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25 August, 2016

Response

to the Request of special procedure experts of the Council for Human Rights of the United Nations, Chairman of the Working Group for Arbitrary Detention S. R. Ajdovi and the Special Rapporteur for Human Rights of Migrants F. Crepeau, regarding the Draft Law on Asylum and Temporary Protection

Introduction

The procedure of preparing the Draft Law on Asylum and Temporary Protection was not finished, and the statements from letters of special procedures experts of the Human Rights of the United Nations, the Chairman of the Working Group on Arbitrary Detention S.R. Buckwheat and the Special Rapporteur on the Human Rights of Migrants F. Crepeau, the inconsistency between the provisions of the final Draft Law and regulations that are commented is noted. The next steps in the drafting of the Draft Law to be adopted by the National Assembly of the Republic of Serbia include further harmonization of its provisions with the attitudes of the European Commission regarding the harmonization of the decision of the Draft Law and the EU acquis.

The Draft Law was prepared under the Twinning Project IPA 2013 “Support to the national asylum system” and was harmonized with the provisions of the European Union Directives governing the field of asylum, in particular by the following: Directive 2011/95/EU which prescribes standards for the qualification of third country nationals or stateless persons for the realization of the right to asylum, standards in order to achieve the unique status of refugees or persons eligible for subsidiary protection, as well as standards related to the content (rights and obligations) of granted protection, Directive 2013/32/EU which prescribes the procedure for the recognition and withdrawal of the right to asylum, with the emphasis that the stated procedures must be the same in national legislations, Directive 2013/33/EU which prescribes standards for the reception of persons who have applied for asylum and Directive 2001/55/EC which prescribes the minimum standards for allocation of temporary protection in the event of a mass influx of displaced persons, measures to be applied in respect of the admission procedure, obligations for the state which accepts the displaced persons, as well as the rights and obligations of persons to whom the temporary protection was granted.

The process of preparation of the Draft Law, in addition to members of the Working Group consisting of representatives of all relevant state authorities, included the expert from Sweden, who was in the scope of

this project in charge of drafting the text of the new Law on Asylum, and who, inter alia, acquainted the Working Group with the best practices of the asylum system within the European Union, which solutions were entered into the text of the Draft.

After the preparation of the first text of the Draft Law a public discussion was held, in which all the relevant international organizations, including UNHCR and IOM, as well as local civil society organizations dealing with asylum and migration were acquainted with the text of the Draft Law, after which they gave their comments and suggestions, of which after the completed public discussion a large part were adopted, since the Working group was of the opinion that this will contribute to raising the efficiency of the asylum system of the Republic of Serbia.

The second version of the text of the Draft Law was, after the completion of amendments, published on the website of the Ministry of Interior and then returned for opinion of all relevant participants in the asylum procedure, international organizations and civil society organizations and the European Asylum Support Agency (EASO). There were no comments on that version that were related to non-compliance of the provisions of the Draft Law with international instruments, in particular with the regard of freedom of movement of asylum seekers and their rights and freedoms.

I) In connection with letter of the Chairman Rapporteur of the Working Group for arbitrary detention S.R. Ajdovi and the Special Rapporteur for Human Rights of Migrants F. Crepeau, we point out the differences between what is in the final Draft Law and in the letter:

In Article 5 of the Draft Law it is provided that the competent authorities shall cooperate with the Office of UNHCR in the implementation of activities in accordance with its mandate, and that asylum seeker has the right to contact the authorized officials of the UNHCR at all stages of the process, which has allowed the UNHCR to monitor the entire procedure. Also, Article 57 of the Draft Law provides that a foreigner who has expressed intention to seek asylum in the Republic of Serbia, as well as asylum seekers, can use free legal assistance and representation before the competent authorities by associations whose goals and activities are aimed at providing legal aid to seekers and persons who have been granted asylum, as well as free legal aid provided by UNHCR.

Bearing in mind that the UNHCR is an organization in which mandate is to take care of refugees and to protect their rights, special attention in preparation of the Draft Law was given to the cooperation with the said organization and in the course of preparation of the Draft Law the UNHCR, particularly bearing in mind its mandate, had the opportunity to, before conducting the public discussion, familiarize with the text of the Draft Law so that **certain solutions provided by the Draft Law were precisely formulated based on consultations with experts from UNHCR, and in particular those concerning the fundamental rights of asylum seekers and refugees.**

Also, after the public discussion, UNHCR gave a comment in terms of Article 41 of the Draft Law relating to the implementation of the procedure at the border crossing in the transit zone that refers to the need for precise definition of the conditions for the implementation of the said procedure and to determine the restrictions on movement in the transit zone, as well as the need to exclude minors from implementation of the provisions of the said Article, bearing in mind the provisions of the Convention on

the rights of the child, while **there were no comments on the Chapter VIII which Articles 78, 79, 80, and 81 prescribe conditions for restriction of movement of the asylum seekers.**

The above-mentioned comments and suggestions were adopted and the text of Article 41 of the Draft Law was amended, which was praised in a letter received by UNHCR, number SRB/HCR/2-021/16 from May 30, 2016, by which the submitted comments on the revised Draft Law pertaining to the institutes which were already provided in the Draft Law or other national laws that apply to the field of asylum (e.g. the submission of a written decision, short deadline for the possibility to appeal). In the said letter, UNHCR had no comments or suggestions regarding the possible changes of Articles 78-81 from Chapter VIII.

UNHCR did not give a negative feedback regarding the conditions for limiting the movement of asylum seekers provided by the Draft Law. Otherwise, the comments of this organization would certainly be taken into account.

After the visit of EASO experts in June 2016, the second version of the Draft Law was partially amended, including the text of Article 41 which was fully harmonized with Article 43 of Directive 2013/32/EU on the procedure for recognition and deprivation of the right to asylum.

