints would be investigated and addressed as a vast majority would at the start be rejected for formal reasons, without going into the substance, which implies bureaucratic acting that is by no means suitable for a child. On the one hand, one of the Committee's objections of the Deputy Protector of Citizens for Child Rights was that she acts with insufficient visibility and authority, while at the same time there are plans to establish a separate body for the protection of the rights of the child, whose authority would be even smaller and limitations in acting upon complaints even greater.

¹⁰ Concluding observations of the Committee on the Rights of the Child on the combined second and third periodic reports of Serbia, Section 17 a).

Finally, as the Draft Law does not state the necessary financial means for the implementation of the Law, the question remains open as to how much the new institution would cost citizens of the Republic of Serbia. According to our opinion, the proposer should clearly and transparently present the costs of the establishment and operation of a separate Protector of the Rights of the Child and make a cost-benefit analysis of such legal solutions. Only then would it be possible to have a comprehensive public debate about the justifiability of adopting such a law. In addition, an integral part of the analysis should also be an analysis of the potential sources of financing the work of such institution bearing in mind the limitations arising from the economic situation facing the Republic of Serbia and the country's administrative decisions concerning the ban on employment, restrictions and austerity measures.

Comments and proposals of amendments to individual articles

Basic principles Article 3

We are of the opinion that two more principles should be added to paragraph 1, Article 3, to read:

The principles of the Law are the following:

- 1) The rights of the child are indivisible and are exercised in their entirety so that no right of the child automatically excludes another right.
- 2) IN ALL ACTIVITIES CONCERNING THE CHILD, REGARDLESS OF WHETHER UNDERTAKEN BY PUBLIC OR PRIVATE INSTITUTIONS, COURTS, ADMINISTRATIVE BODIES OR LEGISLATIVE BODIES, THE BEST INTERESTS OF THE CHILD WILL BE OF PRIMARY IMPORTANCE
- 3) THE LAW SHALL APPLY TO EACH CHILD UNDER THE JURISDICTION OF THE REPUBLIC OF SERBIA WITHOUT ANY DISCRIMINATION
- 4) In the exercise, improvement and protection of the rights of the child, the Protector of the Rights of the Child, public authorities, legal and natural persons must mutually cooperate.
- 5) The decisions about the rights and interests of the child shall be made by respecting the child's opinions and development capacities, and within the shortest possible deadline.

Explanation

Our opinion is that one of the main postulates of the Convention on the Rights of the Child – acting in the best interests of the child (Article 3 of the Convention), should be prescribed at the level of the principle and not through provisions which specifically regulate individual actions/procedures/exercise of individual rights. Article 6, paragraph 5 of the Uniform Methodological Rules for the Drafting of Regulations states, *inter alia*, the following: "The principles express the basic values in the area being regulated". If within the principles, an item is envisaged prescribing the obligation of respecting the best interest of the child, articles/paragraphs of the Draft Law which underscore the obligation of respecting the best interest of the child when undertaking a concrete action / conducting a procedure etc. (example: Article 8, paragraph 1) should be deleted.

With regard to item 3, the *explicite* provision about the effect of the Law on each child under the jurisdiction of the Republic of Serbia should be introduced, given that the current Draft mentions only some specific categories of foreigners, and room is left for different interpretations, in terms of whether and to what extent the provisions of the

Law should be implemented in respect of categories of children foreigners that have not been mentioned. Article 2 of the Convention on the Rights of the Child states that parties shall ensure the rights set forth in the Convention to each child within their jurisdiction, and Article 1 of the European Convention on Human Rights outlines the competences of the signatories. Although direct application of the provisions of these Conventions should be a sufficient guarantee, in our opinion, *mutatis mutandis*, as it has been done with some other provisions of conventions that have been consistently incorporated into the Draft Law, the stipulation of an unambiguous obligation of respecting the rights of each child under the jurisdiction of the Republic of Serbia is indispensable.

Judicial and other protection of the rights of the child

Article 6

We are of the opinion that item 2, paragraph 2, Article 6 should read:

The measures referred to in paragraph 1 of this Article shall ensure to the child:

- 1) access to the court, administration bodies, Protector of the Rights of the Child and other independent bodies;
- 2) accessible court, administrative, ~~independent, complaints~~ and other procedures for the protection of the rights of the child;
- 3) provision of information, advice and legal assistance;
- 4) independent representation, and
- 5) other services, procedures or remedies ensuring efficient protection of the rights of the child.

Explanation

The words "independent" and "complaints" should be deleted from Article 6, paragraph 1, item 2, because the administrative and judicial proceedings also incorporate the complaints procedure, which is guaranteed by the Constitution and regulations of the Republic of Serbia. In our opinion, the word "independent" is inadequate and it is not commonplace to use this word to designate the procedures initiated and conducted before independent institutions.

Right to the freedom of association

Article 23

We are of the opinion that paragraph 1, Article 23 should read:

A CHILD WHO TURNED 14 YEARS OF AGE SHALL BE ENTITLED TO ESTABLISH ASSOCIATIONS, BECOME A MEMBER OF AN ASSOCIATION, AND ACTIVELY PARTICIPATE IN ITS WORK, IN ACCORDANCE WITH LAW.

Explanation

Article 23, paragraph 1 of the Draft Law should be harmonised with provisions of Article 10 of the Law on Associations (RS Official Gazette, Nos 51/2009, 99/2011 – other laws and 44/2018 – other law), according to which only minors who turned 14 years of age may be founders of associations. Therefore, instead of the words *Each child shall be entitled to establish associations*, there should be: *Minors who turned 14 years of age*. Given that paragraphs 3 and 4 of Article 23 also regulate the freedom of assembly and the limitation of the freedom of association and assembly, the title of the Article should be supplemented to read: *Right to the freedom of association and assembly*.

