

**Mandates of the Working Group on Enforced or Involuntary Disappearances and the Special Rapporteur on the sale of children, child prostitution and child pornography**

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Excellency,

We have the honour to address you in our capacities as Chairperson-Rapporteur of the Working Group on Enforced or Involuntary Disappearances and Special Rapporteur on the sale of children, child prostitution and child pornography pursuant to Human Rights Council resolutions 27/1 and 25/6.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the "**Draft law on determining the facts on the position of newborn infants suspected to have disappeared in maternity hospitals in the Republic of Serbia**".

According to the information received:

On 26 March 2013, the European Court of Human Rights (ECtHR) found Serbia in violation of the European Convention on Human Rights in the lead case of *Zorica Jovanovic v. Serbia*. The case concerns the violation of Ms. Jovanovic's right to respect for her family life, due to the State's continuing failure to provide her with credible information as to the fate of her son, who allegedly died three days after his birth in a maternity ward in 1983. His body was never transferred to her, and she was never informed about the location of his alleged burial. In addition, his death was never properly investigated and officially recorded.

It is reported that hundreds of parents have reported similar incidents, in which newborn babies "went missing" following their alleged deaths in State-run hospital wards, especially in the 1970s, 1980s and 1990s. The allegations include children being stolen at birth and sold for profit to adoptive parents abroad.

In this regard, we wish to remind your Excellency's Government that under the Convention on the Rights of the Child and the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, to which Serbia is a party since 2001 and 2002 respectively, the sale of children must be unequivocally prohibited in law, and criminalised. This should include, inter alia, the

responsibility of the State to criminalize improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption.

In the case *Zorica Jovanovic v. Serbia*, the European Court found that there had been a violation of Article 8 of the Convention and ordered the payment of non-pecuniary damage, as well as costs and expenses, to the applicant. Furthermore, and in view of the significant number of potential applicants, the Court held that “the respondent State must, within one year from the date on which the present judgment becomes final [...], take all appropriate measures, preferably by means of a *lex specialis* [...] to secure the establishment of a mechanism aimed at providing individual redress to all parents in a situation such as, or sufficiently similar to, the applicant’s”.

In July 2015, a “Draft law on determining the facts on the position of newborn infants suspected to have disappeared in maternity hospitals in the Republic of Serbia” was reportedly circulated to a number of concerned civil society organisations by the Ministry of Justice of Serbia.

A number of concerns have been raised by civil society organizations, regarding the content of the draft legislation, as well as the process by which it was drafted. Firstly, it is reported that a working group was established to develop the *lex specialis*. However, while the meetings were reportedly attended by representatives of the ministries, by legal experts, as well as by representatives of NGOs and organizations of parents, the current draft does not include the recommendations made by the working group.

It is also reported that the draft law envisages a timeframe that does not include cases that occurred prior to 1970. Therefore, families wishing to find the truth concerning babies born at an earlier date, including at least one identified case from 1968, would be excluded from its application. It is reported that the reasoning behind this decision is the difficulty of investigating such cases, given the time that has elapsed since the alleged incidents took place.

In this sense, we would like to remind your Excellency’s Government of its obligations under the Declaration on the Protection of All Persons from Enforced Disappearance to conduct thorough and impartial investigations “for as long as the fate of the victim of enforced disappearance remains unclarified” (art. 13.6). Under international human rights law, enforced disappearance is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law. This can include the wrongful removal of children who are subjected to enforced disappearance, as well as the falsification, concealment or destruction of documents attesting to the true identity of such children (See International Convention for the Protection of All Persons from Enforced Disappearance, Art. 2 and Art. 25).

Another source of concern is that the draft law limits its provisions only to families who reported cases to state authorities prior to the ECtHR *Zorica Jovanovic* judgment. However, many families allegedly did not report their cases, as they did not suspect that their children had been abducted until after they had heard of the *Zorica Jovanovic v. Serbia* case. It was only then that some of these families reported similar incidents to the European Hotline for Missing Children. Furthermore, many of the affected families only addressed the hospitals unofficially after the incidents, and did not report to any further authorities when they did not receive the documents proving the death of their children. The legal reasoning that establishes this arbitrary exclusion date remains unclear.