Article 57 of the Draft Law provides that a foreigner who has expressed intention to seek asylum in the Republic of Serbia, as well as the asylum seeker, has the right to be informed of his rights and obligations during the entire asylum procedure, and he can use free legal assistance and representation before the competent authorities by associations whose goals and activities are aimed at providing legal aid to asylum seekers and persons granted asylum as well as the free legal aid of UNHCR, which guarantees the right to timely information to asylum seekers of all actions and measures taken by the competent authorities.

The Draft Law regulates the position of “asylum seekers” and in the letter they are referred to as “migrants”. A special attention must be paid on this special circumstance because by stating the term “migrant” creates a picture that this is a disproportionately greater number of persons than those to which the Draft Law relates, which is especially creating a false picture when it comes to the restriction of freedom of movement.

In Chapter VIII of the Draft Law named “Restriction of movement”, Article 78 provides the reasons for the restriction of movement and does not provide the possibility of implementation of the proceeding on the border, in the transit area or in specifically designated accommodation (as stated in the letter), but it does provide that the movement of asylum seekers may be restricted in order to decide on the right of asylum seeker to enter the territory of the Republic of Serbia (which was not stated in the letter), and only if necessary. The decision on this restriction must be made in the form of a Solution issued by the Asylum Office.

The Article 79 of the Draft Law lists the cases in which the measures of restriction of movement are implemented. Increased police control applies exclusively to adults, as from the provisions of Article 79 it

can be unambiguously determined (as opposed to the formulation used in the letter). Also, the letter does not include cases of temporary confiscation of travel documents.

The concern expressed in the letter that the retention/detention of migrants and asylum seekers should be the last resort was in the same manner provided in the Draft Law. Namely, Article 51 entitled “Stay and freedom of movement in the Republic of Serbia” which reads: “Upon receipt in the Center for asylum or other facility intended for accommodation of asylum seekers under Article 52 of this Law, the asylum seeker has the right to reside in the Republic of Serbia and in that time period he can move freely in its territory, unless there are reasons to restrict the movement referred to in Article 78 of this Law”, therefore, **a narrow interpretation of the exceptions, the Draft Law guarantees freedom of movement to asylum seekers, as well as many sources of international law provide exceptions. Retention is not arbitrary, and the decision on retention is issued by a decision of the Asylum Office, therefore, each individual case of retention must be reviewed and its terms and conditions defined in the decision. The Court shall decide on these matters in accordance with Article 78, paragraph 5, which provides for the right to appeal to be decided by a Higher Court. Article 78, paragraph 2 provides the following: “The measure referred to in paragraph 1, item 3 of this Article may be imposed if the individual assessment finds that other measures cannot achieve the purpose of restriction on movement“.**

Article 79, paragraph 4 of the Draft Law reads: “Exceptionally, when the restriction of movement is determined for the reasons specified in Article 78, item 2, 3 and 4 of this Law, the restriction of movement can be extended for another three months”, and it does not mention minors. However, Article 79, paragraph 1, item 4 reads: Restriction of movement is carried out by “specifying the residence in the institution of social protection for minors with increased supervision“. **By interpreting these legislations it is easy to reach the conclusion that the restriction of movement applies to the cases referred to in Article 78 “The reasons for restriction of movement”, which existence justifies the determination of “residence in an institution of social protection for minors with increased supervision”. Remark given by special procedure experts is that it is contrary to the interests of unaccompanied migrant minors to be placed in “an institution of social protection for minors with increased supervision” cannot be accepted. This is because the listed accommodation facilities for unaccompanied migrant minors are only formally within the organizational structure of the Institute for Education of Children and Youth, while spatially separated, with special work organization, educational staff and educational content of professional work as part of assistance and support to this sensitive group of minors. In particular, we point out that in these organizational units, migrant minors are not limited movement in order to meet all their basic needs during a limited period of accommodation until the provision of more permanent forms of protection, such as entry into the asylum procedure in the Republic of Serbia, reuniting with the family, provision of movement to third countries that have decided to accept them. The procedures provided for in Chapter VIII of the Draft Law, therefore, necessarily represent the exception to the general rules on freedom of movement provided for in Article 51 of the Draft Law.**

The provisions of Article 78 stipulates that the competent authority shall issue the decision on restriction of movement in writing and deliver it to the asylum seeker, while Article 79, paragraph 5 stipulates that the decision on restriction of movement can be appealed within eight days from the delivery of the decision, and that the appeal shall be decided by the competent Higher Court (Article 79, paragraph 7 of the Draft Law), which is in accordance with the provisions of Article 9, paragraph 2, 3 and 4 of the International covenant on civil and political rights.

When it comes to the implementation of the measures of restriction of movement referred to in Article 79, paragraph 1, item 3 of the Draft Law, i.e. when the restriction of movement of asylum seeker is carried out by placing in the Reception Centre for Foreigners, paragraph 2 of the same Article provides that the measures referred to in paragraph 1, item 3 of this Article shall be imposed if the individual assessment finds that the other measures cannot achieve the purpose of restriction on movement, which completely excludes the possibility of an arbitrary and unjustified detention of asylum seekers for the reason of the submitted request for asylum.

When it comes to retention of unaccompanied minors by determining residence in an institution of social protection for minors with increased supervision, Article 81 of the Draft Law stipulates that a person referred to in Article 15 of this Law may be determined accommodation in the Reception Centre for Foreigners only if based on individual assessment it is determined that such accommodation does not suit his personal circumstances and needs, particularly health condition, and that unaccompanied minor can be ordered to stay in the institution of social protection for minors with increased supervision if other alternative measures cannot be effectively implemented.

