

**Protection of Abducting Mothers in Return Proceedings:
Intersection between Domestic Violence and Parental Child Abduction ('POAM')**



SERBIAN REPORT

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1. Return proceeding in the Republic of Serbia

1.1. Legal framework

In terms of international parental child abduction, the Republic of Serbia is a Contracting Party to the 1980 Hague Child Abduction Convention¹ as one of the successor States to the former Socialist Federal Republic of Yugoslavia, which became a Party to the Convention on 1 December 1991.² In 2016, Serbia also acceded to the 1996 Hague Children Protection Convention.³ Meanwhile, in 2001, Serbia ratified the 1980 European Convention on the recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children (Council of Europe)⁴, which also can be set into motion in those child abduction cases where the child's removal or retention was in breach of a judicial decision on custody rights. In addition, Serbia is a Contracting State to the 1989 UN Convention on the Rights of the Child⁵ and

¹ The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, *Official Gazette of the SFRY - International Treaties*, 7/91.

² In the letter received by the Ministry of Foreign Affairs of the Netherlands (as a depositary) on 26 April 2001, the Federal Republic of Yugoslavia (FRY from 1991 to 2003), known as the State Union of Serbia and Montenegro from 2003 to 2006, declared itself bound by the 1980 Child Abduction Convention. Following the dissolution of the latter State Union (2006), the Republic of Serbia was internationally recognized as the successor to the legal personality of the State Union of Serbia and Montenegro.

³ The Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children. *Official Gazette of the RS - International Treaties*, 20/2015.

⁴ European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children. *Official Gazette of the SRY - International Treaties*, 1/2001.

⁵ *Official Gazette of the SFRY - International Treaties*, 15/90 and *Official Gazette of the SRY - International Treaties*, 4/96 i 2/97.

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the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).⁶

Regarding the Serbian national legislation, child abduction cases are subject to the 2005 Family Act, the Non-Contentious Proceedings Act⁷, and the Enforcement and Security Act.⁸ The main national source of Private International Law is the 1982 Act on the Resolution of the Conflict of Laws with Regulations of Other Countries (hereinafter: the 1982 PIL Act).⁹

However, it should be noted that the Serbian PIL has been at the crossroads in the last six years. After the dissolution of the common State, the 1982 PIL Act was one of the rare Yugoslav legislative acts which was taken by all the newly formed States. Yet, whereas most of the former SFRY countries enacted their national PIL acts, the 1982 PIL Act has remained in force only in the Republic of Serbia and in the Federation of Bosnia and Herzegovina (B&H). The Republic of Slovenia enacted the new PIL Act in 1999. The Republic of North Macedonia replaced the 1982 PIL Act with the new one in 2010, followed by the Republic of Montenegro in 2014, and the Republic of Croatia in 2019. The *ratio* for the hesitation of the B&H Federation to enact the new PIL act is conceivable being related to the jurisdictional issues. It opens the dilemma whether the new PIL Act should be enacted at the federal level or at the level of two entities: the Serbian Republic (*Republika Srpska*) and the Federation of Bosnia and Herzegovina.¹⁰

In the case of Serbia, the situation is rather vague. In 2011, the Serbian Ministry of Justice appointed the official Working Group for drafting the new Private International Law Act. The Working Group finished its work in 2014, after holding two

⁶ *Official Gazette of the Serbia and Montenegro - International Treaties*, 9/2003, 5/2005, 7/2005 and *Official Gazette of the RS - International Treaties*, 12/2010 i 10/2015.

⁷ *Official Gazette of the SRS*, 25/82 i 48/88 and *Official Gazette of the RS - International Treaties*, 46/95, 18/2005, 85/2012, 45/2013, 55/2014, 6/2015 and 106/2015.

⁸ *Official Gazette of the RS*, 106/2015, 106/2016, 113/2017 and 54/2019.

⁹ *Official Gazette of the SFRY*, 43/82 i 72/82, *Official Gazette of the SRY*, 46/96 and *Official Gazette of the RS*, 46/2006.

¹⁰ V. Šaula. Da li je došlo vrijeme za donošenje novih zakona o međunarodnom privatnom pravu u Bosni i Hercegovini (Is it a time to enact the new legislative acts on Private International Law in Bosnia and Herzegovina), *Godišnjak Pravnog fakulteta Univerziteta u Banja Luci*, Vol. 33(2011), pp. 91-100.

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public hearings and receiving the positive opinion of the Council of Europe's experts. However, the 2014 Draft PIL Act has been kept in a drawer of the Ministry of Justice ever since, in spite of the fact that it gained the attention of the PIL scholars worldwide as its translation into English was published in the prominent Encyclopaedia of Private International Law (2017).¹¹ In this national report, the 2014 Draft PIL Act provisions have been taken into consideration in the matter of civil protection against domestic violence since they introduce the special regime in terms of the international jurisdiction, applicable law and the recognition and enforcement of civil protection measures (CPO).

1.2. Implementation of the 1980 Child Abduction Convention

It is rather difficult to draw a general straightforward conclusion on the implementation of the 1980 Child Abduction Convention in Serbia due to the lack of the concentration of jurisdiction which would ensure that only specific courts have jurisdiction to decide on the return of the child. As a consequence, a total of 66 Serbian courts could decide in the first instance cases involving the 1980 Child Abduction Convention.

The concentration of jurisdiction was proposed in the 2013 Draft Act on the Civil Protection of Children from Wrongful Cross-border Removal and Retention (hereinafter: Draft CPC Act).¹² This Act authorizes only four largest municipal courts in Serbia to decide in the child abduction cases.¹³ The concentration of jurisdiction is in line with the recommendation of the Special Commissions of the Hague Conference on Private International Law¹⁴ and the decisions of the European Court for Human Rights

¹¹ Encyclopaedia of Private International Law (eds. J. Basedow et al), Cheltenham, UK: Edward Elgar Publishing, [2017].

¹² The Working Draft of the CPC Act (2013) is available at <https://arhiva.mpravde.gov.rs/lt/news/vesti/radna-verzija-zakona-o-gradjanskopravnoj-zastiti-dece-od-nezakonitog-prekogranicnog-odvodjenja-i-zadrzavanja.html>

¹³ According to Art. 27 of the Draft CPC Act, those four courts would be the Municipal Court in Belgrade, the Municipal Court in Niš, the Municipal Court in Novi Sad, and the Municipal Court in Kragujevac.

¹⁴ The Seventh Meeting of the Special Commission on the Practical Operation of the 1980 Hague Child Abduction Convention - October 2017, Preliminary Document No. 11 A of February 2018 - revised, p. 5.