Concept of violence against the child

Article 26

We are of the opinion that the following forms of violence should be added to paragraph 2, Article 26 to read:

Violence against the child includes, *inter alia*, the following:

- a. abuse,
- b. torture,
- c. PERSECUTION,
- d. neglect,
- e. corporal discipline,
- f. cruel, inhuman or degrading treatment or punishment,
- g. unlawful deprivation of liberty
- h. ABDUCTION OF A MINOR
- i. holding in slavery
- j. labour exploitation, particularly for the worst forms of child labour
- k. FORCED MARRIAGE
- l. CHILD MARRIAGES
- m. sexual violence, SEXUAL (GENDER) HARASSMENT and exploitation,
- n. FEMALE GENITAL MUTILATION
- o. VIOLENCE IN THE NAME OF THE SO-CALLED "HONOUR", DUE TO CULTURE, CUSTOMS, RELIGION OR TRADITION, OR ENCOURAGING A CHILD TO COMMIT SUCH ACTS
- p. exploitation of a child in armed conflict,
- q. other forms of exploitation,
- r. sale and trafficking of the child
- s. WITNESSING AND/OR EXPOSING A CHILD TO ANY FORM OF VIOLENCE OR CRIMINAL OFFENCES AGAINST OTHER PERSONS

Explanation

The stated forms of violence against the child should be supplemented by all forms covered by the ratified international treaties, such as the Council of Europe Convention on preventing and combating violence against women and domestic violence¹¹ (hereinafter: CE Convention), which is largely aligned with the Criminal Code of the Republic of Serbia¹².

Article 3 of the CE Convention – *Definitions*, reads: "f) "women" includes girls under the age of 18". Among other forms of violence, the Convention specifies *Stalking* in Article 34, and *Inacceptable justifications for crimes, including crimes committed in the name of so-called "honour"* in Article 42.

The Criminal Code of the Republic of Serbia envisages: *Sexual harassment* – Article 182a, *Forced marriage* – Article 187a, *Abduction of a minor* – Article 191, *Female genital mutilation* – Article 121a. These are harmonised with the forms of violence covered by the CE Convention.

Child marriages are mentioned only in the context of migrant and refugee children (Article 72). The problem of child marriages should not be connected only with this population of children. In this regard, we propose that child marriages should be added in Article 26 as a form of violence against the child.

¹¹ <http://www.parlament.gov.rs/upload/archive/files/lat/pdf/zakoni/2013/2246-13Lat.pdf>.

¹² https://www.paragraf.rs/propisi/krivicni_zakonik.html.

According to Section 6 of the General Protocol for Action and Cooperation of Institutions, Bodies and Organisations in the Situations of Violence against Women within the Family and in Intimate Partner Relationship¹³ – *Child and Other Vulnerable Family Members Witnessing Violence against Women within the Family and Intimate Partner Relationship*: “Children are considered victims of violence in the family not only when they experience it directly, but also when they are exposed to acts of violence that one family member performs against other family members as witnesses. Witnessing and exposure to violence traumatises children, regardless if they watch the violence directly, or hear sounds, thumps or screams from a close range, when they know that violence is occurring or can occur, or when they subsequently see the consequences of violence among family members. Recent studies confirm that exposure to physical, sexual or psychological abuse and violence between parents or other family members have a serious impact on children and other vulnerable family members. [...] The term “child witness” does not only relate to children who witness the act of domestic violence directly, but also to the children exposed to violence indirectly. In these cases it is necessary to apply complementarily the General Protocol on the Protection of Children from Abuse and Neglect. [...] All services to children witnesses of domestic violence and other vulnerable family members need to be provided in accordance with their best interests.”

Article 41 – *Right to recovery and reintegration* of the Draft Law mentions the right “of the child who witnesses these and other acts committed against other persons”.

Prohibition of torture and deprivation of liberty **Article 27**

We are of the opinion that paragraph 1, Article 27 should be amended. Paragraph 4 should also be added to Article 27 to read:

A CHILD MUST NOT BE SUBJECTED TO TORTURE, OR INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT.

Children cannot be deprived of liberty, except in legally prescribed cases, in the manner and in the procedure determined by law.

The deprivation of liberty of a child shall be the last resort measure when alternative measures are not possible or have not yielded results, and shall be applied exclusively for the sake of the protection of the child, other persons and public safety, and for the sake of the rehabilitation of the child, within the shortest possible time, with periodic checks and the right to complain.

THE ARREST AND DEPRIVATION OF LIBERTY OF THE CHILD SHALL BE THE LAST RESORT MEASURE WHEN ALTERNATIVE MEASURES ARE NOT POSSIBLE OR HAVE NOT YIELDED RESULTS, AND SHALL BE APPLIED EXCLUSIVELY FOR THE SAKE OF THE PROTECTION OF THE CHILD, OTHER PERSONS AND PUBLIC SAFETY, AND FOR THE SAKE OF THE REHABILITATION OF THE CHILD, WITHIN THE SHORTEST POSSIBLE TIME, WITH PERIODIC CHECKS AND THE RIGHT TO COMPLAIN.

Explanation

The Republic of Serbia is signatory to several international treaties which prohibit torture and other cruel, inhuman or degrading treatment and punishment. The prohibition of torture and abuse is the civilisational achievement of the modern times, and is thus the

¹³ <https://www.minrzs.gov.rs/sites/default/files/2018-11/Opsti%20protokol%20nasilje%20u%20porodici.pdf>.

jus cogens of international law.¹⁴ The prohibition is absolute and cannot be derogated in accordance with Article 4 of the International Covenant on Civic and Political Rights, and Article 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, regardless of the prevailing situation in a given state. Therefore, Article 27 should be harmonised primarily with Article 37 of the Convention on the Rights of the Child and other international documents prescribing the obligation of the prohibition of torture (Article 3 of the European Convention on Human Rights, Article 1 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 1 of the Council of Europe Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment etc.). Furthermore, Article 25 of the Constitution of the Republic of Serbia guarantees the inviolability of physical and mental integrity and stipulates that "Nobody may be subjected to torture, inhuman or degrading treatment or punishment, nor subjected to medical or scientific experiments without their free consent."¹⁵ The above paragraph unjustifiably limits the prohibition of torture, which is why it should be harmonised with the provisions of the Constitution of the Republic of Serbia and ratified international treaties.