The Ministry of Labor, Employment, Veteran and Social Affairs has issued the Instruction on conduct of the Center for social work and Social care institutions for accommodation of beneficiaries in ensuring the protection and accommodation of unaccompanied migrant minors on July 10, 2015, which was delivered to all Centers for Social Work and wherein the instructions on treatment of Centers were given in conditions of a significant increase of immigration in the Republic of Serbia. The aim of the Instruction would precisely be the provision of timely, comprehensive, equal and legal treatment of social welfare centers, institutions for accommodation of beneficiaries which in its organizational structure have special units for temporary accommodation and care of unaccompanied migrant minors and other social protection institutions for accommodation in which migrant minors can be accommodated as well as migrants who in accordance with the Law on Migration Management¹ may be placed in social protection institutions. The stated Institutions were through the Instruction presented the duty that in accordance with the principle of protection of the rights of migrants, taking into account as far as possible the specifics of their needs and interests, in accordance with the possibilities of the Republic of Serbia, and with respect to ratified international treaties and generally accepted rules of international law, provide measures of family-legal protection-custody and accommodation services. Also, the Centers for social work were through the Instruction given the instruction to immediately upon receipt of a written or verbal notice from the Ministry of Interior, Police Directorate - Border Police Administration or the Commissariat for Refugees and Migration on the found unaccompanied minor migrant, to provide to such minor foster protection by determining a temporary guardian in accordance with Article 132, paragraph 2, item 4 of the Family Law.²

¹“Official Gazette of RS“, number 107/2012

²“Official Gazette of RS“, no. 18/2005, 72/2011- other Law, 6/2015

Action Plan of the Ministry of Labor, Employment, Veteran and Social Issues was made for reaction in provision of assistance, support and protection of migrant minors not accompanied by a responsible adult person. The stated plan provides for the following activities: (1) Determining the scope and content of available capacities for accommodation of unaccompanied migrant minors in the social protection system (Within this activity it is necessary to determine the available capacities in social care institutions for accommodation of children without parental care, children with behavioral disorders and children with disabilities. This means that based on the analysis it is necessary to determine the actual occupancy rate, number of vacancies, organization of space for the reception of unaccompanied migrant minors, manner of ensuring security, health care and life conditions, the necessary financial resources and professional and other personnel necessary for the implementation of help to these children); **(2) providing the necessary financial resources, professional and other personnel conditions necessary for the realization of help to unaccompanied migrant minors;** **(3) the provision of accommodation and allocation of unaccompanied migrant minors in available capacities in the social protection system** (Upon obtaining notification on the need for accommodation of unaccompanied migrant minors, individuals or groups that exceed the capacities of the existing organizational units for accommodation of unaccompanied minors in social care institutions in collaboration with the directors of social welfare institutions in which the analysis indicated the possibility of providing care and accommodation of these children, the same should be referred to accommodation in these institutions); **(4) ensuring the protection of the rights and interests of unaccompanied migrant minors** (Centre for Social Work is obliged to immediately upon receipt of a written or verbal notice from the Ministry of Interior, Police Directorate – Border Police or the Commissariat for Refugees and Migration, about the found unaccompanied minor migrant on its territorial and actual competence, shall provide that minor the following: foster protection by appointing a temporary guardian in accordance with Article 132, paragraph 2, item 4 of the Family Law - the scope and content of powers of the temporary guardian are defined exclusively in relation to the provision of temporary accommodation in social protection institutions for accommodation of beneficiaries, which in its organizational structure has special organizational unit for temporary accommodation and care for unaccompanied migrant minors. After accommodation, the competent Center for Social Work in whose territorial jurisdiction the institution where the child is accommodated is located shall immediately give the minor a new temporary guardian for temporary protection of the individual rights and interests of the child. In the event of transfer of a child from the institution to the asylum center, transfer is organized by the institution where the child is located and the child is transferred in the company of the guardian and translator. Center for Social Work in whose territorial jurisdiction is the asylum center, shall appoint to the minor immediately after accommodation a new temporary guardian for temporary protection of personality, rights and interests of the child. In connection with the procedure of accommodation in social care institution, the Social Work Center is obliged to abide by certain rules in accordance with Article 41, paragraph 2, item 8 of the Law on Social Protection it shall issue a decision on accommodation of a minor migrant in social care; in accordance with Article 15, paragraph 6 of the Law on Migration Management he shall deliver the Commissariat for Refugees and Migration a decision on accommodation which costs are implemented based on the actual duration of accommodation; provide transport from the place where the unaccompanied migrant minors were found to the place of accommodation in social protection institutions for accommodation of beneficiaries, which in its organizational structure has a special organizational unit for temporary accommodation and care for unaccompanied migrant minors - this is done in cooperation with the Ministry of Interior, Police Directorate - Border Police, the Commissariat for Refugees and Migration, and accompanied by the appointed temporary guardian); **(5) provision of accommodation**(Social protection institutions for accommodation of beneficiaries is required to, in accordance with its activity, provide to the unaccompanied minor migrant the following: security; health care in accordance with special regulations on health care; existential conditions - housing, adequate nutrition in accordance with national and religious origin of minor migrants, personal hygiene, clothing, footwear); **(6) monitoring of implementation of activities from the action plan and reporting in accordance with the Instruction**

on Centers for Social Work and Social Care Institutions for accommodation of beneficiaries in provision of protection and accommodation to unaccompanied migrant minors on the basis of commitments the director of the Center for Social Work or Social Care Institution shall in writing monthly or upon request of the ministry inform the Ministry of Labor, Employment, Veteran and Social Affairs - Division of family care and social protection report on its activities related to provision for minor migrants.

In cooperation with UNICEF, the Ministry of Labor, Employment, Veteran and Social Affairs has: (1) **in accordance with internationally accepted documents, conventions, directives clearly and unambiguously define the term “children – migrant minors unaccompanied by adult responsible person”;** (2) **defined the procedure for the examination of the risks for unaccompanied children and separated children on focal points and border crossings;** (3) **defined the content of the best interest of the child – minor migrant unaccompanied by an adult responsible person;** (4) **defined the standard operating procedures of identification of the child – minor migrant unaccompanied by an adult responsible person;** (5) **defined the standard operating procedure of taking measures of social and family protection of the child – minor migrant unaccompanied by an adult responsible person;** (6) **provided additional social workers on terrain for direct work with children – minor migrants unaccompanied by adult responsible person in reception and transit centers at the entrance and exit from the Republic of Serbia;** (7) **provided 24 hour, seven days a week, on call specialists from centers for social work in reception and transit centers for asylum, as well as on the route of movement of migrants;** (8) **made preparations of training programs and its implementation which is dedicated to professional workers of social welfare centers and institutions of social protection in work with children – minor migrants unaccompanied by an adult responsible person;** (9) **realized three seminars – counseling in the process of treatment of the system of social and family care with children – migrant minors unaccompanied by an adult responsible person (Belgrade, Subotica and Kanjiža);**

