



**REPORT BY HUMAN RIGHTS OMBUDSMAN OF BOSNIA AND
HERZEGOVINA ON THE IMPLEMENTATION OF OPTIONAL PROTOCOL TO
THE CONVENTION ON THE RIGHTS OF A CHILD RELATED TO
TRAFFICKING IN CHILDREN, CHILDREN'S PROSTITUTION AND
CHILDREN'S PORNOGRAPHY**

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I Introduction

At the 130 session of 19 March 2002 Presidency of Bosnia and Herzegovina adopted the Decision on ratification of the Optional Protocol to the Convention on the Rights of a Child concerning trafficking in children, children's prostitution and children's pornography ("Official Gazette B&H – International agreements", no 5/02), on the basis of which Bosnia and Herzegovina signed the act of ratification 04 September 2002. In terms of standards established by the Protocol to the Convention on the Rights of a Child concerning trafficking in children, children's prostitution and children's pornography (hereinafter the Protocol) ***Bosnia and Herzegovina has made no limitations.***

Analysis of the Report of B&H on the implementation of the Protocol shows the same deficiencies as well as initial reports under the Convention - ***contains a detailed (and sometimes too detailed) description of the legal arrangement but does not deal with in practice, the exercise of their rights and do not contain data on the basis of which could be seen displayed a realistic range of standards. Besides, the reports themselves are not available to the general public; there was not announcement, printed reports, or its distribution.***

However, the general picture made on the basis of analysis of harmonization of legislation with the Convention on the Rights of a Child (hereinafter: Convention), announced by the Institution of Ombudsman of Bosnia and Herzegovina in December 2009¹, and within its content consideration of the application of the Protocol, should be viewed, bearing in mind that:

1. Revised Plan of Actions for Children for the period 2002-2010 has not yet been adopted. It is still in the form of a draft, although its adoption was defined and recommended by the UN Committee on the Rights of the Child. Since after the expiration of the tenure of previous members of the Council for Children no new members were elected, one can conclude that this Council no longer exists.
2. In BiH there is neither efficient nor systemic mechanism for protection of the rights of a child, these rights are usually considered as part of additional competence mandated of the Constitution or law to the bodies or institutions dealing with some other matters. Due to this fact, the rights of the child are treated as additional obligation, often imposed. Thus, **the children's rights are not the primary focus of interest and actions of the institutions.**
3. With reform of the BiH Institution of Ombudsmen and subsequent appointment of the new ombudsmen in December 2008 and adoption of a new policy, significant progress was made in terms of children's rights protection, because this reform resulted in establishment of a Department for children's rights with a very broad mandate defined by the Law on BiH Ombudsmen. Support of „Save the Children“ Norway to the Institution of BiH Ombudsmen is particularly important for the capacity strengthening of the Department for children's rights because thanks to their support this Department has the capacity to respond to all challenges in the area of protection of children's rights. The positive developments in Bosnia and Herzegovina are visible through creation of strategic documents, and these documents significantly include children's rights far more than legislation does.
4. Certain positive steps are evident in BiH documents development because these documents, significantly more than the legislation, appear to include, to a greater extent, the aspects of the rights of children.
5. Evidently, there is a lack of measures with regard to harmonize of B&H legislation regulating the rights of children, or ensuring equal allocation of resources. In practice, this situation results in a different treatment of children and non-compliance with Article

¹ Analysis of compliance of legislation with the Convention on the Rights of a Child, the Institution of Human Rights Ombudsman of Bosnia and Herzegovina, www.ombudsmen.gov.ba

- 4 of the Convention according to which the State Parties are obligated to undertake all measures required to ensure the rights set forth by the Convention, taking into account that the economic and social rights are of a progressive nature.
6. In BiH there is still no database based on which the situation of the rights of the children could be monitored and the problem identification process facilitated. Census has not yet been carried out and in reality there are neither statistics on the number of children in general nor the number of children with special needs, children without parents, etc.
 7. As a part of the civil advocacy campaign aimed at defining joint activities of BiH authorities, nongovernmental and other civil society organizations in BiH focused on promotion and strengthening of institutional dialogue and cooperation, in May 2007 an Agreement on cooperation was signed between the BiH Council of Ministers and NGO sector in BiH. This Agreement creates a basis for official cooperation between the two sectors and democratization of society as whole. Realistic expectations are that in the future civil sector will become specialised in different fields of action.
 8. BiH Ministry for Human Rights and Refugees, in cooperation with UNICEF has made a significant progress in promoting the Convention, Concluding observations and recommendations of the Committee. Unfortunately, lower governmental levels failed to take an adequate participation in promoting the rights set forth by the Convention. System of communication, exchange of information and cooperation among the different governmental levels - both horizontal and vertical, and is not established in a satisfactory manner and mainly occurs as result of individual efforts.