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(hereinafter: ECtHR) which sanctioned the delays in the return proceedings.¹⁵ In fact, the Draft CPC Act was initially prepared as an implementation act regarding the 1980 Child Abduction Convention, even though the Serbian legal system applies the monistic theory. Based on the statistical data from 2008 (taken in 2010 when the work on the Draft CPC Act began), the delays in the return proceedings were noted¹⁶ as well as the hesitation of judges concerning the type of procedure which should be applied in the adjudication proceeding.¹⁷ In its decision on this case, the Serbian Supreme Court of Cassation took the stand that the proceedings on the return of the wrongfully removed or retained children are to be conducted as non-contentious proceedings.¹⁸ The Draft CPC Act regulates in detail the proceedings on the return, the issue of the permitted legal recourses and time-limits, mediation, hearings, the enforcement proceeding, the role of the Social Care Centre, etc. Unfortunately, this act has had the same fortune as the 2014 Draft PIL Act.¹⁹

The research conducted for the purposes of the POAM project involved the incoming and outgoing return requests submitted in 2016 and 2017 to (or via) the Central Authority of Serbia (Ministry of Justice). On the basis of the collected data, there is a notable increase of the outgoing requests. In 2016 and 2017, there were 20 outgoing requests in comparison with the 31 incoming requests. Most of the incoming requests were submitted from Bosnia and Herzegovina (4), Germany (3) and Croatia (2). In the outgoing cases, the largest number of requests was submitted to the Central

¹⁵ *Ignaccola-Zenide v. Romania* (Application 3169/96), (2001) 31 EHRR 7, *Sylvester v. Austria* (Application 36812/97 and 40104/98), (2003) 37 EHRR 17, *Monory v. Hungary and Romania* (Application 71099/01), (2005), *Neulinger and Shuruk v. Switzerland* (Application 41615/07), (2010), *X v. Latvia* (Application 27583/09), (2011), *Shaw v. Hungary* (Application 6457/09), (2011), and *B v. Belgium* (Application 4320/11), (2012).

¹⁶ The data on this matter were available in one case only (in 2008) and it took the court 105 days to decide on the return.

¹⁷ Statistical data for 2008 available at <https://arhiva.mpravde.gov.rs/lt/news/vesti/otmica-dece-gradjansko-pravni-aspekti-haska-konvencija.html>

¹⁸ Supreme Court of Cassation Decision Rev. 2239/10 of 24.02.2010, delivered at the session of the Civil Division of the Supreme Court of Cassation on 13.09.2010.

¹⁹ On the Serbian national report in 2014 see S. Marjanović: *Some open issues in the application of the 1980 Child Abduction Convention in the Republic of Serbia*, In: *Private International Law in the Jurisprudence of European Courts – Family at Focus* (ed. M. Župan), Faculty of Law University Josip Juraj Strossmayer, 2015, pp. 257-272.

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Authorities of Germany (8) and Austria (4). The increase of the outgoing cases is most likely the consequence of migrations towards EU Member States. This presumption could be confirmed by the analysis of the abduction type. In the outgoing cases, the prevailing type of abduction is wrongful removal of children.²⁰ Wrongful retention of children prevails in the incoming cases.²¹ In general, the cases involving wrongful removal and retention of children are almost equally present in the incoming and the outgoing cases alike.²²

According to the collected data, the custody rights were usually grounded on the statutory law (in cases where the parents were married at the time of wrongful removal or retention) or on the judicial decision.²³ The access rights were mostly breached in the outgoing cases.²⁴ The analysed cases did not include the dilemma on the access rights as *ne-exeat* orders. In the Serbian family law, the access rights expressly include, *inter alia*, the right of the parent who exercises this right to decide on the change of the child's domicile.²⁵ The interpretation of this type of the access rights (giving the right of veto to the parent enjoying the access right) as *a joint custody right* for the purposes of the 1980 Child Abduction Convention, was taken in the *Abbott vs. Abbott* case and later on in the ECtHR's decision in famous *Neulinger and Shuruk v. Switzerland* case. This interpretation corresponds to the legal nature of access rights in the Serbian family law.²⁶ The parent who is entitled to decide on the change of domicile has to decide on

²⁰ In the outgoing cases, there were 12 wrongful removal cases as compared to 7 such cases in the incoming cases.

²¹ In 11 incoming cases in comparison with 7 outgoing cases. In the incoming cases, there were 11 wrongful retention cases as compared to 7 such cases in the outgoing cases.

²² 19 cases of the wrongful removal in total.

²³ The parents were married at the relevant moment in 7 incoming cases and in 10 outgoing cases. The judicial decision served as the ground in 3 incoming cases and in 11 outgoing cases.

²⁴ In 17 outgoing cases comparing to 4 incoming cases.

²⁵ Art. 78 paras. 3 and 4 of the 2005 Family Act envisages that the parent who do not exercise the rights of custody has the right and the duty to maintain personal relations with the child, and to decide jointly with the parent who exercise sole custody on the issues that significantly affects the child's life. Issues that significantly affect the life of the child, within the meaning of this Act, are in particular: the education of the child, undertaking major medical interventions over the child, changing the domicile of the child and disposing of the property of the child of great value.

²⁶ The partial deprivation of access rights may include the right to decide on the change of the child's domicile. In one case from 2017, the father was deprived of the rights to decide on the issuance of the child's passport, health care insurance card, school enrolment, travels abroad, and the change of the

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the change of habitual residence of the child. Like the 1982 PIL Act, the 2005 Family Act recognizes only the notions of domicile and residence but not the concept of habitual residence.

The common profile of the child shows that the he/she is usually a female child, ranging 5-10 years of age. This profile is common for both incoming and outgoing cases.²⁷ In the outgoing cases, most of the children have Serbian nationality, but there was also a small number of cases involving children with dual nationality.²⁸

In 22 outgoing cases and 13 ingoing cases, the mother was a taking-parent.²⁹ The profile of the typical taking-parent corresponds to the most common profile in the Global Report.³⁰

In respect of the return proceedings, as previously noted, the Non-Contentious Proceedings Act has to be applied. However, the lack of the concentration of jurisdiction still results in procedural errors.³¹ Furthermore, the provision of Article 16 of the 1980 Child Abduction Convention is not strictly applied in all cases.³²

child's domicile. The deprivation was a result of the fact that the father had moved to live abroad although the court failed to determine the country of his new residence. Judgment of the First Municipal Court in Belgrade, 1П2 No. 652/17 of 01.11.2017.

²⁷ The return of daughters was requested in 21 outgoing cases while the return of sons was requested in 18 outgoing cases. Daughters were wrongfully removed or retained in 11 incoming cases. The child was 5 to 10 years old in 28 outgoing cases and in 15 incoming cases.

²⁸ The children had Serbian nationality in 34 outgoing cases; they had dual nationality in 5 cases (they were the nationals of Serbia/Austria; Serbia/Bosnia and Herzegovina; Serbia/France; Serbia/Germany).

²⁹ The fathers appear as the taking-parent in 16 outgoing cases and in 5 incoming cases.

³⁰ In the latest available Global Report (2017), the mother appears to be a taking-parent in 73% of cases. The Seventh Meeting of the Special Commission on the Practical Operation of the 1980 Hague Child Abduction Convention - October 2017, p. 3.

³¹ The collected data show that in one case the court applied the procedural rules of international legal assistance cases (more specifically, in case where the 1965 Hague Service Convention is applicable); Rešenje Osnovnog suda u Novom Pazaru, 10 Pom. UGH 1 br. 1/17 od 06.03.2017. (Decision of the Municipal Court in Novi Pazar, 10 Pom. UGH 1 br. 1/17 of 06.03.2017). Yet, this case is certainly not the only one because the Serbian Central Authority does not have all the data on the abduction cases.

³² In the case decided by the Municipal Court in Niš, the mother who wrongfully retained her 3-year-old child in Serbia instituted proceedings on divorce and parental responsibility in 2015 (before the father lodged the return request). When the return request was lodged, the divorce proceeding was pending. At first, the return proceeding was carried out as a contentious proceeding, but, upon the mother's attorney initiative, the judge finally applied the provisions of the Non-Contentious Proceedings Act. The judge who conducted the divorce proceeding and the (ancillary) parental responsibility proceeding did not stay the proceeding, although the mother's attorney made such a request. Rešenje Osnovnog suda u Nišu, R3 284/16 od 16.12.216. (Decision of the Municipal Court in Niš, R3 284/16 of 16.12.216).