In cooperation with the International Organization for Migration (IOM) four trainings were held for professionals of the social and family legal protection in work with children - migrant minors unaccompanied by an adult responsible person (Bujanovac, Vranje, Pirot, Šid), which included experts from centers for social work from regional territories through which migrants enter the Republic of Serbia, move in and out of the territory of the Republic of Serbia, representatives of the Commissariat for Refugees and migration of the Republic of Serbia, representatives of NGOs that provide services to children, Red Cross, UNHCR, etc.;

In cooperation with the Danish Refugee Council programs of assistance and support to children- migrant minors unaccompanied by an adult responsible person are being prepared. Two trainings were held for centers for social work and other stakeholders in order to provide assistance and support to children migrants who are victims of abuse and neglect, as well as for the children and families from reception centers in which domestic violence was noted;

On the basis of cooperation with the Swiss Confederation through which funds were provided, the project of extension, adaptation and reconstruction of the Institute for education of Children and Youth is being implemented, within which an organizational unit for the reception of unaccompanied migrant minors operated. Special attention will be paid on the creation of conditions for the reception of underage migrant female children. The International Organization for Migration (IOM) has preliminarily indicated its intention to take part with their funds and support this project.

II) The solutions adopted in the Draft Law are in complete compliance with international legal acts, as well as with the relevant provisions of other positive legal regulations that must be taken into account when considering the legislation of this matter.

International Covenant on Civil and Political Rights

Provision 9.1 of the International Covenant on Civil and Political Rights is underlined and reads: “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful”.

The provisions of the Covenant have been consistently implemented in the Draft Law since it is prescribed in the provisions of Article 51 that asylum seekers may move freely within the territory of the Republic of Serbia, unless there are conditions for restriction of freedom of movement, which is defined as a measure only when it is necessary and in cases that are precisely defined by the Law. Also, the decision on the restriction of freedom of movement shall be made in writing and against the decision on the restriction of freedom of movement may be appealed to the competent higher court, which ensures the legality of the decision, which is in accordance with Article 9 of the International Covenant on Civil and Political Rights.

Also, the positive legislation of the Republic of Serbia is largely, if not entirely in conformity with the laws of the United Nations, while the harmonization of regulations and standards is up to date with the directives of the European Union. The legal measure of custody, i.e. detention of persons is governed by the applicable national legislations governing the criminal legal and criminal procedural matter (The Criminal Code³ and The Criminal Procedure Code⁴). The issue of legal measure of restricting freedom of movement, which is stated in Article 12, paragraph 3 of the Covenant, each member state may apply its legislative solutions so as to protect national security, public order, public health, morals or the protection of rights and freedoms of other persons, if it is in accordance with the other rights recognized by the Covenant. In this case, Article 51 of the Draft Law regulated that an asylum seeker has the right to reside in the Republic of Serbia and during that time he can move freely in its territory, unless there are reasons for the restriction of movement stipulated in Article 78, which specifies the conditions prescribed for restriction of movement of asylum seekers. Also, the other paragraphs of Article 78 and Article 79 prescribe the conduct of the competent authority that makes the decision on the restriction of freedom of movement, provides for the possibility of appeal, the deadline for submission of the same, as well as the judicial instance to decide on it, which is in accordance with the entire Article 9 of the Covenant. In this connection, it can be concluded that there is no arbitrary proceeding in regard of determining the restriction of movement of persons acting as asylum seekers, as well as it, if applicable, exhaustively provides legal conditions for imposing measures of restricting of freedom of movement.

³“Official Gazette of RS”, number 85/2005, 88/2005 – corrected, 107/2005 – corrected, 72/2009, 111/2009, 121/2012, 104/2013 and 108/2014

⁴“Official Gazette of RS”, number 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 and 55/2014

By means of the Draft Law, the institution of the restriction of movement of asylum seekers is designated as the last measure to be taken, because Article 79, paragraph 1, item 3 stipulates that the restriction of movement of asylum seekers shall be carried out by provision of accommodation in the in the Centre for Foreigners when it is determined that other measures cannot achieve purpose of the restriction of movement (implementation of the principle of proportionality).

The Convention on the Rights of the Child

Experts of special procedures have particularly expressed concern about the provisions of Article 79 of the Draft Law concerning the determination of residence in the institution of social protection for minors with increased supervision, referring to Articles 20 and 37 of the Convention on the Rights of the Child, which stipulate that a child who is temporarily or permanently deprived of family environment, or to whom, in his best interests, is not allowed to remain in that circle is entitled to special protection and assistance of the state, he is provided alternative care which includes accommodation in another family, kafalah according to Islamic law, adoption or placement in suitable institutions for the care of children; Member States shall ensure that no child shall be subjected to torture or other cruel inhuman or degrading treatment or punishment; The death penalty and life imprisonment without possibility of release cannot be imposed for offenses committed by persons below eighteen years of age; no child shall be deprived of his liberty unlawfully or arbitrarily. Arrest, detention or imprisonment of a child must be in accordance with the Law and shall be used only as a measure of last resort and for the shortest possible time; every child deprived of liberty shall be treated with respect of the dignity of the human person, and in a manner which takes into account the needs of persons of his age. Every child deprived of liberty shall be separated from adults unless it is considered that it is in the best interests of the child, and he has the right to maintain contact with his family through letters and visits; every child deprived of liberty shall have the right to prompt access to legal and other appropriate assistance, the right to challenge the legality of detention before a court or other competent, independent and impartial authorities, and the right to a prompt decision on that matter.