Special measures of the protection of the child against violence Article 29

We are of the opinion that item 2 should be added to paragraph 2, Article 29 to read:

Each child ~~entitled~~ shall be entitled to special measures of protection against all forms of violence.

Special measures of protection shall be particularly applied to the child who:

1. is a victim of any form violence, abuse, neglect, exploitation, sale or trafficking of children;
2. WITNESSES AND/OR IS EXPOSED TO ANY FORM OF VIOLENCE OR CRIMINAL OFFENCES COMMITTED AGAINST OTHER PERSONS;
3. the exercise of each right to visitation and/or guardianship shall not jeopardise the rights and safety of the victim or children;
4. is exposed to discriminatory or stigmatising treatment of public authorities, a natural or legal person;
5. is involved in damaging practices dangerous to life;
6. is deprived of family care;
7. is in conflict with law;
8. is deprived of freedom or exposed to other limitations of his rights and freedoms;
9. faces other situations which pose or can pose risk to his normal development and wellbeing.

Explanation

The explanations concerning supplements to the Article about witnessing and/or exposure of children to violence are the same as those stated for supplements to Article 26.

14 "[The International Court of Justice] believes that the prohibition of torture is part of customary international law and became a peremptory norm (*jus cogens*)", International Court of Justice, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgement, ICJ Reports 2012, ¶ 99; "The prohibition against torture exhibits three important features [...] a) The Prohibition Even Covers Potential Breaches [...] b) The Prohibition Imposes Obligations Erga Omnes [...] c) The Prohibition Has Acquired the Status of Jus Cogens [...]" International Criminal Tribunal for the Former Yugoslavia, *The Prosecutor v. Anto Furundzija. The Judgement of the Trial Chamber*, IT-95-17/1-T, 10 December 1998, ¶ 147-157.

15 Constitution of the Republic of Serbia (RS Official Gazette, No 98/2006), Article 25.

Special measures of protection of a child victim

Article 32

We are of the opinion that items 6 and 7 should be added to paragraph 3, Article 32 to read:

In applying special measures of protection of the child, public authorities shall in particular:

1. limit the number of hearings of the child to two;
2. ensure that the hearing of the child is carried out by two trained official and/or professional persons on the appropriate premises with the use of available technical means for the transmission of the image and sound, in accordance with law;
3. disable any contact of the child and the suspect offender, including confronting, except on the request of the child and provided this does not contravene his best interests;
4. provide the child with legal assistance, services of an interpreter and translator, support of professional bodies, persons or services or support and the presence of the parent, guardian and/or person of trust according to the child's choice;
5. undertake other measures to protect the child's physical and mental integrity and prevent potential detrimental effects of actions on the personality, development and wellbeing of the child;
6. ENSURE THAT MEASURES IN THE PROCEDURE OF CHILD CUSTODY AND REGULATION OF THE VISITATION RIGHT OF THE CHILD WITH THE PARENT WITH WHOM THE CHILD DOES NOT LIVE WILL BE TAKEN INTO ACCOUNT IN CASES OF VIOLENCE, AND/OR THE VISITATION RIGHT SHALL NOT JEOPARDISE THE RIGHTS AND SAFETY OF THE CHILD AND THE NON-VIOLENT PARENT;
7. ENSURE MEASURES WHICH PREVENT MISUSE OF THE TERM "PARENTAL ALIENATION" IN SITUATIONS WHEN THE PARENT IS ACCUSED OF VIOLENCE AGAINST THE CHILD OR DOMESTIC VIOLENCE.

Explanation

The proposal to add item 6 is in line with the CE Convention – Article 31 *Custody, visitation rights and safety*, which reads: 1) Parties shall take the necessary legislative or other measures to ensure that, in the determination of custody and visitation rights of children, incidents of violence covered by the scope of this Convention are taken into account. 2) Parties shall take the necessary legislative or other measures to ensure that the exercise of any visitation or custody rights does not jeopardise the rights and safety of the victim or children.

The Platform of independent United Nations and regional expert mechanisms on violence against women and women's rights¹⁶ recently issued the statement¹⁷ that the correlation between domestic violence against women and child abuse is most often underestimated in practice¹⁸. The statement stresses the importance of a holistic and coordinated

¹⁶ Dubravka Šimonović, [Special Rapporteur on violence against women, its causes and consequences](#); Hilary Gbedemah Chairperson of the [UN Committee on the Elimination of Discrimination against Women](#); Ivana Radačić, Chair of the [UN Working Group on the issue of discrimination against women in law and in practice](#); Feride Acar, President of the [Group of Experts on Action against Violence against Women and Domestic Violence of the Council of Europe](#); Margarete May Macaulay, [Rapporteur on the Rights of Women of the IACHR](#), Lucy Asuagbor, [Special Rapporteur on Rights of Women in Africa](#) and Sylvia Mesa, President of the [Committee of Experts of the Follow-up Mechanism to the Belém do Pará Convention](#).

¹⁷ <https://rm.coe.int/final-statement-vaw-and-custody/168094d880>.

¹⁸ As also confirmed by domestic researches: <https://bit.ly/2Vw24SN>, including the Ombudsman's findings in the cases of femicide as a consequence of domestic violence and abuse and neglect of children in the context of domestic violence.

approach based on the existing international and regional standards, as confirmed by jurisprudence of international courts, UN treaty bodies and other relevant mechanisms, which should be applied at the national level as well, not only to uphold the principle of the best interest of the child but also the principle of equality between women and men.