II Application of general principles of the Convention

The analysis shows a high degree of variation in the harmonization of national legislation with the provisions of the Convention. This is especially pronounced in the segment of the ensuring application of general principles of the Convention. It significantly contributes to the complexity of the legal framework and the non-harmonized legal definitions of terms, a large number of amendments to laws that create confusion among the citizens and make difficult their access to the rights, which leads to discrimination in the practice.

2.1. Definition of a Child

As a general principle relevant to the application of the Protocol is certainly the definition of the term insurance application of definition of term: a child. Unfortunately, in the legislation of B&H there are different approaches to the definition of a child, which directly reflects on the implementation of the Protocol, especially in cases where children are victims. Thus, the relevant legislation in BiH at different levels of government are built on identical terms to acquire majority with 18 years as the basis for the acquisition of full legal capacity. In exceptional cases, a business may acquire the ability of a person under 18, and only on the basis of court decision in extra-judicial procedure in the cases of marriage conclusion or if a minor becomes a parent before 16.

Regarding the definition of a child in the legislation on health insurance, after the Ombudsman's intervention, it is ensured that all children up to age of 15, regardless of whether they are in ordinary education, have the right to health care. Unfortunately, a resolution of the rights to health insurance of children older than 15 is absent, but in practice occur problems in realization of their rights to health care, if their parents are not insured. Thus, the legislation doesn't provide a clear definition of a child in accordance with the Convention. This directly implies the provision of health care of a child over 15 and was the victim of some certain action prohibited by the Protocol unless the child is insured.

In terms of criminal and misdemeanor responsibilities and the conditions and methods of realization of childrens' rights, in the legislation there is a significant difference depending on its age.

There is a difference in the definition: in misdemeanour legislation in Federation of B&H wherein is set forth that a person under 14 can not be subject to misdemeanour proceedings, but in Republika Srpska and Brčko Distrikt of B&H such legislation is not applied.

The definition of a child has not been recognized in the legislation of B&H in the way it is recognized in the Convention. This can be viewed through the prism of the methodological approach to legal acts.

2.2. Non-Discrimination

The constitutional framework of B&H guarantees application of the highest standards of human rights without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. During 2009, The Law on Prohibition of Discrimination² was adopted, and before this, the Law on Gender Equality in B&H³ was adopted as well. There are still a number of problems in application of this principle in the practice. There is still no real evidence on implementation of the Law on Prevention of discrimination, but there is a high degree of concern. Since first cases of complaints filed with the Institution of Ombudsman of Bosnia and Herzegovina show that the adoption of this law is understood too generally. Moreover, the implementation of measures within the year of the adoption of the law, and harmonization of legislations in the country has not yet formally begun (Article 24). ***Particular concern was related to the reluctance of the judicial system to implement the provision on the burden of proof because, according to the Law on Prevention of discrimination, the obligation of proving is on the person claimed of committing discrimination.*** A similar situation exists with the Law on Gender Equality, which has been in effect since 2003.

Criminal legislation in Bosnia and Herzegovina (B&H Criminal Code, Criminal Code RS, FB&H Criminal Code and Criminal Code of B&H BD) contains penalty provisions sanctioning crimes against freedom and human and civil rights and treats as a separate offense violation of the equality of man and citizen. ***Regardless of the fact that in recent years the necessary legislation was adopted, the issue of discrimination remains one of the biggest problems in B&H.*** In that sense ***Roma children, children without parental care and children with disabilities are most vulnerable.***

In the legislation of Bosnia and Herzegovina can be seen that the principle of non-discrimination stipulated by the Convention is not adequately introduced in the legislation of B&H. There are deviations present in all spheres, especially they are expressed in education, and that is why it arises concern. Specifically, the Framework Law on Primary and Secondary Education in B&H has established the principle of non-discrimination. However, by non-harmonizing of legislation that regulates education at lower levels of government with this law six months following of its adoption⁴, creates space to non-discrimination principle on which primary and secondary education is regulated. Canton Law of Education stipulates that the principle of equal access and equal conditions is obvious example, but this incorporated principle is not a guarantee for the prohibition of discrimination. In some cantons even legislation prescribes the principle of non-discrimination in a way which guarantees only the segment of non-discrimination on the basis of language, or through the provision in the law that everyone must be entitled to application of languages and scripts without discrimination.