Please note that one of the basic principles of the Draft Law is the principle of protecting the best interests of minors, which is stipulated in Article 10 and in which it is pointed out that when assessing the best interests of minors the well-being, social development and the origin of the minor, the minor opinion depending on his or her age and maturity shall be taken into consideration; the principle of family unity and the protection of minors, especially if there is a suspicion of a minor - victim of trafficking or a victim of domestic violence and other forms of gender-based violence. **This is fully in accordance with the provisions and the tone of the Convention on the Rights of the Child. Also, it can be seen in multiple places in the law that the emphasis is placed on the protection of minors and taking care of their interests, and Articles 16 and 17 of the Draft Law relate to minors and unaccompanied minors. In Article 17 of the Draft Law it is stated that unaccompanied minor shall be appointed temporary guardian by the guardianship authority, who shall during the whole procedure ensure that all activities are carried out with respect of the principle of the best interests of the minor which is in accordance with Article 20, paragraph 1 and 3 of the Convention on the Rights of the Child. Therefore, here we also speak about the rule and the law guaranteed by the Draft Law, and the law provided for the implementation of procedures which regulate specific situations. For a minor, who is**

found on the territory of the Republic of Serbia, unaccompanied by parents/guardians, in accordance with the Family Law, the Center for Social Work from the area in which the minor was found shall issue a decision on the appointment of a temporary guardian who shall further decide on his temporary care and protection measures.

In accordance with the provisions of the Law on Minor Offenders and Criminal Protection of Minors and the Code of Criminal Procedure, the measure of detention towards minor for the offense shall be applied by a judge for minors. Also, according to Article 294 of the Code of Criminal Procedure, the determination of measures of detention of the suspect (adult and minor) person is within the jurisdiction of the public prosecutor, who may authorize the police to bring the suspect and hand the decision on detention in the duration of 48 hours in the preliminary proceeding. Please note that from October 2013, the pre-trial process is governed by the competent public prosecutor, and in the case of minor offenders the public prosecutor for minors orders the police to take certain measures and actions in the preliminary investigation proceedings.

After the entry into force of the Law on Offences⁵ from March 2014, measure of detention of the accused (adult and minor) person in misdemeanor proceedings up to 24 hours shall be issued by the minor offences judge by issuing an order on detention (Articles 191 and 192), and the police can issue a decision to determine the detention of up to 12 hours for a person (adult and minor), which is caught in the act of commission of minor offenses under the influence of alcohol or other psychoactive substances (Article 193). This measure may also be applied against a minor foreigner if his misdemeanor responsibility was determined.

The Law on Minor Offenders and Criminal Protection of Minors given in Article 2 provides for the exclusion of criminal sanctions against children (persons who at the time of the crime have not reached the age of fourteen) and the measures provided for in this law are not applicable to them, the competent center for social work is informed on the event and a report is then sent to the relevant prosecutor.

Convention on the Status of Refugees (1951)

Article 9 of the Convention on the Status of Refugees "Interim Measures" reads: "None of the provisions of this Convention is intended to prevent any Contracting State, in time of war or other hard and exceptional circumstances, from taking temporary measures towards a particular person which that state deems necessary for national security, in the expectation that the said Contracting State determines that that person is in fact a refugee and that the application of the said measures towards him is necessary in the interests of its national security".

From this it can clearly be seen that even this convention cannot, nor it is its intention prevent a country to in the difficult and exceptional circumstances (migrant crisis and the influx of a large number of migrants) also take measures towards refugees necessary for national security. Restriction of movement of refugees is such a measure, as defined in Articles 78-81 of the Draft Law.

⁵"Official Gazette of RS", number 65/2013 and 13/2016

Taking measures necessary for national security is applicable for the case that attorneys or representatives of associations engaged in providing legal assistance to asylum seekers and persons granted asylum, except for UNHCR, may temporarily be restricted access to the asylum seeker, where necessary in order to protect national security or public order of the Republic of Serbia, as defined in Article 41 of the Draft Law.

UNHCR Revised Guidelines on criteria and standards to be applied in relation to the detention of asylum seekers (1999)

In accordance with the obligations arising from the International Law, as well as the attitude of UNHCR that the detention of asylum seekers is basically undesirable, Article 51 of the Draft Law stipulates that asylum seekers after their admission to the Asylum Centre or other facility intended for accommodation of asylum seekers has the right to reside in the Republic of Serbia, and that during that time he can move freely in its territory, unless there are reasons specified in Article 78 of the regulation. Article 50 stipulates that the asylum seeker has the right to residence and freedom of movement in the Republic of Serbia. This is especially true with regard to vulnerable groups such as women, children, unaccompanied minors and persons who have special needs. Trauma through which these persons undergo makes them a particularly sensitive category which should be taken into account in determining any restrictions of freedom of movement based on illegal entry or presence in it.

As provided by the UNHCR Revised Guidelines on criteria and standards to be applied in relation to the detention of asylum seekers (1999), detention is the last resort to be applied only if the offered alternatives would not be effective in this case. Guideline 3 relating to special conditions for detention it is provided that mere expediency and proportionality of its objectives to be achieved should be considered.

It is further stated that the exceptions that allow detention would be prescribed by the Law. According to the conclusion of the Executive Board no. 44 (XXX-VII) the detention of asylum seekers is resorted to only when necessary:

- (i) in order to verify the identity
- (ii) in order to determine facts on which the request for refugee status or asylum is based
- (iii) in cases where asylum seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the country in which they intend to seek asylum
- (iv) for protection of national security and public order

- **Guideline 4 “Alternative measures in relation to detention”**

Guidelines provide for the following alternative measures concerning the detention which should be taken into account:

(i) Control measures:

- obligation of reporting. Stay on freedom of asylum seekers may be conditioned by obligation of regular reporting during the process of determining of the status.
- obligation of stay on freedom of asylum seekers may be conditioned by obligation of stay at a certain address or in certain administrative region until the decision in his status. The person seeking asylum must obtain approval for any change of address of residence or relocation from a certain administrative region.
- opened centers. Persons seeking asylum may be released under the conditions to stay in centers for collective stay with the permission to exit and return in certain time periods.