The Platform of independent United Nations and regional expert mechanisms reminds that the CEDAW General Recommendation No 35 on gender-based violence against women, updating general recommendation No 19, Article 40 – *Protection*, reads: Adopt and practically implement efficient measures for protection and support to women prosecutors and witnesses of gender-based violence before, during and after judicial proceedings, including through: b) (...) Perpetrators or alleged perpetrators' rights or claims during and after judicial proceedings, including with respect to property, privacy, child custody, access, contact and visitation, should be determined in the light of women's and children's human rights to life and physical, sexual and psychological integrity, and guided by the principle of the best interests of the child¹⁹. The Platform also refers to Article 31 of the CE Convention *Custody, visitation rights and safety*.

The proposal to add item 7 is also in line with the statement of the Platform of independent United Nations and regional expert mechanisms on violence against women and women's rights, in which experts discourage the abuse of the "parental alienation" and similar concepts invoked to deny child custody to the mother and grant it to a father accused of domestic violence in a manner that totally disregards the possible risks for the child. The Platform notes that the Committee of Experts of the Follow-up Mechanism to the Belém do Pará Convention (MESECVI), in the 2014 Declaration²⁰, recommends to explicitly forbid, during the investigations to determine the existence of violence, "evidence based on the discrediting testimony on the basis of alleged parental alienation syndrome". This and similar terms could be misused if applied without taking into consideration international standards concerning these issues. Experts state that accusations of parental alienation by the abusive parent against mothers must be considered a continuation of power and control by state agencies and actors, including those deciding on child custody. In all cases, account should be taken of the women's and children's rights to life and physical, sexual and psychological integrity, guided by the principle of the best interests of the child.

Exploitation of the child in prostitution **Article 34**

We are of the opinion that paragraph 2, Article 34 should also envisage mediation as an act of execution to read:

The offering, obtaining, procuring, MEDIATION or providing a child for the needs of child prostitution shall be forbidden.

Explanation

It is necessary to stipulate MEDIATION as a form of exploiting a child in prostitution within paragraph 2, Article 34 Exploitation of the child in prostitution (PART FOUR – THE RIGHTS OF THE CHILD TO PROTECTION AGAINST VIOLENCE).

Protection of the child against participation in games of chance **Article 37**

¹⁹ Fatma Yildirim v Austria, No 6/2005, Sahide Goekce v Austria, No 5/2005; Angela González Carreño v Spain, No 47/2012; M.W. v Denmark, No 46/2012; Isatou Jallow v Bulgaria, No 32/2011.

²⁰ <https://www.oas.org/en/mesecvi/docs/DeclaracionDerechos-EN.pdf>.

We are of the opinion paragraph 1 in Article 37 should be amended to read:

PARENTS, GUARDIANS, FOSTER PARENTS AND OTHER ADULT CUSTODIALS OF THE CHILD ARE FORBIDDEN TO ENABLE THE CHILD TO PARTICIPATE OR EXPOSE THE CHILD TO GAMES OF CHANCE.

Explanation

It is not sufficient for children to be protected against others who expose them to games of chance or enable their participation in games of chance, with or without the consent of the parent, guardian or foster parent, while at the same time there is no clear prohibition for the parent, guardian, foster parent or other adult person who cares about the child against enabling the child to participate in games of chance or exposing him to games of chance.

Right to recovery and reintegration **Article 41**

We are of the opinion that Article 41 should read:

Public authorities shall undertake all measures to encourage physical and psychological recovery IN A SAFE ENVIRONMENT and the social reintegration of the child who suffered violence, abuse, torture, neglect or other form of cruel, inhuman or degrading treatment or punishment, labour and other exploitation, sexual violence and exploitation, armed conflict, sale and trafficking of children, of the child threatened with these acts, and the child who is a witness to these or other acts committed against other persons.

Recovery and reintegration shall be enabled in the conditions which GUARANTEE PHYSICAL AND EMOTIONAL SAFETY IN AN ENVIRONMENT WHERE THE CHILD STAYS, encourage health, self-respect and dignity of the child.

The local self-government shall, in accordance with needs, provide services which encourage the physical and psychological recovery and social reintegration of the child, INCLUDING SPECIALISED AGE-APPROPRIATE PSYCHOSOCIAL SUPPORT.

Explanation

A physically and emotionally safe environment is the first and indispensable condition for the recovery of the child who was exposed to violence. This means that violence must be stopped, that its repetition should be prevented, and the place where the child stays must be safe in physical and emotional terms, which corresponds to the *General Principles in the Protection of Victims of Domestic Violence* (Section 1) of the General Protocol for Action and Cooperation of Institutions, Bodies and Organisations in the Situations of Violence against Women within the Family and in Intimate Partner Relationship.²¹

The proposal to amend paragraph 3 is based on Article 26 of the CE Convention – *Protection and support for child witnesses*, which envisages the obligation of states to establish a specialised psychosocial support to children who witnessed violence and which reads: 1) Parties shall take the necessary legislative or other measures to ensure that in the provision of protection and support services to victims, due account is taken of the rights and needs of child witnesses of all forms of violence covered by the scope of this Convention. 2) Measures taken pursuant to this article shall include age-appropriate

²¹ <https://www.minrzs.gov.rs/sites/default/files/2018-11/Opsti%20protokol%20nasilje%20u%20porodici.pdf>.

psychosocial counselling for child witnesses of all forms of violence covered by the scope of this Convention and shall give due regard to the best interests of the child.

A similar measure is envisaged by Article 62, paragraph 2 of the Draft Law – *Rights of the child placed in a hospital institution for treatment*, which reads: Public authorities and legal persons providing the service of hospital treatment shall provide the child and his parents with the service of psychosocial assistance and support during the child's hospital treatment.

Right to life in the family and maintenance of personal relations with family members
Article 42

We are of the opinion that paragraphs 2, 4 and 5, Article 42 should read:

A child shall have the right to live with parents and the right to be reared and cared for by his parents before all others, UNLESS THIS CONTRAVENES THE BEST INTERESTS AND WELLBEING OF THE CHILD.