² Article 1 of the Law on Prohibition of Discrimination, Official Gazette B&H, number 59/09.

³ The Law on Gender Equality in Bosnia and Herzegovina, Official Gazette B&H, number 16/03

⁴ Article 59, paragraph 3 Framework Law on Primary and Secondary Education in BiH

2.3. Best interests of a child

Family laws, as *lex specialis* laws, regulates the issues of family and relations within it, especially the relationship between parents and children, adoption, care of a child without parental care and procedures of the competent authorities in connection with these relations. Although in all segments the criteria for the best interests of a child are highlighted, corresponding provisions of existing laws are not applied in practice.

There are recorded cases of legal solutions in which the best interest of a child is not expressly mentioned, but the provision shows that the legislator had in mind the interest. Thus, in the Law on Travel Documents of Bosnia and Herzegovina the legislator gave the opportunity for a child in way that passport can be issued without the consent of the other parent, if he/she is a missing person of unknown residence or temporary residence, is not available for the competent authorities or if a child is entrusted by court decision to one of the parents without obligations that other parent provides such consent.

Recommended by the Ombudsman in Federation of B&H, the Center for Social Work acted in cases where one parent refuses to give consent to the issuance of passport and in such situations, the opinion of the Center replaced the consent of one parent.

Law on Social Protection and Child Protection does not emphasize the meaning of the term "best interest of a child", or establish criteria for determining the interest that should emanate from the legislature intended.

In Bosnia and Herzegovina there is still a problem in applying the principle of best interests of a child, because the lack of understanding, especially if the right of a child regarding the rights of parents, where it is understood that only parents can assess the best interest of the child.

It is necessary to take measures to ensure that legislation in BiH embeds principle of best interests of a child and provide mechanisms that will guarantee effective application of this principle. In practice, this implies a high level of awareness and knowledge of professional staff who make decisions about children's rights, and ensure adequate financial resources to implement these decisions.

UN Committee on the Rights of a Child, in its concluding deliberations, has recognized that most of the laws and programs in BiH are in accordance with the principle of best interests of a child, but this principle in practice is applied to a limited extent. The reason for this is a lack of adequate financial resources. Bosnia and Herzegovina is recommended to strengthen efforts to the general principle of best interests of a child as conceived, appropriately built in legal provisions, judicial and administrative decisions and projects, programs and services that affect the children.

2.4. The right to life, survival and development

The principle of expressing an opinion of the child is only partially embedded in some laws in B&H. Thus, the Law on Citizenship of Bosnia and Herzegovina requires that a child over 14 gives his consent in cases of acquisition of citizenship by naturalization, renunciation of citizenship of BiH and revocation of citizenship.

According to the provisions of ***domestic legislation in B&H***, a child is entitled to a right to express its own opinions and respect in accordance with its age and maturity. A child has the right to seek protection of its rights before the competent authority; a child over 10, if able to understand the meaning, must give its consent for adoption.

Legislation on nationality and family relations, criminal-procedural legislation, without doubt, in a considerable extent has put in its focus the question of respect for children's opinions. Unfortunately, this measure has failed in the education segment, but also in other spheres of life of significance for the survival and development of a child. There is also a concern to what extent the provisions which determined the right to express opinions of a child. In fact, although competent

institutions of social protection must be included in the process conclusions the rights of children. However, these legal provisions are not implemented in efficient manner in practice. The causes are evident on both sides; administrative organ that precedes the treatment and fail to notify the competent institution of social protection, as well as in institutions themselves.

Ombudsmen of Bosnia and Herzegovina have an opinion that it is necessary *to take measures to eliminate stereotypes that children should not be asked for an opinion in all spheres of child's life, especially in the field of education, which by definition has a pedagogical dimension.* This would result in growing up with awareness that they must bear responsibility for their own decisions. Measures should be realized by raising awareness of the public, media, schools, agencies and authorities in order to promote the principles of respect for children's opinions in all cases when deciding on their rights. *It is necessary to take measures to ensure the effective application of the provisions of law, which requires the involvement of institutions of social protection in all proceedings in where the parties are children in order to ensure the professional support for a child to present its views and understands the importance of this act.*

III Regulation prohibiting trafficking in children, children's prostitution and children's pornography

3.1. Criminal legislation in Bosnia and Herzegovina

Prohibition of trafficking in children, children's prostitution and children's pornography is regulated in a way that the actions listed in the criminal legislation of B&H⁵ are defined as crimes, and are therefore prohibited. Thus, the Criminal Code of B&H sanctions the following crimes: slavery and transportation of slaves, trafficking in human beings, international recruitment for prostitution, trafficking in persons, taking of hostages⁶. ***One of the main consequences of such offences is that victims may be children and the youth.***

FB&H Criminal Code, Criminal Code RS and Criminal Code BD B&H sanction crimes against sexual freedom and morality, including sexual intercourse with a child, adultery action, inciting into prostitution, exploitation or child pornography to minors and incest.