Article 79 of the Draft Law provides for possible measures for restriction of the movement for which we consider to fully comply with the given guidelines: 1) prohibition of leaving the Asylum Centre, a particular address or a specific area; 2) regular reporting at a determined time to the regional police department or police station according to the place of residence; 3) determination of residence in the Reception Center for Foreigners under police supervision; 4) determination of residence in the institution of social protection for minors with increased supervision; 5) temporary seizure of travel documents. Restriction of movement shall last as long as the reasons referred to in Article 78 of the Draft Law exist.

When it comes to persons in need of special procedural and/or reception guarantees, stay in the Center for Foreigners may be ordered only if it is based on individual assessment which determined that such accommodation suits his personal circumstances and needs, and in particular the health status (Article 81 of the Draft Law).

- **Guideline 5 “Process Guarantees”**

In the event that a person seeking asylum is remanded in custody, the Guidelines provide that it will enjoy the following guarantees:

- Timely reception of complete information about the order of detention with the reasoning and the rights associated with such order, in a language and manner they understand,
- Information on the right to legal counsel, when possible, they need to be provided free legal aid,
- Independent judicial or administrative control of decisions on custody,
- The right to personally or through a representative dispute the necessity of detention at a hearing in the process of control of the decision, and the right to challenge the established findings,
- The right to contact the local UNHCR office, national bodies for the care of refugees, other agencies and lawyers and their right to contact the asylum seeker,
- Detention cannot be an obstacle asylum seeker to conduct proceedings on the application for asylum.

Article 78 of the Draft Law stipulates that the movement of asylum seekers may be restricted by the decision of the Asylum Office, while in the following Article it is provided that an appeal on the decision by which restriction of movement is determined or prolonged is to be issued by the competent Higher

Court. The provisions of the Law on Administrative Procedure⁶ which regulates this procedure, and the rights and obligations of the parties are precisely described below, in the part where the comparison of the Draft Law with EU directives is made.

Special attention in almost all international instruments is dedicated to categories with special needs, such as women, children and the elderly. In addition to the fact that detention of these persons is particularly undesirable, their care arrangements should be designed to respond to specific needs of their protection and assistance (Reception of asylum seeker, including standards of conduct in the context of individual asylum systems (2001), adopted at the meeting of the Global Consultations (EC/GC/01/17) of November 27, 2001).

The Draft Law contains several provisions that relate to this category of persons: the principle of protecting the best interests of minors (Article 10), the principle of providing special reception and procedural guarantees (Article 15), and specific provisions relating to unaccompanied minors (Article 17) as one of the most vulnerable categories. The controversial Article 41, pointed out in the letter, which regulates the procedure at the border or in the transit area, explicitly excludes the application of this procedure in respect of minors (paragraph 4).

General Declaration on Human Rights (1948)

The General Declaration of Human Rights in Article 9 provides that no one shall be subjected to arbitrary arrest, detention or prosecution. In Article 10 it is provided that everyone is entitled in full equality to a fair and public hearing by an independent and impartial court which shall determine on his rights and obligations, and on merits of each criminal charge against him. Article 12 stipulates inter alia that no one shall be subjected to arbitrary interference with his family and that everyone has the right to the protection of the law against such interference or attack. Article 13 guarantees the right to freedom of movement and choice of residence within the borders of each state. Article 14 anticipates that everyone has the right to seek and to enjoy in other countries asylum from persecution. This right may not be invoked in the case of prosecutions based on nonpolitical offense or offenses contrary to the purposes and principles of the United Nations. At this point we draw your attention on the General Declaration of Human Rights (1948), and it is about the act that largely lists fundamental rights, provides for restriction of the right to asylum, which is the only limitation this Act provides for.

International Covenant on Economic, Social and Cultural Rights

In the context of the provisions of the International Covenant on Economic, Social and Cultural Rights, the Draft Law does not contradict the Covenant, especially when you take into account Article 6 of the Draft Law that regulates the prohibition of expulsion or return of asylum seekers, where his life or freedom would be threatened because of his race, sex, gender, gender identity, language, religion, nationality, membership of a particular social group or political opinion. Article 7 of the Draft Law stipulates the principle of non-discrimination which prohibits any discrimination on any grounds, particularly on race, color, sex, gender, gender identity, sexual orientation, national

⁶ “Official Gazette of FRY”, number 33/97 and 31/2001 and “Official Gazette of RS”, number 30/2010

origin, social origin or similar status, birth, religion, political or other opinion, property status, culture, language, age, or intellectual, or physical disability.

Also, by examining the documents of the United Nations, Economic and Social Council, Commission on Human Rights, which dealt with issues of “violation of human rights of all persons who have been detained or are in jail”, E/CN.4/1998/44 of 19.12.1997, or issue of “civil and political rights, including the questions of torture and detention”, E/CN.4/1999/63 of December 18, 1998, by using a comparative method it can be concluded that the Draft Law incorporates the principles for preventing arbitrariness in determining custody.

The European Convention for the Protection of Human Rights and Fundamental Freedoms

The provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms concerning the area of the Draft Law, which are adopted and adequately implemented in the Republic of Serbia are: Article 5 - The right to liberty and security, Article 6 - Right to a fair trial, Article 8 - Right to respect for private and family life, Article 13 - Right to an effective remedy, Article 14 - Prohibition of discrimination, Article 15 - Derogation in exceptional circumstances, Article 18 - Limitation on use of restrictions of rights: “The limitations of those rights and freedoms that are permitted under this Convention shall not be applied for any purpose other than those for which they were prescribed”.

We especially point to the fact that the text of the European Convention for the Protection of Human Rights and Fundamental Freedoms is designed to be a fundamental right guaranteed by paragraph 1, and situations in which that guaranteed right is restricted or exceptions to the basic rules are stipulated in paragraph 2. Examples: Article 2 “The right to life”, Article 4 “The prohibition of slavery and forced labor”, Article 5 “The right to liberty and security” and so on.