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Regarding the opinion of the child, in those cases where the data was clear, the child's opinion was taken into consideration.³³ However, the relevant Social Care Centre, which has to be involved in all the proceedings concerning the protection of the children's rights and parental responsibility disputes³⁴, observes and examines the child's relations with the parents in the same manner as it does in the proceedings on the merits of the case (parental responsibility). On the one hand, the Social Care Centre officers do not receive sufficient special training for determining the best interest of the child in the context of the 1980 Child Abduction Convention. Likewise, the training should include the difference between the best interest of the child in parental responsibility cases and in child abduction cases. On the other hand, the courts do not specify (as much as it is necessary) the issues which the Social Care Centres should address and thoroughly examine in the proceeding on the return of the child.

2. Protection of domestic violence victims in Serbian law

2.1. Legal framework

The Serbian legislator stands on the point of the so-called "zero tolerance" towards domestic violence. This approach has been confirmed in the Serbian jurisprudence. In that respect, the courts took the view that "protection measures need to be imposed even when violence has not developed into more serious forms, as the

³³ The child's opinion was taken into account in 7 outgoing cases and in 4 incoming cases. The child's interaction with the parents was observed by the Social Care Centre in 15 incoming cases, but it is not clear whether the child was consulted about his/her return to the State of his/her habitual residence.

³⁴ Art. 270 of the 2005 Family Act.

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legal definition of domestic violence covers all potential forms of violence."³⁵ This legal standpoint could be analysed from the aspect of substantial and procedural family law, criminal law, and misdemeanour law. As we will see, these aspects of prevention or repression are not always sufficient in cross-border cases. Therefore, cross-border cases of domestic violence have to be regulated by the instruments of Private International Law. Currently, as there is a lack of special provisions in the 1982 PIL Act, the 2014 Draft PIL Act envisages specific rules. Bearing in mind that Serbia is the candidate State for the EU membership, in terms of the recognition of the foreign civil protection orders, the 2014 Draft PIL Act heavily inclines to the provisions of the EU Regulation on mutual recognition of protection measures in civil matters (hereinafter: the CPO Regulation).³⁶ Finally, the Republic of Serbia is a State Party to the Istanbul Convention on preventing and combating violence against women and domestic violence.³⁷

2.2. Civil protection of domestic violence victims - Family Law aspects

³⁵ "In the judgment of the Fourth Municipal Court in B. P no. ... of 15.05.2009. the court has dismissed the claim of the plaintiff AA, by which it proposed that the defendant BB, in the period from 10.02.2007. until 03.05.2007. restricted the plaintiff's freedom of movement and communication with third parties, thereby committing the act of domestic violence referred to in Article 197, paragraph 2(5) and (6) of the Family Act, and prohibiting him from approaching the plaintiff at 500 m, as well as access to the place nearby the place of the plaintiff's residence...as well as any further harassment of the plaintiff in any way by physical or verbal means, and to determine these measures for a period of one year...the reasons given by the first instance court that the conduct of the defendant despite being impermissible cannot be characterized as an act of violence, and that the plaintiff was not a victim of domestic violence and not endangered of further perpetration are unclear and contradictory. Therefore, the plaintiff's appeal had to be upheld...In the retrial, the first instance court will act on the objections made in this decision and re-evaluate whether the defendant's conduct has compromised the plaintiff's physical integrity, mental health or serenity, especially with regard to the provisions of Article 197, paragraph 2(6) of the Family Act...". The Judgment of the Court of Appeal in Belgrade, Gž2. 366/2010 of 17.05.2010. See also Judgment of the Court of Appeal in Belgrade, Gž2 71/2017 of 23.02.2017: "No legal or social norms allow domestic violence...The defendant's explanation in the lawsuit and in the appeal of the motives that led to his behaviour towards the plaintiff...is also without prejudice to a different decision in this legal matter. This is because the motives of the former partner for which they mutually express any form of violence do not make such violence justifiable or permissible, and the society must have zero tolerance to all forms of violence."

³⁶ Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters. *OJ L* 181 of 29.6.2013.

³⁷ *Official Gazette of the RS - International Treaties*, 12/2013.

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The 2005 Family Act defines domestic violence as conduct that threatens one family member's physical integrity, mental health or the serenity of another family member.³⁸ Furthermore, the legislator gives *exempli causa* the types of the conduct which are to be considered domestic violence:

1. causing or attempting to cause bodily harm;
2. causing fear by threatening to kill or cause bodily harm to a family member or his/her close person;
3. coercion to sexual intercourse;
4. reference to sexual intercourse or sexual intercourse with a person who has not attained the age of 14 or with a vulnerable person;
5. restricting the freedom of movement or communication with third parties;
6. insults, and any other insolent, reckless and malicious behaviour.³⁹

The 2005 Family Act prohibits all types of domestic violence: psychological, physical, sexual, and financial, as long as they affect the integrity and serenity of the victim.⁴⁰

The notion of a domestic violence victim as the perpetrator's family member is defined in broad legal terms in order to cover all possible family and quasi-family relations that the perpetrator usually takes advantage of in order to harass the victim.⁴¹ The 2005 Family Act envisages that the family members (as direct victims) include *numerus clausus*:

1. spouses or ex-spouses;
2. children, parents and other blood relatives (next-of-kin), relatives by affinity or adoption, or persons bound by foster care;
3. persons who live or have lived in the same family household;
4. extramarital partners or former extramarital partners;

³⁸ Art. 197 para. 1 of the 2005 Family Act.

³⁹ Art. 197 para. 2 of the 2005 Family Act.

⁴⁰ For example, in one case, the court found that the limitation of electricity consumption in the context of other psychological harm constitutes domestic violence. Judgment of the Court of Appeal in Belgrade, Gž2 87/2015 of 25.2.2015.

⁴¹ The 2005 Family Act especially takes into account the frequency of controlling mechanism used by the former partners after the dissolution of the relationship. For more on this issue, see: D. Kurz, *Violence against Women or Family Violence?*, Gender Violence, New York, p. 445 et seq.

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5. persons who have been or are still in an emotional or sexual relationship, or who have a common child or a child who is expected to be born even though they have never lived in the same family household.

Although the cohabitants have to be of the opposite sex,⁴² in case of persons who have been, or still are in an emotional or sexual relationship, the perpetrator and the victim can be of the same sex. Hence, the civil protection against domestic violence is currently the only right guaranteed in the Serbian law to the same-sex partners.⁴³ It is not necessary that the perpetrator and the victim have lived together; the previous relationship (emotional or sexual) is equally sufficient.

The family law theory considers that the notion of "the close person" to the direct victim is not necessarily constrained to his/her relatives, but it is rather flexible and subject to the interpretation of the jurisprudence.⁴⁴ On the other hand, the available data suggests that the courts have had an opportunity to interpret the notion of a family member, but rarely the notion of the other close persons.⁴⁵ In those cases where violence was simultaneously aimed at the perpetrator's family member and the victim's close person, the court dealt only with the violence against the family member while taking into consideration the fact that the other victim of violence was another person close to the victim.⁴⁶ Still, it should not be deemed that the notion of "the close person" could not include close friends of the direct victim or other close persons.⁴⁷

⁴² Art. 4 para. 1 of the 2005 Family Act.

⁴³ M. Draškić, *Porodično pravo i prava deteta* (Family Law and the Rights of the Child), Beograd, 2011, pp. 58-59.

⁴⁴ *Ibid*, p. 57.