Criminal legislation in Bosnia and Herzegovina defines as crimes kidnapping, seizure of the children and minors, as well as the act of a person who insinuates, exchanges or otherwise changes the family status of a child.

The basic characteristic of the criminal legislation in Bosnia is that the introduction of the definitions of prohibited actions set forth in the Protocol is not secured. This creates certain dilemmas for practitioners in the application and also raises the question of application of Article 3 of the Protocol. This protocol provides disputed definitions due to which these actions in practice are hardly recognizable in B&H. So, this is the reason why these actions are rarely processed by the competent authorities.

3.2. Family legislation in B&H

Family legislation in B&H stipulates that ***parents and other family members may not expose a child to degrading treatment,⁷ including all forms of sexual abuses, which also goes to parents who sexually exploit their children all parental rights will be taken away.***

⁵ Giving the complexity of the structure of the B&H authorities, and therefore the legislative arrangement to avoid specifying all the criminal law (Criminal Code of Bosnia and Herzegovina, the Federation Criminal Code, Criminal Code of the Republic and the Serbian Criminal Code of Brčko District B&H) for the purposes of this report is used criminal legislation in B&H, which includes all the previously mentioned law

⁶ Article 185, 186, 187, 189, 191 of the Criminal Code of B&H.

⁷ Article 97 of family law, Official Gazette RS, No. 54/02, 41/08.

In Bosnia for years the focus of international organizations and institutions of Government was to protect children against sexual exploitation, especially if it takes place within the criminal offence of trafficking. Unfortunately, more active role in identifying of other forms of action prohibited by the Protocol and development of their awareness of the risks to child development is absent. This is especially a characteristic of educational institutions, institutions of social protection institutions and law enforcement. This results in absence from classes and leaving schools, drifting away and total social marginalization of children, which often happens due to negligence of parents.

Especially important to point out is the fact that ***in B&H society is not created awareness about the dimension of the problem of children's pornography, and therefore are not taken effective measures to prevent the children of socially harmful occurrence are not taken.***

In Bosnia and Herzegovina there is still ***a problem of particularly pronounced lack of direct application of international standards, although the Constitution of B&H has established this as an obligation for all institutions, especially if national legislation is not harmonized with international standards. In B&H creation of specific measures is still partial and without a systematic approach. That's why certain negative occurrence observed in isolation which creates the space for certain problems not to thoroughly be resolved.*** Matters covered by the Protocol are an example of such practices, because regardless to a number of strategic documents (National Action Plan to combat trafficking, the Action Plan for Children, etc.), children more often appear as victims of acts prohibited by the Protocol.

Special concern related to legislation to prevent the prohibited action is established by the Protocol relating to non-ensuring of implementation of Article 7 of the Protocol, especially the part that refers for taking measures ensuring the seizure and confiscation of financial profit resulting from execution of these crimes and to take measures to close, on an interim or basis, the facilities for executions of these sanctions.

Recommendation

- ***The competent authorities should take all actions to eliminate deficiencies in the system to combat trafficking of human beings, which have been identified in the reports of different institutions.***
- ***effective measures are necessary in combating other prohibited activities by the Protocol and efforts to determinate accountability for neglection and abuse of children.***
- In this process ***the best interest of the child should be the basic guideline***, which means that children should be primarily moved from the streets to schools with provision of adequate housing and care.

IV System of Protection and Prevention

In B&H, there are ***a number of problems related to the child protection system and the prevention of sexual exploitation, exploiting of children in pornography and prostitution, and other similar actions.*** In recent years efforts aimed to protection of victims of trafficking⁸ are made, but the process was characterized by a number of weaknesses. In this way the protection of foreign nationals is primarily ensured, and then the protection of citizens of B&H.