Also, we especially mention every person’s right to liberty and security as guaranteed in Article 5 in which the list of the cases in which a person may be deprived of liberty in accordance with the procedure prescribed by the Law, and the rights that person has in that case. With respect to migrants in point f) there are two situations in which there may be a deprivation of liberty in the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition. As the European Court of Human Rights confirmed in *Vasileva vs Denmark* it is about enumerated cases which must be interpreted narrowly so as to avoid any possibility of arbitrary deprivation of liberty.

We draw attention to Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, by which Section 2 “Freedom of Movement” provides broader reasons for the restriction of freedom of movement and of nationals e.g. restrictions on movement justified by the protection of health or morals, for the protection of rights and freedoms of others, as well as limitations justified by the public interest in a democratic society. The Republic of Serbia could on the basis of this provision significantly limit the influx of migrants to its territory in the current migrant crisis, but it has not done so.

Protocol 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms in Article 1 provides for the general prohibition of discrimination, and these provisions are in the same manner regulated by the Draft Law.

Recommendation of Committee of Ministers R (2000)9

Recommendation of Committee of Ministers R (2000)9 on temporary protection which was adopted at the 708th meeting of the Ministers' Deputies on 3 May 2000, in Clause 2 stipulates that the persons enjoying temporary protection must be registered without delay and enjoy the right to reside in the territory of the receiving state during the entire period of temporary protection. Freedom of movement within the territory of the receiving state shall not be unduly restricted.

Instead detention, the Draft Law introduces the category of “restriction of movement”, which is defined in Article 78, which we consider to be in full compliance with international standards and norms of the international law. Observed together with the other members in this chapter, it provides to the asylum seekers adequate guarantees for the protection of their rights guaranteed by international legal instruments.

Recommendation of Committee of Ministers R (2003)5

Recommendation of Committee of Ministers R (2003)5 on measures of detention of asylum seekers, from April 16, 2003, a case of “when a decision on their right to enter the territory of that State must be made” is also anticipated.

Article 78 of the Draft Law pertaining to restriction of movement is fully in accordance with the stated guidelines. Determining the extent of restriction of movement is absolutely not aimed at deterring or discouraging asylum seekers to submit their request. Also, it is clear that this is not a criminal or disciplinary measure for illegal entry into the country or stay in it. Those measures can be determined only when in each case with due diligence their necessity is determined.

Recommendation of Committee of Ministers R (2003)5 on measures of detention of asylum seekers also anticipates that asylum seekers held in detention have the right to contact the Office of UNHCR, which also must have unhindered access to asylum seekers in detention. After consultation with Article 5 of EACO which stipulates the obligation of cooperation of the competent authorities with UNHCR, it has been amended by adding the following paragraphs:

“UNHCR is provided free access to all persons, in accordance to its mandate.

At the request of UNHCR, the competent authorities shall provide the following:

- General information relating to asylum seekers, refugees and persons who have been recognized subsidiary and/or temporary protection in the Republic of Serbia, including trends and

statistics, as well as specific information on individual cases, provided that the applicant has provided its consent;

- Information regarding the interpretation of the 1951 Convention and other international documents relating to the protection of refugees, and their application in the context of this Law”.

Directive 2013/32/EU on common procedures for granting and revocation of international protection

Directive 2013/32/EU provides that certain retention shall be considered a judicial authority at reasonable intervals of time, ex officio and/or at the request of asylum seekers, whenever the retention is continued, the relevant circumstances arise or new information becomes available which affects the lawfulness of detention. Article 79, paragraph 6 of the Draft Law stipulates that the appeal against the decision has been made, or the measure referred to in paragraph 1, item 3 of this Article has been extended by the competent Higher Court.

In connection with the terms of detention, Article 10.1 of the Directive 2013/32/EU provides that the retention shall be done in, as a rule, the specifically intended premises. Where a Member State is unable to provide accommodation for the specially intended premises and where it is forced to resort to placement in the prison premises, detained asylum seekers will be housed separately from ordinary prisoners under the terms of the retention provided for in this Directive. In the Draft Law there is no provision which provided for the retention of asylum seekers, more freedom of movement to be applied the prohibition to leave the Asylum Centre, a particular address and/or certain areas and to determine placement in the Centre for Foreigners under police supervision.

Article 81 “The restrictions of movement of persons in need of special procedural and reception guarantees” and Article 10 “The principle of protecting the best interests of minors” provide that the person who is in need of special procedural guarantees may be ordered accommodation in the Reception Center for Foreigners only if based on individual assessment it is determined that such accommodation suits his personal circumstances and needs, particularly health, and that unaccompanied minor can be ordered to stay in an institution of social protection for minors with increased supervision if other alternative measures cannot be effectively applied, and the general rule was determined that when implementing the provisions of this Law it shall comply with the principle of the best interest of the minor, and that in order to determine what is the best interest of the minor the well-being, social development and the origin of the minor shall be taken into account; opinion of the minor depending on his age and maturity; the principle of family unity and the protection and safety of minors in particular if there is a suspicion of a minor - victim of trafficking or a victim of domestic violence and other forms of gender-based violence. These provisions are in accordance with Article 11.1, 11.2, 23.2 of the Directive.

Article 9 “The principle of family unity” and Article 15 “The principle of providing special procedural and reception guarantees” anticipate that the authorities will take all available measures to maintain the unity of the family during the proceedings, as well as upon granting asylum or temporary protection and that persons who are granted asylum or temporary protection shall have the right to family reunification, in accordance with the provisions of this Law, and that in the asylum procedure the following shall be taken into account: the specific situation of persons in need of special procedural and / or reception guarantees, such as minors, unaccompanied minors,

persons with disabilities, the elderly, pregnant women, single parents with minor children, victims of trafficking, ill persons, persons with mental disorders and persons who have been tortured, raped or subjected to other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation and that by means of special procedural safeguards and reception appropriate assistance shall be provided to the applicant who, with regard to their personal circumstances, is not able to exercise the rights and obligations under this Law without the proper help. These provisions are in accordance with Article 11.5 of the Directive.

Directive 2013/32/EU establishes common standards which guarantee access to legal and efficient asylum process.