In this respect, we would like to recall the General Comment of the Working Group on Enforced or Involuntary Disappearances on enforced disappearance as a continuous crime, which states that enforced disappearance is a unique and consolidated act, and not a combination of acts. Even if some aspects of the violation may have been completed before the entry into force of relevant legislation, if other parts of the violation are still continuing, until such time as the victim's fate or whereabouts are established, the matter should be heard, and the act should not be fragmented. The crime can be punished on the basis of an *ex post* legislation without violating the principle of non-retroactivity, for as long as the fate or the whereabouts of the disappeared person has not been clarified (See A/HRC/16/48/Add.1, para. 39).

The proposed draft law envisages the establishment of a special unit within the Ministry of the Interior, which would be authorised to implement certain investigative procedures, upon a request made by the court. However, given that no special rules have been stipulated to govern the authority of that special unit, it remains unclear what will be the scope of its authority, powers and action.

The European Court decision states that the mechanism established to provide individual redress “should be supervised by an independent body, with adequate powers, which would be capable of providing credible answers regarding the fate of each child and awarding adequate compensation as appropriate”. It is unclear from the draft law how the body proposed would meet the standard of independence required by the European Court.

As regards the evidentiary procedure, the draft law fails to stipulate any specific rules on the investigations, as well as on other phases of the proceedings. It rather attempts to regulate this subject matter through the application of rules from civil and non-contentious proceedings. This calls into question the authority of the special unit and of the Commission to exercise the broad investigative powers necessary to effectively conduct its work, as requested by the Court ruling.

In this regard, the Working Group on Enforced or Involuntary Disappearances is of the view that States should create or adapt already-established institutions to search for disappeared children and to ensure their care in the event they are found. These

institutions should serve as intermediaries between the State and the families, fulfilling not only the victim and the families' right to truth, but also the right to truth of society as a whole. These institutions should be charged with various investigative duties for determining the whereabouts of the child or his or her parent or guardian; they should also coordinate with a bank of genetic data, referring potential cases of enforced disappearances to it for DNA testing. These entities should also be charged with documentation duties, keeping up-to-date records on investigations and making them available to the families, counsel, and others with a legitimate interest in the child, unless the release of such information is detrimental to the best interests of the child. Institutions should also support the efforts of different nongovernmental organizations that are seeking the truth concerning enforced disappearance of children and their families. [...] Such institutions should complement but not replace the role of the competent authorities charged with carrying out criminal investigations. All searches should be carried out in a safe, child- and gender-sensitive and fair manner by trained professionals (See A/HRC/WGEID/98/1, General comment on children and enforced disappearances, para.25).

We would like to stress to your Excellency's Government that the search for the disappeared children should be undertaken in addition to any other related reparation measures envisaged for their families. These efforts should include the establishment of clear lines of investigation in the search of the disappeared children, who would now be in their adulthood. The search for the truth, including the obligation to investigate and establish the facts and to identify, prosecute and, where appropriate, punish those responsible, is a form of its part and parcel of the rights to truth and to justice for the victims. Procedural rights to an investigation, to truth and to justice are central to victims' perceptions of reparation, and, in some instances, the truth and justice process may in itself constitute a form of reparation (See A/HRC/22/45, para. 60).

If the alleged sale of children is confirmed, Serbia also has obligations under the Optional Protocol on the sale of children, child prostitution and child pornography, to provide appropriate assistance to victims, including their full social reintegration and their full physical and psychological recovery. The Committee on the Rights of the Child further elaborates in its General comment No.5 (2003) on General measures of implementation of the Convention on the Rights of the Child that "for rights to have meaning, effective remedies must be available to redress violations." It also insists on the need to have "appropriate reparation".