⁴⁵ Judgment of the Supreme Court of Cassation, Kzz 52/2012 of 27.06.2012; Judgment of the Supreme Court of Cassation, Kzz 640/2016 of 27.5.2016; Judgment of the Supreme Court of Cassation, Kzz 758/2017 of 12.9.2017.

⁴⁶ In this case, the court found that the violence was mutual. The plaintiff was a woman whose (extramarital) relationship with the defendant ended, but the plaintiff kept harassing the defendant and his new partner on a regular basis. The harassment was performed by telephone calls to the defendant and his new partner, including cursing and insults (calling him a madman...), stalking the ex-partner and attempt to damage his vehicle in front of the defendant's place of residence, spitting on the defendant, stalking the defendant's current partner JJ outside her house (where the defendant started a joint household in October 2016) and her mother NA, insulting them all (calling the defendant, his partner and her mother a whore), and continuing to make occasional cell phone calls to the defendant and his partner... The defendant expressed violence in the form of harassment by calling the plaintiff by telephone, arriving at the plaintiff's office and threatening her in the presence of other employees, stalking the plaintiff with his vehicle, intercepting the plaintiff with his vehicle, disabling her freedom of

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In regard to the civil protection orders which are envisaged in the 2005 Family Act, the court can impose one or several measures which may aim to ban completely or to restrict the personal relations between the perpetrator and the victim. The Family Act prescribes five measures:

1. an (eviction) order against the offender, who is obliged to vacate the family house, regardless of the right of ownership or lease of real estate;
2. a protective order in favour of the victim to move into a family house, regardless of the right of ownership or lease of real estate;
3. a restraining order, prohibiting the offender to approach a family member at a certain distance;
4. prohibition of access to the area near the family member's place of residence or workplace;
5. prohibition of further harassment.

The eviction order against the offender to leave the family house and the protective order in favour of the victim to move into the family house are aimed at temporary ban of the personal relations between the perpetrator and the victim (eviction order)⁴⁸ or protection of the victim who was forced to move out (protection

movement, intimidation by threatening and insulting her in various places, even in the presence of a common daughter, and using physical violence by striking, kicking and drowning her (the incident in front of the bakery at about 7.00 pm on 22 October 2016, when the defendant repeatedly struck the plaintiff on the head several times with his fist; when the plaintiff raised her hand to protect her head, the defendant choked her, kicked her in the lower abdomen, and he moved away from her only when the plaintiff managed to yell "help". Judgment of the Court of Appeal in Belgrade, Gž2 No. 71/2017 of 23.02.2017.

⁴⁷ In one case, the court found that harsh and reckless behaviour toward the handymen engaged in the repairs of the victim's home along with harassment of the victim constitutes domestic violence. Judgment of the Court of Appeal in Belgrade, Gž2 87/2015 of 25.2.2015.

⁴⁸ "...The defendant also opened a fake Facebook profile in the name of the plaintiff, on which he tried to present her in a negative light, which the plaintiff learned from a friend, after which, upon the plaintiff's demand, he extinguished this fake profile. The litigants split twice in 2010 and 2012, when the defendant left the apartment but then returned and continued the same or similar behaviour...The defendant also made threats and insults to the parents of the plaintiff, and in June 2014, while the plaintiff and her children were staying with her parents in ..., he came to their house, stood in the middle of the street, stopped vehicles and spoke (to people in vehicles) that her father is a paedophile and a maniac. The plaintiff...went to the Safe House with her children, where they spent 4 months, after which they returned to the mother's apartment, which the defendant had previously left. Due to the length and intensity of the violence and abuse suffered, the constant fear and lack of sense of security for her own livelihood, but also the fear that the defendant would endanger the minor children, the plaintiff experienced...loss of will to live, which is why she was treated at the Clinical Centre "Dragiša Mišović "in the period from...where

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order). Both measures are in line with Protocol No. 1 to the ECHR which allows the deprivation of the property which is lawful, in the public interest, in accordance with the general principles of international law, and reasonably proportionate. In the context of domestic violence, all four standards have been met as specified in the ECtHR jurisprudence.⁴⁹ Nonetheless, the purpose of the eviction order is not to deprive the perpetrator of his/her property; in effect, it does not interfere with the right of ownership or the lease of real estate. Otherwise, the eviction order would breach the Serbian Constitution's provision on the protection of the right of ownership (Art. 58 para. 2).⁵⁰

The civil protection orders are temporary by their legal nature and they could last for a maximum of one year, but they may be prolonged as many times as needed. Likewise, the imposed order could be revoked prior to the expiry of the time-limit if the reasons leading to specific measure ceases to exist.⁵¹ Although these measures are temporary by their legal nature, the decision on the measures becomes final when it cannot be challenged anymore by appeal. This effect is important in terms of the cross-border recognition of the imposed measure.

she was diagnosed.... After carrying out the diagnostic procedure, the expert team of the competent Social Care Centre confirmed in its finding and opinion that the defendant's conduct constitutes violent behaviour, and that in the specific case of violence, even minor children were not spared, which made them think that it is appropriate to determine the measure protection against domestic violence - eviction of the respondent from the apartment in which the parties live, so by a legally binding decision on temporary measure, dated 20.10.2014. issued in these proceedings, ordered the defendant to move out of the apartment...In the established factual situation, the court, by properly applying the provisions of Articles 10 and 197 of the Family Act of the Republic of Serbia (Official Gazette of the RS, No. 18/05), found that the defendant's conduct constitutes psychic and verbal violence against the plaintiff, which justifies the determination of a measure of protection against the defendant...The Supreme Court of Cassation finds that a measure of protection against domestic violence was imposed to prohibit further harassment, as well as to refrain from any other insolent, malicious and reckless behaviour towards the plaintiff, rendered in line with proper application of Article 198, paragraph 2(5) of the Family Act, given to represent an adequate measure of protection against violence according to the established type and extent of violence. In this way, the purpose of the imposed measure is also achieved, that is, the prevention and termination of the described behaviour of the defendant which represents violence." Judgment of the Supreme Court of Cassation, Rev 867/2017 of 24.5.2017.

⁴⁹ James and Others v. the United Kingdom (Application no. 8793/79), Judgment of 21 February 1986, para. 39 et seq.

⁵⁰ As noted in the Serbian family law theory, Draškić, *op.cit.*, p. 59.

⁵¹ Art. 198 para. 3 of the 2005 Family Act.

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(2014-2020).

In terms of the proceeding for issuing protection measures, the 2005 Family Act regulates it as a special type of contentious proceeding.⁵² The claim for a relevant measure (order) may be brought before the court by the family member who is allegedly the victim of family violence, his/her legal representative, public prosecutor, as well as the Social Care Centre. The action for the revocation may be instituted by the perpetrator exclusively. The territorial jurisdiction is grounded on the criterion of the domicile of the defendant (general territorial jurisdiction), and domicile or residence of the alleged victim. The proceeding is envisaged as particularly urgent, which implies that the first hearing has to be scheduled in 8 days from the date of filing the action. The same principle applies to the second instance court. The time-limit for rendering the decision on appeal is 15 days from the date of submitting the appeal to the second instance court. The first instance court is not bound by the measure claimed in the action. Thus, the court can order some other measure which is more convenient, taking into consideration all the circumstances of the case. The appeal does not suspend the enforcement of the imposed measure, including the prolonged measure.⁵³

When it comes to the role of the Social Care Centre, besides the right to bring an action, it is required to participate in the proceeding in the capacity of specific competent expert authority, which is in charge of providing expert opinions on the efficiency of the imposed measure and, if needed, to assist the court in taking evidence.⁵⁴ Once the measure is ordered, the Social Care Centre is obliged to keep record on the data about the victim, the perpetrator and the implementation of the imposed measures.⁵⁵

In spite of the proclaimed principle of "zero tolerance" to domestic violence, the Serbian courts are not willing to order protection measures in isolated incident cases. In effect, jurisprudence insists on the repetitive behaviour of the alleged perpetrator. The

⁵² Arts. 283-289 of the 2005 Family Act.