A child shall have the right to establish and maintain personal relations with the parent with whom he does not live, family members and other persons to whom he is particularly close, UNLESS THIS CONTRAVENES THE BEST INTERESTS AND WELLBEING OF THE CHILD.

The right to establish and maintain personal relations shall be ensured to the child even in the cases when the parent, family member or a person to whom the child is particularly close is accommodated in a healthcare or social welfare institution, or a correctional facility, UNLESS THIS IS DETRIMENTAL TO THE WELLBEING OF THE CHILD.

Explanation

Article 9, item 1 of the Convention on the Rights of the Child²² reads: 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. 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.

Item 3 of the same Article reads: States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

Item 4 of the same Article: 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, that 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. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

Article 31 of the CE Convention – *Custody, visitation rights and safety* reads: 1) Parties shall take the necessary legislative or other measures to ensure that, in the determination of custody and visitation rights of children, incidents of violence covered

²² https://www.paragraf.rs/propisi/zakon_o_ratifikaciji_konvencije_ujedinjenih_nacija_o_pravima_deteta.html.

by the scope of this Convention are taken into account. 2) Parties shall take the necessary legislative or other measures to ensure that the exercise of any visitation or custody rights does not jeopardise the rights and safety of the victim or children.

Obligations and responsibilities of parents Article 43

We are of the opinion that paragraph 8, Article 43 should be amended to read:

Parents must protect the child from all forms of violence, neglect, and exploitation, and FROM WITNESSING AND/OR EXPOSURE TO ANY FORM OF VIOLENCE THAT THE PARENT COMMITS AGAINST THE OTHER PARENT OR THE THIRD PERSON, and must refrain from corporal punishment or bodily suppression of the child, use of physical force against the child and any other inhuman, degrading and denigrating treatment of the child.

Explanation

A detailed explanation is given in the explanation of the proposal of amendments to Article 26 of the Draft Law.

Support to the child and family Article 44

We are of the opinion that item 5 should be added to paragraph 2, Article 44 to read:

Assistance and support shall include, *inter alia*, the following:

- 1) psychosocial, health and legal counselling and education in relation to the upbringing, care, education and development of the child;
- 2) informing and referral to the exercise of rights and use of services in the fields of education, social welfare and healthcare;
- 3) assessment of needs, individual capabilities and interests of the child for the purpose of encouraging optimal development and involvement in educational, cultural, recreational and other activities;
- 4) assistance in crisis situations and conflict resolution;
- 5) ASSISTANCE AND PROTECTION FROM NEGLECT, ABUSE AND VIOLENCE, INCLUDING WITNESSING AND EXPOSURE TO ANY FORM OF VIOLENCE, THROUGH SUPPORT TO THE NON-VIOLENT PARENT.

Explanation

According to Section 6 of the General Protocol for Action and Cooperation of Institutions, Bodies and Organisations in the Situations of Violence against Women within the Family and in Intimate Partner Relationship, children are considered victims of violence in the family not only when they experience it directly, but also when they are exposed to acts of violence that one family member performs against another family members as witnesses. [...] This is why it is necessary to ensure that children's rights and needs are taken in consideration when providing services and assistance to victims of domestic violence when they are witnesses of violence. [...] In these cases it is necessary to apply complementarily the General Protocol on the Protection of Children from Abuse and Neglect. [...] All services to children witnesses of domestic violence and other vulnerable family members need to be provided in accordance with their best interests.

According to Section 8 of the General Protocol – *General Principles in the Protection of Victims of Domestic Violence*, all experts involved in organising the protection and support for victims of domestic violence need to uphold to the general principles,

including, *inter alia*, the following: 2. Ensure the safety and wellbeing of the child by ensuring safety and supporting the independence of the non-violent parent.

Article 26 of CE Convention – *Protection and support for child witnesses*: 1) Parties shall take the necessary legislative or other measures to ensure that in the provision of protection and support services to victims, due account is taken of the rights and needs of child witnesses of all forms of violence covered by the scope of this Convention. 2) Measures taken pursuant to this article shall include age-appropriate psychosocial counselling for child witnesses of all forms of violence covered by the scope of this Convention and shall give due regard to the best interests of the child.

Rights of the child accommodated outside his home **Article 48**

We are of the opinion that paragraph 6, Article 48 should be made more precise to read:

A child shall be entitled to an accessible and independent complaints procedure IN ACCORDANCE WITH ARTICLE 7 OF THE LAW.

Explanation

For a child to be able to use his right to an accessible and independent complaints procedure, there must be the option to designate a support person for him (a person of trust), who will provide the child with psychological support so that he could resort to an independent complaints procedure. Such measure is also envisaged by Article 7 of the Draft Law – Status of the child in judicial and administrative proceedings.

Family reunification **Article 50**

We are of the opinion that Article 50 should be amended to read:

PUBLIC AUTHORITIES MUST ACT WITHOUT DELAY WHEN MAKING DECISIONS ON THE RIGHT TO FAMILY REUNIFICATION OR THE MAINTENANCE OF PERSONAL RELATIONS OF THE CHILD WITH THE PARENT.

General note:

In our opinion, this Article cannot be implemented in practice without taking into account and referring to regulations which in the broader sense regulate the issue of the movement and stay of foreigners, asylum and temporary protection, and regulations relating to the movement of citizens of the Republic of Serbia. The very fact of residence of a person in a country cannot be the only parameter for making the decision about the possibility of exiting/entry or stay in a particular territory, which is why it is also important to take into account the question of the legal status, citizenship and the existence of measures pronounced against a person. Account should also be taken of the rich practice of the European Court for Human Rights in terms of Article 8 of the European Convention on Human Rights, provisions of Directive 2003/86/EC on the right to family reunification and opinions of the European Court of Justice (in the form of guidelines as the Republic of Serbia is not formally committed by these standards). Due to the significant number of valid regulations relevant for the movement, entry, exit and stay of foreigners and citizens of the Republic of Serbia, and to avoid overregulation within this Article, the proposal for amending the Article aims at proclaiming the obligation to respect the principle of family reunification, guaranteed both by the

international legal framework and valid regulations of the Republic of Serbia, with the additional obligation of urgent action.

