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## BOSNIA AND HERZEGOVINA

## HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

**Introduction**

The Republic of Bosnia and Herzegovina, which is one of the former Yugoslavia successor states, declared its sovereignty in October of 1991, and then on March 3, 1992, declared its independence from Yugoslavia. Bosnia and Herzegovina became a party to the Hague Convention on the Civil Aspects of International Child Abduction on December 1, 1991, after ratification of the Convention by the Bosnian legislature *Skupstina* on September 27, 1991.<sup>1</sup> Through a letter received by the depositary, Bosnia declared itself to be bound by the Convention since August 23, 1993. Bosnia and Herzegovina is a non-Member State of the Convention on the Civil Aspects of International Child Abduction, because it did not participate in the Hague Conference on Private International Law at the time of its 14<sup>th</sup> Session as required by article 37 of the Convention, and in Bosnia the Convention applies as a result of ratification. Because no objections were received from the contracting states, it appears that Bosnian accession has been accepted by all parties to the Convention. Belarus, Costa Rica, Iceland, Georgia, Moldova, Turkmenistan, and Uzbekistan issued separate statements on acceptance of Bosnian participation in the Convention.

**I. Domestic Laws and Regulations Implementing the Hague Convention**

Bosnia and Herzegovina acceded to the Hague Convention with the purpose of international recognition and improving its independent image on the international arena. The issue of parental child abduction was an acute problem in post-socialist Yugoslavia with active ethnic migration, porous borders, and widely accepted inter-ethnic marriages in the pre-civil war period. Bosnia's accession to this Convention did not directly affect the development of the national legal system, because amendments to domestic civil and criminal legislation and reform of judicial institutions were conducted with the purpose of fulfilling obligations accepted by Bosnia and Herzegovina by joining European institutions and most of the European legal instruments. The Constitution of Bosnia and Herzegovina was adopted as an annex of the Dayton Peace Agreement and came into force with its signing in Paris on December 14, 1995. Although the Constitution provides for the priority of international obligations over domestic regulations and states that concluded international agreements have direct impact and do not require the adoption of additional implementing legislation,<sup>2</sup> the implementation of the Convention before 1997 was complicated by military conflicts and the partitioning of the Republic along ethnic lines.

The Constitution mentions the right to family life among major rights guaranteed to citizens of Bosnia and Herzegovina; however, it does not serve as a legislative basis for legislation in this field. Family law issues are included in the jurisdiction of two Bosnia and Herzegovina entities - the Bosniak-Croat Federation of Bosnia and Herzegovina and the Bosnian Serb-led Republika Srpska. Internationally supervised Brcko District is governed by the Sarajevo authorities and laws adopted by the national *Skupstina* are directly applied there. Each entity has its own Family Law. However, there are no major differences between them since all laws are modeled on the Family Law of the former Socialist Union Republic of Bosnia and Herzegovina. Bosnian family legislation regulates the rights and obligations of

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<sup>1</sup> SLUZHBENI LIST [Official gazette of Bosnia and Herzegovina], No. 45/91.

<sup>2</sup> CONSTITUTION OF BOSNIA AND HERZEGOVINA, signed Dec. 14, 1995, art. 14.

family members, marriage, and marital relations; relations between parents and children; adoption; guardianship; support; and “other forms of social and legal protection of the family.” Both laws contain the identical broad definition of family, as a community of parents, children, and other relatives. Family Laws promote the equality of parents regardless of their nationality and protects the interests of all family members without any preferences. Under Family Laws, only civil marriages between two persons of different sexes registered according to the procedure established by the state are recognized. Individuals under 18 years of age are considered juveniles. Family laws of both entities are applicable legal instruments in all parental abduction cases.

Ratification instruments for the Convention on Civil Aspects of International Child Abduction assign the Ministry of Civil Affairs and Communications of Bosnia and Herzegovina to be a Central Authority with the responsibilities prescribed in article 7 of the Convention. According to the implementing legislation, the Central Authority is obliged to provide general information to the applicant; however, it is not clear what kind of information and/or services are available. Also there is no information about further designation of authorities in territorial components forming the state of Bosnia and Herzegovina.

Another legal act related to aspects of parental abduction is the Law on Travel Documents.<sup>3</sup> This legislation is intended to serve as the deterrent to the potential abductor. The law states that the petition for the issuance of documents allowing travel abroad for a person under 18 years of age should be submitted by the minor’s parent with written consent of the other parent or child’s legal representative. The law enumerates exclusions from this rule, such as unknown residence of the other parent, impossibility to reach him by passport authorities, among others. As a rule, juveniles are listed in the parent’s passport. Persons who are 16-18 years of age may have their own passport for individual travel.