⁵³ Arts. 285-287 of the 2005 Family Act.

⁵⁴ Arts. 286 and 289 of the 2005 Family Act.

⁵⁵ Pravilnik o evidenciji i dokumentaciji o licima prema kojima je izvršeno nasilje u porodici i o licima protiv kojih je određena mera zaštite od nasilja u porodici, *Službeni glasnik RS*, 56/2005 (Regulation on Records and Documentation on Victims of Domestic Violence and on Perpetrators, *Official Gazette of the RS*, 56/2005).

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Court of Appeal in Belgrade stated that "domestic violence is a model of behaviour rather than a single incident, which involves various actions and behaviours taken by one family member, or manifested towards another, in order to establish power and control and meet one's needs at the detriment of another family member."⁵⁶

2.3. Civil protection of the domestic violence victims - Private International Law aspects and the child abduction cases

2.3.1. The 1982 PIL Act

As previously noted, the 1982 PIL Act does not envisage the special provisions on the international jurisdiction, applicable law or the special regime for the recognition and enforcement of foreign civil protection orders rendered in domestic violence cases. As a result, the legal gaps have to be filled by other statutory provisions contained in the 1982 PIL Act and other legislative acts.

In terms of international jurisdiction, Serbian courts can decide on cross-border domestic violence cases if the defendant has his/her domicile⁵⁷ or residence (in the specific circumstances) in Serbia.⁵⁸ If the defendant is a foreigner (alien), domicile is subject to the stringent conditions laid down in the Foreigners Act (2018).⁵⁹ The permanent residence permit, as the condition for domicile, shall be granted to an alien

⁵⁶ Decision of the Court of Appeal in Belgrade, Gž.2 881/2016 of 02.11.2016.

⁵⁷ Art. 46 para. 1 of the 1982 PIL Act.

⁵⁸ The criterion of defendant's residence can serve as the jurisdictional ground only if the defendant has no domicile abroad or it cannot be determined. Art. 46 para. 2 of the 1982 PIL Act.

⁵⁹ The Foreigners Act, *Official Gazette of the RS*, 24/2018 and 31/2019. Pursuant Art. 70 of the Foreigners Act, a foreign national who applies for the permanent residence permission has to submit a valid foreign passport; proof that he/she has the means of subsistence; proof of health insurance; registration of the address of residence in the Republic of Serbia; evidence of the justification of the application for permanent residence permit; and the proof of payment of the prescribed administrative fee.

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who has remained in the Republic of Serbia continuously for more than five years, on the basis of the temporary residence permit, until the date of submission of the application for permanent residence. However, a foreigner who has been granted temporary residence in the Republic of Serbia on the basis of study or education cannot obtain the permanent residence in the Republic of Serbia unless he/she has changed the ground for the stay in Serbia.⁶⁰ Permanent residence shall be considered to be an effective stay, with the possibility of a repeated absence from the Republic of Serbia up to ten months or a one-time absence of up to six months, for a period of five years. If only on one occasion the foreigner extends his/her stay abroad for a single day, irrespective of the actual reason for the prolonged stay abroad, his/her stay in Serbia will not be considered as a continuous stay because the time-limit of the permitted absence has been exceeded.⁶¹

A special regime applies when the foreigner has specific ties with Serbia. Thus, a foreigner can obtain a permanent residence permit if he/she has been married for at least three years to a national of the Republic of Serbia or to a foreigner who has a domicile permit; or if he/she is a minor, temporarily staying in Serbia with the consent of the other parent, in case one parent is a national of the Republic of Serbia or a foreigner who has a domicile permit; or if he/she has his origins in Serbia. Exceptionally, a domicile permit may also be granted to foreigners whose temporary stay has been permitted, but only if it may be justified by humanitarian reasons, or if the interests of the Republic of Serbia prevail.⁶² Hence, it may happen that a foreign national who appears to be the perpetrator cannot be sued before the Serbian courts based on the criterion of general international jurisdiction because he/she has not yet obtain the permanent residence permit, due to fact that a longer period is needed to meet the envisaged requirements. On the other hand, a Serbian national living abroad could be

⁶⁰ Art. 67 paras. 2-5 of the Foreigners Act.

⁶¹ More on the critic of the rigidity of this solution in general see S. Marjanović, Personal name in Serbian Family law and Private International Law *de lege lata* and *de lege ferenda*, Proceedings of the 4th Balkan Conference "Personal Name in Internal Law and Private International Law" (ed. M. Živković), Faculty of Law, University of Niš, 2016, pp. 99-101. Online edition available at http://www.prafak.ni.ac.rs/files/centar_pub/ZBORNİK-MPP_2016-maj-2018.pdf.

⁶² Art. 68 of the Foreigners Act.

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brought before a Serbian court if he/she still has a valid Serbian ID card, even though he/she has established another domicile abroad. Due to the principle that a person can have only one domicile,⁶³ the 1982 PIL Act does not recognize the problem of positive conflict of domiciles.⁶⁴ This standard is fully applicable in cases without an international element but it is not necessarily valid in cross-border cases. On the other hand, a Serbian national living abroad, who has a domicile in a foreign State exclusively, can be sued on the criterion of general international jurisdiction because the Serbian ID card is not difficult to re-obtain in case of Serbian nationals.⁶⁵

Despite the fact that foreigners can obtain residence in Serbia after only 24 hours,⁶⁶ this criterion of general international jurisdiction is less applicable since it can be relied on only when the defendant does not have a domicile anywhere or if it cannot be determined.

In case the victim and the perpetrator are both Serbian nationals living abroad, the general jurisdiction may be additionally subject to the criterion of establishing the defendant's residence in Serbia.⁶⁷ This rule is applicable only in contentious proceedings, including civil protection against domestic violence.

In all cases when the general jurisdiction of Serbian courts cannot be established, the existing legal gap in terms of special international jurisdiction has to be filled by the criterion of territorial jurisdiction, in compliance with the rule expressly envisaged in the law.⁶⁸ Consequently, the 2005 Family Act will be applied by bringing the criterion of the victim's domicile or residence in Serbia to the fore. Bearing in mind that the domicile and residence criteria are set on equal footing when the victim is a foreigner, the residence can be easily established.

⁶³ M. Dika, G. Knežević, S. Stojanović, *Komentar Zakona o međunarodnom privatnom i procesnom pravu* (The Commentary on the Private International Law and Procedure Act), Beograd, 1991, p. 168.

⁶⁴ However, the problem is regulated in Art. 4 of the 2014 Draft PIL Act.

⁶⁵ Pursuant to Art. 9 para. 1 of the Citizens' Domicile and Residence Act (*Official Gazette of the RS*, 87/2011), a Serbian national has a duty to report his/her domicile within 8 days from the day when he/she has started residing at the recorded address in Serbia.

⁶⁶ Art. 110 para. 1 of the Foreigners Act.

⁶⁷ Art. 46 para. 3 of the 1982 PIL Act.

⁶⁸ Art. 26 para. 2 of the Contentious Proceedings Act, *Official Gazette of the RS*, 72/2011, 49/2013, 74/2013, 55/2014 and 87/2018.