In this sense, we would also like to recall the recommendations made by the Working Group on Enforced or Involuntary Disappearances, regarding the registration of babies under a fake identity, the restitution of their identity, and their reunification with their biological families. The experience of the Working Group demonstrates that disappeared children have been often registered under false identity or other information or had their personal data altered. The effects of this are twofold: on the one hand, for the children who were appropriated, it makes it impossible to find their family and learn their biological identity—and in some cases their own nationality—and, on the other, for the family of origin, which is prevented from exercising the legal remedies to re-establish the

child's biological identity and the family ties. This situation only ceases when the truth about the identity is revealed and the child victims are guaranteed the legal and real possibility of re-establishing their true identity and, where appropriate, the family ties, with the pertinent legal consequences. The right to an identity is expressly recognized in articles 7 and 8 of the Convention on the Rights of the Child, including the right to preserve and re-establish the child's identity. In the case of enforced disappearances of children, the violation of the right to identity has particular consequences as it tends to include a series of illegal acts to conceal them and to prevent the re-establishment of the bond between the disappeared children and their families (See A/HRC/WGEID/98/1, op. cit., paras. 16-18). In its country mission report to Spain, the Working Group made specific recommendations on these matters, including: 1) to strengthen efforts to find and identify children who may have been victims of theft, enforced disappearance or identity substitution; 2) to ensure that a national DNA bank has genetic samples for all reported cases of children who may have been victims of theft, enforced disappearance or identity substitution, whether reported through administrative or judicial channels; and 3) to encourage victims' associations to facilitate the collection of samples from family members (A/HRC/27/49/Add.1, para 67(s-u)).

Finally, the proposed draft law stated that the court would freely assess the amount of fair compensation by taking into account all the circumstances of each individual case; however, it establishes in the same article that the amount cannot exceed 10,000 euros. Stipulating the maximum amount of fair compensation is in disagreement with the guarantees of fair trial and the principle of unbiased judicial apprehension. It is unclear whether the rationale of this provision is to somehow remain "consistent" with the amount of compensation awarded in the case of *Zorica Jovanovic v. Serbia*. It has been argued that, on the contrary, fair compensation should not be lower than what was awarded in that case.

We would like to remind your Excellency's Government that reparation is often interpreted exclusively in the form of compensation, namely, as a sum of money intended to compensate all forms of damages caused to victims. However, as explained by the Working Group on Enforced or Involuntary Disappearances in its general comment on article 19 of the Declaration, the obligation to provide redress to victims of enforced disappearances is not limited to the right to monetary compensation, but includes, inter alia, medical and psychological care and rehabilitation for any form of physical or mental damage as well as legal and social rehabilitation, guarantees of non-repetition, restoration of personal liberty and similar forms of restitution, satisfaction and reparation that may remove the consequences of the enforced disappearance (See E/CN.4/1998/43, para. 75). As mentioned above, measures of satisfaction for the victim should certainly include the search for the truth, including the obligation to investigate the facts and to identify, prosecute and, where appropriate, punish those responsible (See A/HRC/22/45, para. 62).

It is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention. We would therefore be grateful for your observations on the following matters:

1. Please provide any additional information and comments that you may have on the above-mentioned allegations.

2. Please provide detailed information, and where available, the results of any investigation, judicial or other inquiries carried out in relation to the allegations of enforced disappearance of newborn babies in Serbia. If no inquiries have taken place, or if they have been inconclusive, please explain why.

3. Please provide information regarding the consultation process undertaken in drafting the proposed law on determining the facts on the position of newborn infants suspected to have disappeared in maternity hospitals in the Republic of Serbia.

4. Please provide details as to how the Government intends to ensure that effective investigative powers will be bestowed to the Ministry of Interior's special unit tasked with investigating instances of disappearances of newborn babies, so that it has a proper legal mandate and authority to conduct its work, and how legal remedy measures envisioned will be fully compliant with international law, including human rights treaties ratified by the Republic of Serbia.

We would appreciate receiving a response within 60 days.

Your Excellency's Government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

Please accept, Excellency, the assurances of our highest consideration.

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