Travelling and border crossing **Article 51**

The words IN THE TERRITORY OF THE REPUBLIC SERBIA should be added to paragraph 1, Article 51 to read:

A CHILD WHO TURNED 14 YEARS OF AGE CAN TRAVEL ALONE IN THE TERRITORY OF THE REPUBLIC OF SERBIA WITH THE CONSENT OF BOTH PARENTS, I.E. THE PARENT WHO INDEPENDENTLY EXERCISES THE RIGHT OF A PARENT OR GUARDIAN, AND A CHILD WHO TURNED 16 CAN TRAVEL WITHOUT CONSENT.

Explanation

If the intention was to make a distinction between paragraph 1 and paragraphs 2 and 3 in terms of travelling and border crossing, it is necessary to specify that a travel implies movement and stay within the territory of the Republic of Serbia. In regard to Articles 2 and 3, in our opinion, the provisions of the Draft Law directly contravene the provisions of the Law on Border Control which, in Article 54, regulates the crossing of the state border by a minor. Article 54 stipulates different actions towards a child who turned 16 and a child under 16, which is why it is important to envisage a norm to avoid legal uncertainty due to the non-harmonised norms of regulations with the same legal force.

Right of the child to independent consent to a medical measure **Article 60**

We are of the opinion that in paragraph 2, Article 60 the words *and it is important for the health of the child* should be deleted, and that the provisions of paragraph 4 should be amended and harmonised with Article 11 of the Law on Patients' Rights, to read:

IF A CHILD WHO TURNED 15 YEARS OF AGE AND IS CAPABLE OF REASONING REFUSES THE PROPOSED MEDICAL MEASURE, THE COMPETENT MEDICAL WORKER SHALL REQUEST THE CONSENT FROM THE CHILD'S LEGAL REPRESENTATIVE.

Article 60, paragraph 4 should be harmonised with Article 11 of the Law on Patients' Rights to read:

THE COMPETENT HEALTHCARE WORKER SHALL PROVIDE ALL NECESSARY INFORMATION FOR OPINION FORMATION, IN THE MANNER UNDERSTANDABLE TO THE CHILD AND TAKING CARE ABOUT HIS MATURITY AND EMOTIONAL STATE. IF THE COMPETENT HEALTHCARE WORKER ASSESSES THAT THE CHILD, FOR ANY REASON, DOES NOT UNDERSTAND THE GIVEN INFORMATION, THE INFORMATION SHALL BE GIVEN TO THE PARENT OR THE LEGAL REPRESENTATIVE.

EXCEPTIONALLY, THE COMPETENT HEALTHCARE WORKER MAY NOT DISCLOSE THE DIAGNOSIS, THE COURSE OF THE PROPOSED MEDICAL MEASURE AND ITS RISKS, OR MAY DIMINISH THE INFORMATION ABOUT IT, IF THERE IS A SERIOUS DANGER THAT THE INFORMATION CAN SIGNIFICANTLY IMPERIL THE CHILD'S HEALTH. IN THIS CASE, THE INFORMATION SHALL BE GIVEN TO THE PARENT OR THE LEGAL REPRESENTATIVE.

Explanation

Provisions of Article 60, paragraph 2 must be harmonised with provisions of Article 19 of the Law on Patients' Rights (RS Official Gazette, Nos 45/2013 and 25/2019 – other law), by omitting the words *and it is important for the health of the child* because, in accordance with the Law on Patients' Rights, this additional condition for the obligatory seeking of the consent of the legal representative is not requested. In our opinion, this additional condition is superfluous given that pursuant to provisions of Article 2, paragraph 1, item 2 of the Law on Patients' Rights, a medical measure is defined as a healthcare service provided for preventive, diagnostic, therapeutic and rehabilitation purposes, which implies that it is by its very nature important for health, as otherwise there would be no conditions for its implementation.

Also, paragraph 4 of the Draft Law should be amended and harmonised with Article 11 of the Law on Patients' Rights, because the provision of relevant information about the health condition and the proposed medical measure, which are necessary for opinion formation are the responsibility of competent healthcare workers, and not of parents or legal representatives. Moreover, pursuant to Article 11, paragraph 8, in the procedure of exercising health protection, a child capable of reasoning has the right to confidential counselling even without the consent of the parent when this serves his best interest.

Right to education Article 66

We are of the opinion that paragraph 5, Article 66 should be harmonised with the provisions of the Law on the Fundamentals of the Educational System to read:

A child shall be entitled to protection against all forms of discrimination, VIOLENCE, ABUSE AND NEGLECT, BEHAVIOUR THAT THREATENS REPUTATION, HONOUR OR DIGNITY, through the curriculum and working methods in school and all other forms of education.

Explanation

The Law on the Fundamentals of the Education System²³ contains three articles stipulating prohibitions: Article 110 – *Prohibition of discrimination*, Article 111 – *Prohibition of violence, abuse and neglect*, Article 112 – *Prohibition of behaviour that threatens reputation, honour or dignity*. All three should be included in the paragraph which in this Draft Law regulates the rights of the child to be protected from prohibited behaviour.

Objectives of education Article 68

We are of the opinion that item 9 should be added in paragraph 1, Article 68 and that the words *equality of the sexes* should be deleted from item 10, to read:

Public authorities shall ensure that the education of the child be aimed at:

1. the development of the child's personality, talents, mental and physical capacities to his/her ultimate limits, full intellectual, emotional, social, moral and physical development of the child, in accordance with his/her age, development capacities and interests;
2. acquisition of quality and useful knowledge and skills, and the development of creative and other capacities;

²³ https://www.paragraf.rs/propisi_download/zakon_o_osnovama_sistema_obrazovanja_i_vaspitanja.pdf.