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In terms of applicable law, when the domestic violence occurs between the child and the parent(s), the legal gap may be filled with the conflict-of-laws rule on all types of children-parents relations (Art. 40 of the 1982 PIL Act). In fact, since the Republic of Serbia is Party to the 2007 Hague Protocol⁶⁹ and the 1996 Hague Children Protection Convention, the subject matter of domestic violence against a child or parent is the only factor still keeping Article 40 of the 1982 PIL Act in force. However, the adequacy of the envisaged connecting factors could be questioned. Since Article 40 of the 1982 PIL Act envisages the application of the three-step conflict rule known as Kegel's ladder (common nationality, common domicile, and application of Serbian law if one parent or the child is a Serbian national), it is too complicated to be applied in the cases where urgent protection is needed. On the one hand, the connecting factors may lead to the application of foreign law. In the case of urgent protection, the process of determining its content requires more time than available.⁷⁰ On the other hand, the possibility to apply foreign law may lead to prolonging the proceeding for the reason of contingent adjustment of the protection measure envisaged in the foreign law. These issues suggest that the special conflict-of-laws rule is needed.

When the victim of domestic violence is the mother and the perpetrator is the father of the wrongfully removed or retained child, the legal gap in the applicable law has to be filled by referring to the principles envisaged in the 1982 PIL Act, the principles of the Serbian legal system and the general PIL principles (Art. 2 of the 1982 PIL Act). Therefore, the particularly urgent nature of domestic violence proceedings should entail the application of *lex fori*. This rule could be developed as a general rule in domestic violence cases.

⁶⁹ Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations, *Official Gazette of the RS - International Treaties*, 1/2013.

⁷⁰ Pursuant to Art. 13 of the 1982 PIL Act, the only two possible ways to determine the content of the foreign law in court proceedings are as follows: the court is obliged to determine the content of the foreign law *ex offio*, with the assistance of the Ministry of Justice, while the parties can prove the content only by providing public documents. Serbia is a Party to the European Convention on Information on Foreign Law (*Official Gazette of the SFRY - International Treaties*, 7/91). See more on the problem: M. Živković, S. Marjanović, Some questions regarding the application of international agreements in International Private Law of the Republic of Serbia, *Pravni vjesnik* 3-4/2019, Faculty of Law, University Josip Juraj Strossmayer, Osijek, pp. 282-287.

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The recognition and enforcement of foreign civil protection orders is subject to the general regime envisaged in the 1982 PIL Act. Hence, the decision imposing the measure has to be final, enforceable, in line with the Serbian public policy, and the condition of reciprocity has to be fulfilled, while the principle *ne bis in idem* has to be observed.⁷¹ The application of the general regime may seem inadequate when the foreign measure cannot become final due to its temporary nature or when the appeal does not suspend the enforcement pursuant to the law of the State of origin.

2.3.2. The 2014 Draft PIL Act

The 2014 Draft PIL Act (in Part II, Chapter 2 titled "Family Law") regulates the civil protection against domestic violence (Articles 111-113). The international jurisdiction is set broadly, as Serbian court shall have jurisdiction to decide in a dispute on protection against domestic violence: a) if a family member who is a victim of domestic violence is domiciled or habitually resident in Serbia, or if he/she is present in the territory of Serbia at the time of the submission of the claim; or b) if the proceeding in a marital dispute or the proceeding in a paternity or maternity dispute or the proceedings in a dispute on the protection of the rights of the child or the proceeding in a dispute on the exercise or deprivation of parental responsibility is already pending before the competent Serbian court (Art. 111). Those criteria correspond to the provisions of the 2005 Family Act. The only new one is the criterion of the presence of the victim at the territory of Serbia which should cover the untypical cases where the residence of the victim is still not established (e.g. if the violence escalates during the travel through Serbia). Yet, it is flexible enough to be applied in typical cases in order to spare the victim of the duty to prove the establishment of domicile or residence in Serbia.

⁷¹ Arts. 87-92 of the 1982 PIL Act. However, the condition of the indirect jurisdiction protecting the exclusive jurisdiction of the Serbian courts is not applicable in the case of domestic violence since there is no exclusive jurisdiction of the Serbian courts.

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Besides, under the 1982 PIL Act the victim who is a foreign national⁷² could be even asked to pay the security for costs, since *cautio judicatum solvi* could be imposed to the plaintiff in the contentious proceedings on the protection against domestic violence.⁷³ That is contrary to the principle *in favorem victimae*, and it could result in the deprivation of the judicial protection of the victim. In that way, the perpetrator (as the defendant) could misuse his/her procedural powers in order to prevent the lawsuit or to aggravate the procedural position of the plaintiff.⁷⁴ On the other hand, the 2014 Draft PIL Act expressly exclude the security for costs in the case of the lawsuit on the protection against domestic violence.⁷⁵

In respect of the applicable law, the civil protection against domestic violence shall be governed by the law of Serbia in the proceeding instituted before the Serbian court (Art. 112).

Regarding the recognition and enforcement of foreign judgments, the 2014 Draft PIL Act follows the solution of the CPO Regulation as much as possible. Therefore, the Serbian court shall recognize a foreign judgment, including interim measures and measures rendered by default, due to the defendants' failure to appear. The Serbian court shall decide on the application for the recognition of a foreign judgment in non-litigious proceedings, without a hearing, within a period of two days from the application submission date. If a foreign protection measure is unknown under Serbian law, the Serbian court shall adjust it in the recognition proceedings to the most similar domestic protection measure against domestic violence taking into account its purpose,

⁷² Art. 82 of the 1982 PIL Act envisages that when a foreign citizen or stateless person who is not domiciled in Serbia institutes proceedings before the court of Serbia, he is obliged to deposit security for costs in favor of the defendant at the defendant's request.

⁷³ Pursuant to Art. 83 of the 1982 PIL Act, the defendant shall not be entitled to have the security for costs only in the following cases: (1) if in the State whose citizen the plaintiff is, Serbian citizens have not duty to provide security; (2) if the plaintiff enjoys the right of asylum in Serbia; (3) if the claim is related to plaintiff's receivable arising from his contract of employment in Serbia; (4) if marital disputes, or disputes about establishing or contesting paternity or maternity are concerned or if statutory obligation of support is concerned; (5) if the action upon a bill of exchange or cheque, or a counterclaim or issuance of a payment order are concerned.

⁷⁴ On the discriminatory character of the *cautio judicatum solvi* in the 1982 PIL Act see S. Marjanović, M. Živković: *Security for costs in the 1982 PIL Act: Responsibility of the State for discrimination?*, Zbornik radova Pravnog fakulteta Univerziteta u Nišu (Collection of Papers of the Faculty of Law University of Niš), No. 85/2019.

⁷⁵ Art. 32 para. 1(g) of the 2014 Draft PIL Act.

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functions and effects. The appeal does not suspend the enforcement of the decision on recognition (Art. 113).