## **II. Domestic Laws Regarding Child Abduction and Parental Visitation**

### **A. Child Abduction**

The Criminal Codes of all components of Bosnia and Herzegovina contain provisions punishing the abduction of minors regardless of the reasons and not applying measures for the protection of juveniles.<sup>4</sup> All three Codes say:

Whoever takes or keeps a juvenile away from the parents, adoptive parents, guardian or person/institution to whom/which juvenile has been entrusted, who holds or prevents him from being with the person who is entitled to him, or who prevents the execution of a court decision entrusting the child to somebody should be punished by imprisonment.

The term of imprisonment varies from 1 to 2 years depending on the territory where this crime was committed. Stricter punishment is prescribed if the abduction was committed for the purpose of acquiring material gain or for other low motives, or has caused serious detriment of health, education, or schooling of the juvenile. In all cases of abduction the court is obliged to order the submission of the abducted juvenile to the person or institution designated to take care of him. The child’s consent, regardless of his understanding of the significance of the unlawful activity, does not eliminate the criminal responsibility of the abductor. The voluntary surrender of the juvenile to a person or institution to which

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<sup>3</sup> SLUZBENI LIST, No. 4/97 & 1/99.

<sup>4</sup> *Id.*, No. 20/98, 6/00 & 31/00.

the juvenile had been entrusted may be a basis for acquittal. The legal protection of juveniles and enforcement of juvenile related court rulings is provided by criminal law also. Taking measures preventing educational and other measures pronounced by the court or other institution in charge of protecting juveniles is considered a crime and is punishable by imprisonment for up to 1 year.

Parental abduction is one of the categories of disappearance of children under Bosnian police classification. Although it is treated as a criminal offense of abduction of a juvenile, it is not included in the list of criminal offenses, which are recognized as felonies threatening child's health and safety, and therefore requires less urgent and intensive search and rescue activities. Existing criminal procedure does not provide for the possibility to announce a child abducted by a parent as a missing person publicly. Because Bosnian Central Authority under the provisions of the Convention is the Ministry for Civil Affairs dealing mostly with the issues of social security and public welfare, there is weak cooperation between the Central Authority and police in case of international parental abduction of children.

## **B. Parental Visitation**

The major principle of Bosnian Family Law is that decisions relating to a minor should be based on his best interests. No specific act regulates issues related to parental visitation. Under Family Laws of Bosnian Constituent Components, both parents have equal rights and duties in regard to their children. In the case of divorce, however, the court will decide the issue of custody over children. Even in cases where spouses have reached an agreement over this issue, the court must in every case reconsider whether such an agreement is in the best interest of the child. To that end, the court will take into account the report of the social service competent to make suggestions on custody over children and to suggest certain evidence that could be necessary to reach a proper decision. In practice, however, it is very rare that the social service gets really involved in the way in which the Law anticipates it. A survey of 100 cases in one municipality in Sarajevo has shown that, only in five cases, the social service replied to the court request to get involved in the proceeding.<sup>5</sup>

It is up to the court to decide that one parent has custody over all children; that some children remain with the mother and others with the father; or that a third person or an institution gets custody over the children if that would be in their best interest. In deciding on the best interest, practice shows that most often the court takes into account the children's age and health status, family, economic and housing situation, moral qualities of parents and their ability to properly raise children, as well as the emotional attachment between a parent and children. The will of a child is taken into account if a child is capable of expressing it. In a recent case of regarding the incoming return application under the provisions of the Convention, Bosnian court on the basis of article 13 of the Convention refused the application citing the objections of a child under the age of 5. That was the only case in the Convention's application where the objections of a child under the age of 5 were considered.

A parent who does not have custody over a child does not exercise parental rights, but has a right to maintain contacts with a child, follow the development of a child, and influence that development. However, the details on these contacts are not part of the court's decision, which often creates problems in practice. It is not rare that parents use children in order to harm a former spouse by preventing contact and by excluding the former spouse from decisions over the child's development.<sup>6</sup>

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<sup>5</sup> South Eastern European Women's Legal Initiative. Family Law Report: Bosnia & Herzegovina, available at: [www.seeline-project.net/FamilyLaw.htm](http://www.seeline-project.net/FamilyLaw.htm).

<sup>6</sup> Women's Legal Services Network. Family Law Project. 2002 World Report: Bosnia & Herzegovina at [www.naalc.org.au](http://www.naalc.org.au).