3. developing the ability to apply the acquired skills and knowledge;
4. involving the child in educational and professional processes at the national and international level;
5. developing and fostering healthy lifestyles and acquisition of skills and knowledge about health in accordance with Article 52 of this Law;
6. developing and fostering the skill of communication and teamwork;
7. developing the respect of human rights and fundamental freedoms and principles determined by the Constitution and international treaties ratified by Serbia;
8. developing the respect of the child's parents, his/her cultural identity, language and values, national values of the country where the child lives, his/her country of origin and civilisations different from his/her own;
9. DEVELOPING THE EQUALITY OF WOMEN AND MEN, NON-STEREOTYPED GENDER ROLES, MUTUAL RESPECT, NON-VIOLENT CONFLICT RESOLUTION IN INTERPERSONAL RELATIONS, GENDER-BASED VIOLENCE AGAINST WOMEN AND RIGHT TO PERSONAL INTEGRITY;
10. preparing the child for a responsible life in a free society, in the spirit of understanding, peace, tolerance, ~~equality of the sexes~~, friendship among peoples, ethnic, national and religious groups, and with persons belonging to minority groups;
11. developing respect of the environment, including respect of the flora and fauna.

Explanation

According to Article 14 of the CE Convention – *Education*: 1) Parties shall take, where appropriate, the necessary steps to include teaching material on issues such as equality between women and men, non-stereotyped gender roles, mutual respect, non-violent conflict resolution in interpersonal relationships, gender-based violence against women and the right to personal integrity, adapted to the evolving capacity of learners, in formal curricula and at all levels of education. 2) Parties shall take the necessary steps to promote the principles referred to in paragraph 1 in informal educational facilities, as well as in sports, cultural and leisure facilities and the media.

In Section 33, item a) of the Concluding observations on the fourth periodic report of Serbia²⁴, the UN Committee on the Elimination of Discrimination against Women states that education is influenced by an increasingly predominant anti-gender political agenda that translates into gender-stereotyped content of teaching material; widespread discriminatory gender stereotypes among the teaching, predominantly male, personnel; gender segregation in education; and alarmingly widespread gender-based violence, especially sexual violence, in school, in the context of the withdrawal of a proposed teaching tool on sexuality and sexual violence in 2016. In Section 34, the Committee calls on the State party to make improvement in its education sector in line with the Committee's general recommendation No 36 and recommends that the State party: a) develop content on gender discrimination and gender equality and introduce age-appropriate gender-sensitive content into teaching curricula and textbooks at all levels of education.

Rights of unaccompanied children who are foreign nationals in Serbia **Article 71**

We are of the opinion that paragraph 1, Article 71 should be deleted.

²⁴ <https://www.ljudskaprava.gov.rs/sr/node/156>.

Explanation

As also emphasised in the explanation of the proposal for supplements to Article 3, it is of utmost importance that the Draft Law should recognise competence in regard to all children who are foreign nationals and children without citizenship. It is unjustified and contrary to international standards that the rights from this Law be exclusively recognised to unaccompanied children because this is not the situation with domestic citizens either. In our opinion, when it comes to unaccompanied children, it is necessary to envisage only additional guarantees to respond to their particularly vulnerable position. In this regard, when prescribing special guarantees, account should also be taken of the provisions of the Law on Asylum and Temporary Protection and the Law on Foreigners, which regulate in detail the treatment of unaccompanied minors, and whose provisions are largely aligned with standards of the European Union and the General Comments No 6 of the Committee on the Rights of the Child, which specifically deal with treatment of separated and unaccompanied children.

Protection and rights of the asylum-seeking and refugee child **Article 72**

We are of the opinion the title of the Article should be amended to read: **Protection and rights of the asylum- seeker child and of children granted asylum.**

We are of the opinion that paragraphs 1, 4 and 5, Article 72 should be deleted, paragraphs 2 and 3 amended, and that new Article 73 should be stipulated, to read:

DURING THE ASYLUM PROCEDURE, THE COMPETENT BODY SHALL INTERPRET THE RISKS OF PERSECUTION AND PERPETRATION OF GRAVE INJUSTICE WITH DUE ATTENTION, TAKING INTO ACCOUNT THE FACT THAT THE APPLICANT IS A CHILD.

WHEN TREATING ASYLUM-SEEKER CHILDREN AND CHILDREN GRANTED ASYLUM, ACCOUNT SHALL BE TAKEN OF THE WELLBEING, SOCIAL DEVELOPMENT AND ORIGIN OF THE MINOR, THE OPINION OF THE MINOR DEPENDING ON HIS AGE AND MATURITY, THE PRINCIPLE OF THE UNITY OF THE FAMILY, AND THE PROTECTION AND SAFETY OF THE MINOR, PARTICULARLY IF THERE IS SUSPICION THAT THE MINOR IS THE VICTIM OF HUMAN TRAFFICKING OR DOMESTIC VIOLENCE AND OTHER FORMS OF GENDER-BASED VIOLENCE.

NON-REFOULEMENT **Article 73**

A CHILD MUST NOT BE EXPELLED OR RETURNED TO THE TERRITORY WHERE HIS LIFE OR FREEDOM WOULD BE JEOPARDISED DUE TO HIS RACE, RELIGION, NATIONALITY, BELONGING TO A PARTICULAR SOCIAL GROUP, OR POLITICAL OPINION.

A CHILD MUST NOT BE REFOULED TO THE TERRITORY WHERE THERE IS THE RISK THAT HE WILL BE SUBJECTED TO CAPITAL PUNISHMENT, TORTURE, INHUMAN OR DEGRADING TREATMENT OF PUNISHMENT, I.E. WHERE THERE IS A THREAT THAT HIS CONSTITUTION-GUARANTEED RIGHTS WILL BE SERIOUSLY VIOLATED.