In terms of the reasons for the refusal of recognition, the 2014 Draft PIL Act departs from the CPO Regulation. Thus, the recognition could be refused only if the person against whom the foreign judgment has been rendered proves in the appeal proceedings that the measure is manifestly contrary to the public policy of Serbia. The European condition of irreconcilability with a judgment rendered or recognised in the State of recognition was not included in the 2014 Draft PIL Act since the Working Group took the standpoint that even in the case of irreconcilability, it does not have necessarily to mean that the measure cannot be recognized. For example, the previously rendered or recognized judgment may have determined that there was no domestic violence due to the difference in the national definition of domestic violence. Even when the violence was not established, it does not mean that it cannot occur later on. The discrepancy in judicial decisions may be the result of the national approach to observing the pattern of domestic violence over a longer period of time, while the law of the State of origin may sanction even isolated incidents. Likewise, violence may be or become mutual later on; thus, the roles of the victim and the perpetrator may change, which does not have to be construed as being irreconcilable with the other decision.⁷⁶

2.3.3. Child Abduction Cases

In child abduction cases, the conducted research has showed that in the period 2016-2017 there was one case in which direct violence against the mother could be considered proven in the return proceeding. The mother and the child were living in Greece. The mother and the father were married. The mother was unemployed and completely financially dependant on the spouse. She was a Serbian national and the child's father was Greek. As the parents' relationship has deteriorated, she was exposed to repetitive psychological abuse. After many quarrels, the mother travelled to Serbia

⁷⁶ Other procedural issues regarding the recognition and enforcement of foreign judgments are subject to the general rules envisaged in Part III of the 2014 Draft PIL Act. The translation of the 2014 Draft PIL Act into English is also available at http://www.prafak.ni.ac.rs/files/pil_serbia_translated.pdf.

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with then three-year-old child in 2015. The father gave his consent expecting that they would return since he bought the return tickets. The mother and the daughter were supposed to return on 5 November 2015. However, the mother stayed in Serbia with the child, and initiated the divorce proceeding in Serbia as well as the parental responsibility proceeding on 23 October 2015. The father submitted the request for the return of the child under the 1980 Hague Child Abduction Convention on 26 January 2016. In the first instance proceeding, the decision was rendered on 22 July 2016 ordering the return of the child to Greece.⁷⁷ On mother's appeal, the second instance court revoked the decision on the ground that the court did not determine all the relevant issues, especially the UN Convention on the rights of the child. Furthermore, the second instance court has criticized the unwillingness of the first instance court to request the expertise and opinion of the Social Care Centre.⁷⁸ On 16 December 2016, in the re-trial, the first instance court decided to refuse the return of the child, based on the grave risk exception envisaged in Art. 13 para. 1(b) of the 1980 Convention, especially due to the repetitive pattern of domestic violence towards the mother; thus, the return of the mother would expose her to the grave risk. In addition, as the child was heavily emotionally attached to the mother, the separation from the mother was deemed to be extremely stressful and harmful for the child.⁷⁹ The experts also confirmed that the child was manifesting strong signs of anxiety and insecurity when she was told about the possibility of returning to Greece without her mother. The second instance court upheld the refusal.⁸⁰

In the course of the proceeding on the return of the child, the father continued to harass the mother and her parents by making phone calls and sending text messages, using curses and threatening the mother and her parents.⁸¹ The mother reported the

⁷⁷ Decision of the Municipal Court in Niš, R3 br. 18/16 of 22.07.2016.

⁷⁸ Decision of the Higher Court in Niš, 4 Gž No. 4734/16 of 11.10.2016.

⁷⁹ Decision of the Municipal Court in Niš, R3 No. 284/16 of 16.12.2016.

⁸⁰ Decision of the Higher Court in Niš, 4 Gž. No. 1130/17 of 23.02.2017.

⁸¹ Pursuant to the courts' practice in cases of psychological abuse by means of electronic communications, "The number and content of text messages and messages sent by the defendant by email to the plaintiff goes beyond normal communication...; sending such everyday messages..., despite the objection of the recipient, constitutes domestic violence. The defendant's insistence on such communication cannot be justified by the concern of the defendant (as the father) for the welfare of the children, or by other human

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violence to the police and instituted a criminal proceeding after the father came to her house unannounced, accompanied with two adults, but she did not open the door. As she testified before the police, the violence started soon after they had entered into marriage and reached its climax when he forced her to leave the house while she was pregnant. After the birth of the child, he psychologically molested her by insults and curses. On two occasions, he slapped her in front of then three-year-old child. According to the mother's testimony, the child still recollected these events. While living in Greece, the mother sought the advice at the local Centre for women-victims of domestic violence and attended counselling sessions for a few months. The mother presented proof for some of her allegations, which were sufficient for the court when deciding on the return of the child. The criminal proceeding is still pending.

The 1996 Children Protection Convention came into force on 1 November 2016. In this Serbian-Greek case, the conditions set in Art. 7 of the 1996 Convention were fulfilled since the child acquired a new habitual residence after two years of living in Serbia with her primary caretaker; thus, the return was refused. The proceeding on the merits of the parental responsibility case, which was not stayed after the return request was submitted by the father, is still pending. So far, there have been several expertises on the relations between the parents and the child; the Social Care Centre has proposed the model for the access rights of the father. Yet, the proposed model carries a risk of the re-abduction of the child. In that respect, the child, who is now seven years old and enrolled in primary school, should spend several days at her father's house in Greece during the winter break and a longer period during the summer holidays. The Social Care Centre did not propose that the child should be accompanied by her mother. Although the mother does not oppose to the father's rights of access, she was against the proposal of the Centre since the child never travelled without the mother and she

or legal reasons. The plaintiff (as the defendant's former spouse) is under no obligation to accept the model of communication imposed on her by the defendant, and his insistence, accompanied by the defendant's interest in her personal life and her movement, constitutes ...violence that gives the plaintiff the right to protection." Judgment of the Court of Appeal in Niš, GŽ2 420/2017 of 19.10.2017.

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has not been separated from the mother since they returned to Serbia in 2015. On the other hand, the Centre proposed that the mother should exercise sole custody.⁸²

What especially raises concerns in this case is the fact that the competent first instance court in the parental responsibility proceeding did not take into account the facts determined and assessed in the return proceeding, nor did it consider the risk of the re-abduction of the child. The risk could be severe as the mother has repeated many times that the father keeps telling the daughter that he will send her to live with his parents. Although the 1996 Convention does not expressly envisage the duty of the court deciding on the merits of the case to take into consideration the facts determined in the return proceeding, the court should do that. The Brussels IIa recast also imposes such a duty to the courts of the EU member States.⁸³ It is absurd that the decision on the return of the child was rendered by the court of the same State, but still the court deciding on the merits of parental responsibility case did not take it into consideration. Besides, the 1996 Convention was used to ask the competent Greek authority to provide the report on the father's capacity to take care of the child, despite the fact that only the Serbian Social Care Centre can make an expertise on this issue given the fact that the child resides in Serbia (not in Greece), which ultimately implies that the Greek competent authority cannot make a full assessment. Hence, the report which was received was based on the conversation with the father and his friends and relatives.⁸⁴

2.4. Protection of domestic violence victims under Serbian Criminal Law

The criminal law protection against domestic violence was introduced in 2002 by the amendments to the Criminal Code.⁸⁵ Article 194 of the latest Criminal Code⁸⁶ envisages that the criminal offence of domestic violence covers the use of violence and

⁸² The findings and opinion of the Social Care Centre, No. 02 56052-122286/19 of 20.06.2019.

⁸³ Art. 29 of the Regulation (EU) 2019/1111 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction, OJ. L. 178 of 02/07/2019.

⁸⁴ The Report on the Social Assessment of the Greek court, 23.04.2019.

⁸⁵ The Criminal Code of the Republic of Serbia, *Official Gazette of the RS*, 10/02.

⁸⁶ *Official Gazette of the RS*, 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019.