Compared to the previously applicable EU regulations this Directive is much more precise and creates a coherent system which enables the decision-making by Member States in compliance with high standards.

In connection with the remarks from the letter, we point to the fact that Article 41 of the Draft Law about which the concern was expressed is harmonized with Article 8 of the Directive “Information and counseling in facilities for retention/detention of persons and border crossings”.

Article 25 of the Directive 2013/32/EU prescribes guarantees to unaccompanied minors also prescribed in Article 17 of the Draft Law.

Directive 2013/33/EU on reception conditions

Directive 2013/33/EU from June 26, 2013 established common standards regarding the reception and living conditions of asylum seekers. In addition as her uniform material conditions that asylum seekers must be enabled, the Directive provided for detailed rules on full respect for their fundamental rights and introduced important guarantees for their protection. Besides the obligation of the state to carry out an individual assessment of each case of asylum seekers, special protection of vulnerable persons such as minors is prescribed.

Directive 2013/33/EU on conditions of reception in Articles 7.1 and 7.2 provides freedom of movement of asylum seekers in EU Member States and the possibility of Member States to restrict this right on grounds of public interest, public order and the reasons of fast processing of applications. This is also provided in the Draft Law in Articles 51, 52 and 78.

Also, the Directive 2013/33/EU in Section 7.4 provides that the Member State shall provide possibility of granting asylum seekers temporary permission to leave the place of residence. In addition, mandatory information must be provided by local authorities on the current address. In accordance with the stated, Article 59 of the Draft Law was formulated.

Directive 2013/33/EU provides that an asylum seeker can be detained when necessary on the basis of an individual assessment, may be retained if other coercive measures cannot be effectively applied in the following cases:

(a) in order to establish or confirm the identity or nationality;

(b) in order to determine the elements on which an asylum seeker bases its application, which could not be determined if the asylum seeker is not retained, especially if there is a risk of absconding by the asylum seeker;

(c) in order to issue a decision on the right of asylum seekers to enter the territory, etc.

The provisions of Articles 78 and 79 of the Draft Law are harmonized with these provisions.

Proceeding from the above, as well as from the objections made in the inquiry experts of the special procedures of the Human Rights Council, we believe that the above text is in full compliance with all relevant international regulations.

III) Since the beginning of 2015, when a large influx of migrants, refugees and asylum seekers started in Europe, the Republic of Serbia and, within its authority, the Ministry of Interior have invested and are continuing to invest great efforts to humanely and lawfully deal with the emergence of “migrant crisis”, as it is called in all European countries. Numerous meetings of representatives of Member States of the European Union and other affected countries were held on the given theme and the role of the Republic of Serbia has been recognized as the top positive and constructive. In contrast to these assessments, UNHCR representation in Serbia undertakes public appearances in which it proposes that Serbia should assume a greater burden in the integration of migrants from the one the economically more powerful countries of Europe take, undertakes appearances before the representatives of diplomatic and consular representation in the Republic of Serbia, files complaints on work of police officers who were later proved unfounded, files requests for conduct of the members of the Ministry of Interior which, if they were taken, necessarily harm good neighborly relations with neighboring countries. Although UNHCR representation had no objections in the process of harmonization of the Draft Law on asylum and temporary protection, remarks on the text the groundlessness of which we have already addressed is expressed in public television appearances.

Representation of UNHCR was invited to inspect and give suggestions and opinions at each step of preparation of the Draft Law, starting with the analysis and recommendations that were made as a part of the twinning project “Support to the national asylum system”, which is funded by the European Union. Representation of the UNHCR was presented a positive opinion of the European Commission and the European Asylum Support Agency (EASO), further amendments and corrections to the Draft Law, followed by threats that the UNHCR shall give a public comment which will rule against its adoption which seem excessive, uncooperative and inadequate for an organization with which the Ministry of Interior should have a partner relationship in addressing these issues.

On the basis of the existing Law on Asylum⁷ and bearing in mind the fact that the Ministry of Interior, Border Police, Asylum Office do not have employed translators, UNHCR provides support to officers of the Asylum Office in providing translators for registration, taking requests and hearings in asylum centers in Bogovađa, Banja Koviljača and Krnjača in a manner that in the performance of listed official duties they use services of translators engaged and paid by the UNHCR.

⁷“Official Gazette of RS”, number 109/2007

It was noted by the officers of the Office for Asylum in the previous period that the translators do not perform their work in accordance with the provisions of the Law on Administrative Procedure, and that the job of a translator in the procedure is not carried out professionally and impartially. On several occasions it was noted that translators do not translate in full the testimony of the party in the proceeding, some parts of the statement of asylum seekers at its sole discretion and arbitrarily because they consider it to be superfluous and irrelevant, i.e. they do not present a translation objectively and professionally and the translation is performed with the suggestions of lawyers of civil society organizations that provide free legal assistance to asylum seekers and who participate in the proceedings as legal representatives of the party.

The stated behavior is contrary to the provisions of the Law on General Administrative Procedure (Articles 168, paragraph 1 which provides that the witness is obliged to tell the truth and not to withhold anything, which provision is applicable in accordance with Article 179, paragraph 4, and in conjunction with Article 183 of the same Law) and represents an obstacle to officers of the Asylum Office for adoption of appropriate decisions on the submitted request, since due to such indirect and biased translations they are not able to establish all relevant facts and evidence on which the request for asylum is based on.

Also, it was observed that some translators meet with persons who filed a request for asylum before the beginning of conducting of official action and they consult on the content of the statement that will be brought before the officer of the Asylum Office when taking the requests or during a hearing, and the mentioned ca particularly be seen in the fact that the statements of a large number of asylum seekers contain the same facts on which the request for asylum is based on.

Bearing in mind that Article 8, paragraph b of the UNHCR Statute provides that the High Commissioner of the UN shall encourage through concluding special agreements with governments, taking measures calculated to improve the protection of the situation of refugees and the reduction of those seeking protection, the stated acting of translators engaged by the UNHCR is certainly not in accordance with the above provisions of Article 8 of the Statute.