Explanation

The title of Article 72 is not terminologically harmonised with the Law on Asylum and Temporary Protection, which is why the term "azilant" ("asylum seeking") should be changed and the term "lice koje traži azil" ("asylum seeker") introduced. Furthermore, the Draft Law unjustifiably excludes children who were, in accordance with the provisions

of the Law on Asylum and Temporary Protection, recognized subsidiary protection, as a form of protection guaranteed in the Republic of Serbia. Accordingly, with the provisions of the Law on Asylum and Temporary Protection, the persons whose refugee status was recognized and persons who were granted subsidiary protection are practically equalized in the corpus of guaranteed rights after their status is recognized.

Paragraph 1 should be deleted, taking into account the explanation of comments on Article 3 of the Draft Law.

In regard to paragraph 2, the Draft Law unjustifiably limits the interpretation of the reasons for persecution by specifying only some possible manifestations, without stating them according to the *exempli causa* principle, but as "closed norms". Furthermore, paragraph 2 fully ignores the provisions of the Law on Asylum and Temporary Protection, which regulate the procedure of asylum and guaranteed forms of protection in the Republic of Serbia.

Amendments to paragraph 3 are proposed for the purpose of harmonisation with the provisions of the Law on Asylum and Temporary Protection (Article 10).

As regards Article 4, the asylum procedure is regulated by a separate procedure, and urgency of action may be prescribed only by the provisions of that Law, and not by another law as well.

We are of the opinion that paragraph 5 should be deleted and that separate Article 73 should be introduced to regulate non-refoulement. The state is obliged, without possibilities of introducing any limitations in its action, to take account of the respect of the non-refoulement principle. This principle forbids countries to banish a person to another state where that person would be exposed to a real risk of persecution, i.e. violation of human rights. It is one of the basic principles of international law and sets one of the strongest limitations to a country's sovereign right to control the entry of persons in its territory and the right to expel a foreigner. Although created within international refugee law, this principle is today established within international human rights law and is applied to the expulsion of all persons regardless of their status. Such guarantee is also prescribed by the Constitution of the Republic of Serbia, Law on Asylum and Temporary Protection and Law on Foreigners (which also contains an additional guarantee in terms of unaccompanied minors – Article 83, paragraph 4).

Protection of the child at work and protection from exploitation **Article 75**

In our opinion, the words FORCED BEGGING should be added, that words SMUGGLING OF CHILDREN should be deleted, and the words TRAFFICKING OF CHILDREN added in paragraph 4, Article 75 to read:

The worst forms of child labour referred to in paragraph 3 of this Article shall include all forms of slavery, customs similar to slavery such as sale and TRAFFICKING OF CHILDREN, debt bondage and serfdom, FORCED BEGGING, forced or compulsory labour, including the recruitment of children for participation in armed conflicts, use, procuring and offering of the child for prostitution, production of pornography and for pornographic performances, use, procuring or offering the child for illegal activities, particularly the production and smuggling of drugs and any other labour which is, by its nature and within the circumstances in which it is performed, detrimental to the child's health, safety or morality.

Explanation

Given that paragraph 6 of the same Article (75) envisages the obligation of public authorities, legal and natural persons to **ensure to the child appropriate protection at work and protection from exploitation**, and widespread forced begging (not only among children, but particularly with children), it is necessary to define FORCED BEGGING as a form of the exploitation of children and sanction it as such by other relevant laws and bylaws as well. Also, the smuggling of children should be omitted from this Article because it does not belong to child labour, in light of the definition of smuggling in the UN Protocol against the Smuggling of Migrants by Land, Sea and Air.²⁵ Although paragraph 4, Article 75 of the Draft Law is aligned with the translation into Serbian of the ratified ILO No 182 Worst Forms of Child Labour Convention from 1999, we highlight that the term was wrongly translated because the original, English text of the Convention²⁶ does not recognise smuggling as the worst form of child labour, but instead defines the worst forms of child labour as follows:

„For the purposes of this Convention, the term the worst forms of child labour comprises:

- (a) all forms of slavery or practices similar to slavery, such as the sale and **trafficking of children**, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;
- (b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;
- (c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;
- (d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.”

Opinion and recommendations Article 104

We are of the opinion that the new paragraph should be added in Article 104 to read:

IN THE CASE OF PETITIONS SIMULTANEOUSLY ADDRESSED BY THE PROTECTOR OF THE RIGHTS OF THE CHILD AND THE PROTECTOR OF CITIZENS, AN AGREEMENT WILL BE REACHED WHERE THERE IS REASONABLE PURPOSE OF RE-EXAMINING THE ACTIONS OF COMPETENT BODIES IN RESPECT OF ALL JUVENILE AND ADULT FAMILY MEMBERS, WITH THE AIM TO CONDUCT JOINT ACTION AND ISSUE A UNIFIED OPINION AND RECOMMENDATIONS.

Explanation

As indicated by the Special Report of the Protector of Citizens²⁷ and the document Established omissions in the work of competent authorities in the field of the protection of victims in the case of family and partner violence²⁸, which state findings in cases of femicide as the consequence of violence against women and findings in cases of domestic violence in relation to the abuse and neglect of children, these two phenomena are closely related, which is why it is necessary to envisage the possibility for the Protector of the Rights of the Child, when appropriate, together with the Protector of Citizens, to issue unified opinions and recommendations.

²⁵ The smuggling of migrants implies ensuring illegal entry into the member state to a person who is not its citizen and does not have permanent residence there, for the purpose of acquiring, directly or indirectly, financial or other material gain.

²⁶ The original version of the Convention is available at: <https://bit.ly/30ZPcVY>.

²⁷ <https://bit.ly/30Rug3C>.

²⁸ <https://bit.ly/2MsSwnm>.



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