Perceived problems in the system of protection against children's trafficking, pornography and prostitution are:

⁸ Ratified the UN Convention on transnational organized crime and the protocol on the prevention, stopping and punishing human trafficking, especially women and children, B&H Official Gazette-International Agreements 3 / 02

- **The lack of a comprehensive strategy** to prevent child trafficking and utilization of children in pornography and prostitution, and **low level of citizens' awareness**, especially among children about the problem of trafficking of children and their exploitation in pornography and prostitution;
- **Underdeveloped national system to of protection of children** from trafficking and utilization of children in pornography and prostitution, and a **not established information system to for data collection** on trafficking in children and the exploitation of children in pornography and prostitution;
- **Insufficient representation of topics about trafficking of children, utilization** of children in pornography and prostitution **in curricula in ordinary primary and secondary schools**;
- **Insufficient representation of systematic and long-term prevention programs for children especially for those belonging to vulnerable groups** (children with developmental difficulties, children with disabilities, children without parental care, children belonging to national minorities, children of illegal migrants, children who live and work in the streets, children without a regulated legal personality);
- **Insufficiently defined procedures for the identification of child victims** and proactive approach to find potential victims, and **the lack of shelters and alternative accommodation for children victims**, except for victims of trafficking;
- **The lack of specialized programs targeted to the protection and reintegration** of children victims and **lack of procedures for long-term monitoring of rehabilitation** and resocialization of children-victims;
- **A lack of support and strengthening for families of children-victims.**

All these weaknesses of the system of protection of victims are based on deficiencies in the legislation in the field of health, social and educational spheres, as well as the lack of procedures, including mutually non-coordinated and insufficient cooperation of the competent authorities.

4.1. Raising awareness about the Convention and its Protocols

During 2009 the Human Rights Ombudsman of Bosnia and Herzegovina, within the project "Capacity Building of Department for protection children's rights"⁹ has paid special attention to the problem of violation of children's rights and the promotion of the Institution of ombudsman as a mechanism of action in order to realize children's and human rights. At the same time with the process of education and sensitization of children, a research on how children are informed about the UN Convention on the Rights of a Child, childrens' of the most common forms of distortion perception of children's rights and suggestions for improvement the situation, as well as addressing to the institutions and experiences in cases of violation of these rights were all realized.

This study, *inter alia*, has shown:

- **A little less than two-thirds of children interviewed had heard of the UN Convention on the Rights of a Child and its Protocols**, which is a devastating fact if one takes into account the fact that the 20th anniversary of the adoption of this international document was celebrated in 2009. B&H has ratified this document.
- **One quarter of children with basic information about the document has learned of the Convention and Protocols in the media (TV and print media)**, one fifth of children in the

⁹ The project is being implemented in cooperation with partner organization Save the Children Norway, Regional Office for South-East Europe in Sarajevo www.scn-see.ba

school classroom lessons, in school subjects democracy and human rights or the debates that are organized on the theme of democracy and human rights, one tenth of children polled in everyday conversation with family members and peers, or at meetings of the Council / Council School pupils.

- **Children express the need and readiness to study the contents of the Convention and its Protocol in the ordinary course and out of class process in schools.** They also consider that cooperation with neighboring countries and other foreign countries, would facilitate understanding of the concept of human and children's rights and facilitate the adoption of good examples and positive practices.
- When asked "*In your opinion, what are the most violated children's right,*" one third of the respondents did not give an answer. **The other two thirds have the opinion that child's right to express opinions in issues that concern him/her, and the right to protection against abuse and violence and the right to freedom of a child (conceived in the broadest meaning of the word) are most damaged in the environment in which they live.** Analysis of the statistical significance of differences showed that primary and high school population of respondents differ in perceptions of the most common forms of violation of children's rights and that older children complain more about violations of the right to express opinions and the right to freedom of a child, the most widely understood. Primary school population expresses a greater degree of concern for the protection of children from violence, which is disclosed in communication with peers and adults.

V International cooperation

International cooperation of B&H with other countries regarding the implementation of the provisions of the Protocol has not developed the way as defined in Article 9 of the Protocol. This especially applies to cooperation for development of mechanisms for the protection of victims and prosecution of perpetrators of criminal acts, who (if they have dual citizenship of Bosnia and one of the neighboring countries) can escape to the country, without fear that they will be prosecuted.

VI Conclusion

In B&H there are certain shifts in the implementation of the Protocol, but they are more related exclusively to the criminal act of trafficking as a result of activities for ensuring implementation of UN Convention on transnational organized crime and its Protocols. Thus, significant lack of application of the Protocol to the Convention on the Rights of a Child. That has resulted in the fact that the prohibited actions set forth in this Protocol are not adequately regulated in B&H, which must be of priority, because of the situation in the field and the growing number of cases of exploitation of children through child pornography etc.

Bosnia and Herzegovina should continue efforts for improvement protection of victims, and prevent through dissemination of information about children's rights as established by the Convention and its protocols. Special measures should be taken to resolve weaknesses in the system that result in unequal rights in health care, education and social protection.

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