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threat of attacks against life or limb, insolent or reckless behaviour which endangers the tranquillity, physical integrity or mental state of a member of the perpetrator's family. The aggravated types of violence include the use of weapons, dangerous tools or other instruments which are likely to cause serious injury or seriously impair one's health, as well as the violence resulting in grave bodily injury or serious impairment of health, or the violence committed against a minor or causing the death of the victim or a family member. The criminal offence of domestic violence is also punishable when the perpetrator violates the court-imposed protection measures against domestic violence prescribed by the 2005 Family Act. The imposed sentences range from three months to ten years, depending on the type of offence. Moreover, the Criminal Code prescribes two safety measures: the compulsory treatment of alcoholism and the restraining order prohibiting the offender to approach and communicate with the victim or injured party.⁸⁷ The safety measure of compulsory treatment of alcoholism was proposed in the Draft 2005 Family Act, but it was omitted from the Family Act Proposal.⁸⁸ The act of stalking is also criminalized as a special criminal offence rather than as a form of domestic violence, even though it is most commonly committed against a current or former spouse and extramarital partner.⁸⁹

There is a difference between the definition of the family member provided in the 2005 Family Act and in the Criminal Code; the definition provided in the latter is somewhat limited as it does not include the former spouse who does not live in the same household and former spouses who do not have a common child, or extramarital partners even when they live in the same household with the perpetrator.⁹⁰

⁸⁷ Arts. 84 and 89a of the Criminal Code. The compulsory treatment of alcoholism may last between three months and three years, while the prohibition to approach and communicate with the victim may last between six months and three years.

⁸⁸ Draškić, *op.cit.*, p. 59.

⁸⁹ N. Petrušić, N. Žunić, V. Vilić, *Krivično delo nasilja u porodici u sudskoj praksi - nove tendencije i izazovi* (Criminal Offence of Domestic Violence in Jurisprudence-new tendencies and challenges), the OSCE Mission in Serbia, 2018, p. 20.

⁹⁰ Under Article 112 para. 28 of the Criminal Code, the definition of a family member includes spouses, their children, next of kin in the direct line of consanguinity, parents and their children, extramarital partners and their children, adopters and adoptees, foster parents and their *protégé*. Family members also include siblings (brothers and sisters), their spouses and children, their former spouses and their children, and parents of former spouses if they live in the same household, as well as persons having a common child or a child to be born, even though they have never lived in the same family household.

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Domestic violence as a criminal offence is prosecuted *ex officio*. In general, the number of domestic violence cases is rather high.⁹¹

2.5. Domestic Violence Prevention Act as *lex specialis*

The Domestic Violence Prevention Act (hereinafter: DVP Act) has been implemented in the Republic Serbia since 2017. It provides protection to victims of domestic violence even when the violence has not yet been committed, on the basis of behaviour of the potential perpetrator and other circumstances. It is necessary that the violence is imminent and that it may occur over time. In comparison to the 2005 Family Act and the Criminal Code, this Act defines domestic violence more broadly. The Act also applies in situations where the elements of the criminal offense of domestic violence are not established in the specific case, or when there are no conditions for imposing protection measures under the 2005 Family Act.

Under the DVP Act, domestic violence is an act of physical, sexual, psychological or economic abuse of the person with whom the perpetrator is in a current or former marital or extra-marital relationship, or a next of kin in the direct line of consanguinity and in a lateral line to the second degree, or a relative by affinity to the second degree, or an adoptee or an adoptive parent, a foster parent or a protégé, or any other person who the perpetrator lives or has lived with in a common household (Art. 3).

The competent (responsible) police officer is obliged to determine all the circumstances relevant to the risk assessment immediately after receiving the notification on domestic violence. He can keep a possible perpetrator of domestic violence eight hours and give him the opportunity to explain the circumstances of the event. In addition, the competent police officer collects all available evidence from other police officers as well as independently. This process is demanding because it needs to reconcile two opposite requirements: the need to make the risk assessment comprehensive, thorough and based on valid information that is supported by other

⁹¹ In 2019 alone, based on the collected data from the Municipal Court in Niš, there were 71 domestic violence cases prosecuted under the Criminal Code, and a total of 66 civil protection cases instituted under the 2005 Family Act.

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evidence, and the need to perform the risk assessment effectively, quickly and in the shortest possible period of time.⁹² The risk assessment should indicate whether there is a serious risk that the violence will occur in the immediate future. In case of an imminent threat of violence, the competent police officer may order immediate protection measures (Art. 15). The law provides for two urgent (emergency) measures: a measure of temporary removal of the perpetrator from the house and a measure prohibiting the perpetrator from contacting the victim violence and approaching him/her (Art. 17). A measure may last up to 48 hours. Immediately upon issuing an order, the competent police officer has to submit all evidence to the competent Public Prosecutor, who evaluates the risk assessed by the police and conducts its own risk assessment. If the risk assessment confirms his/her position on the danger of domestic violence, the prosecutor submits his/her assessment to the court and proposes the extension of the emergency measure (Art. 18). The court shall decide on the extension within 24 hours from the moment when the proposal was submitted to the court (Art. 19). The measure may be prolonged for the 30 days. The problem that often occurs in practice is the court's inability to gather additional evidence and request additional information, which once again confirms the fact that the responsibility of police officers is paramount.⁹³ An appeal against the decision of the first instance (municipal) court can be submitted to a higher court within three days from the date of receipt of the first-instance court decision. The Higher Court must render the decision within three days. The Higher Court can reject the appeal and uphold the decision of the first-instance court, or uphold the appeal and revise the decision of the first instance court. The High Court cannot revoke the first instance decision and return the case to the first instance court for a re-trial (Art. 20).⁹⁴

The nature of proceedings taken under this Act is not clear. They mostly incline to misdemeanour proceedings but the Act does not specify the type of procedural rules.

⁹² D. Janković, I. Milovanović, *Primena Zakona o sprečavanju nasilja u porodici u Republici Srbiji* (The implementation of the Prevention of Domestic Violence Act in the Republic of Serbia), *Ne nasilju - jedinstveni društveni odgovor*, Banja Luka, 2018, p. 105.

⁹³ *Ibidem*, pp. 105-106.

⁹⁴ *Ibidem*.

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3. Conclusions and Recommendations – the Serbian Perspective

Bearing in mind that the POAM project focuses on the protection of mothers in cross-border cases, the conclusions and recommendations from the Serbian perspective are primarily aimed at improving the current PIL system. Therefore, it is high time to enact the new PIL Act whose legal solutions will more adequately deal with the challenges of civil protection of the domestic violence victims in cross-border cases. Furthermore, in order to clarify the correlation between the 1980 Child Abduction Convention and the 1996 Children Protection Convention, the Draft CPC Act should also be revisited. Under this Act, the courts should be obliged to decide on the merits of the case by taking into consideration the determined facts and the decision rendered in the return proceeding which has resulted in the refusal of child's return. In the cases of the domestic violence, it is especially important that the Serbian courts examine the availability and adequacy of the protection measures which could be rendered in the State where the child had his/her habitual residence immediately prior to the wrongful removal or retention.⁹⁵

⁹⁵ In that respect, the two case scenarios explained in the draft Guide to Good Practice on Article 13(1)(b) of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction could be followed. See S. Marjanović, M. Živković: *Tumačenje iznimke ozbiljne opasnosti u slučaju građanskopravne otmice djeteta* (The Interpretation of the grave risk exception in the child abduction cases), "Prekogranično kretanje djece u Europskoj uniji"/"Cross-border movement of the children in the EU" (ed. Mirela Župan), Faculty of Law University Josip Juraj Strossmayer, Osijek, 2019, pp. 381-396.

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