### III. Court System and Structure - Courts Handling the Hague Convention

The structure of the judicial system in Bosnia and Herzegovina is determined by the Law on Court.<sup>7</sup> The judiciary is built upon the courts of general jurisdiction, which rule in all disputes except in those where the law explicitly determines jurisdiction of another court. There are no special family courts in Bosnia and Herzegovina. Family relations, as defined in the Family Law, fall under the jurisdiction of regular courts of the first instance, that is, municipal courts. There are 10 cantonal courts in the Federation, plus a number of municipal courts; the Republika Srpska has five municipal courts. Courts of general jurisdiction are organized hierarchically in three instances and are divided into entities. Lower courts are municipal courts, which serve as courts of first instance in civil and criminal cases. Most of the cases are tried by a single professional judge. Single judges, or panels of three judges, depending on the case administer cases in cantonal courts, which are almost exclusively second instance courts and courts of appeal. Each entity has a Supreme Court, which is the court of full jurisdiction with respect to court decisions and it can void, confirm, or revise them. The highest court in Bosnia and Herzegovina is the State Court, which consists of nine judges and three divisions - administrative, appellate, and criminal. This Court has jurisdiction over cases related to national level law and appellate jurisdiction over cases initiated in the entities.

### IV. Law Enforcement System

Cases of parental child abduction rarely are brought to the courts. Bosnian courts have relatively little experience in dealing with the application of international legal norms and may have problems with their enforcement. It appears that courts favor those Bosnian nationals who reside in the territory of Bosnia and Herzegovina; however, the small number of cases is not enough to draw significant conclusions. During the first 10 months of 2003 (most recent data available), the responsible authorities of Bosnia and Herzegovina received three incoming return petitions under the Convention.<sup>8</sup> No incoming access or outgoing return applications were filed. In applications to Bosnia all the taking persons were male and had Bosnian nationality, which contradicted to the global trend. There was one voluntary return and two judicial refusals. Both applications were refused on the basis of article 13 of the Convention, which requires taking into consideration the consent and objections of the child in question. In one case, the opinion of a child who was under the age of 5 was used as a ground for refusal. Court rulings were not appealed. Although all three applications were resolved quickly in just over a 3 week period, this fact does not mean that the enforcement of the Convention is free from difficulties. The Ministry of Civil Affairs and Communications, which is designated to be the nation's Central Authority, lacks experience in dealing with the legal resolution of family related disputes and the cooperation with police and judicial authorities is almost nonexistent.<sup>9</sup>

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<sup>7</sup> *Supra* note 1, No. 24/02.

<sup>8</sup> HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW. Convention Status Report, *at* <http://www.hcch.net/e/conventions/menu28e.html>, visited Nov. 24, 2003.

<sup>9</sup> *Id.*

## **V. Legal Assistance Programs**

Legal assistance in Bosnia and Herzegovina could be received through private attorney offices or legal consulting firms. Fees for legal services are determined by mutual agreement. *Pro bono* work is not widely practiced by attorneys. The Sarajevo University and some other provincial law schools are in the process of organizing legal clinics. In 1993, Bosnia and Herzegovina ratified the Convention on International Access to Justice of 1980. Under this Convention, nationals of any contracting state are entitled to legal aid for court proceedings in civil and commercial matters in each contracting state on the same conditions, as if they themselves were nationals and habitually resident in that state. As a contracting state, Bosnia and Herzegovina is bound to carry out necessary administrative measures or to take such steps as are necessary to obtain the determination of applications for legal aid by a competent authority.

The Ministry of Civil Affairs and Communications remains, probably, the best source of assistance and information; however, the Ministry's assistance can be rather administrative. There is no webpage, brochure, or similar materials containing the information or advice on measures available to parents prepared by the Ministry.

## **VI. Conclusion**

The Hague Convention on Civil Aspects of International Child Abduction prescribes basic principles of resolution to disputes in regard to the parental abduction of children. In Bosnia and Herzegovina principles of the Convention helped to amend national legislation and to reform the judiciary, although the Bosnian legal system has not yet elaborated national norms that correspond to the provisions of the Convention. The national judiciary continues to favor Bosnian citizens. The cooperation of Central Authorities in the Member States with the Ministry of Civil Affairs and Communications of Bosnia and Herzegovina is not as effective as it could be expected, because of the lack of cooperation between this administrative agency, courts, and enforcement authorities, and the difficulties with the access to information on how to apply the Convention's provisions. At the same time, the Convention is of great significance for Bosnia and Herzegovina, whose citizens have the right and possibility of using an internationally recognized mechanism for the return of a child in the case of abduction and the guarantee of the protection of the rights of all interested parties if the child was taken to one of the countries that participates in the Convention.

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