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BRIDGING THE NON-PROTECTION OF CHILDREN'S RIGHTS THROUGH THE OPTIONAL PROTOCOL TO THE CRC ON COMMUNICATIONS PROCEDURE AND A FUTURE EUROPEAN COURT

The purpose of this paper is to present benefits of the Convention on the Rights of the Child as well as to analyze the extent that this valuable international document has contributed to the improvement of the legal and general status of children and to consider the difficulties in its application in practice. Furthermore, Optional Protocol to the Convention on the Rights of the Child on a communications procedure and its impact on legal mechanisms for children's rights protection is analyzed and special consideration is given to the problem of legal regulation and efficient protection of children's rights in the framework of European integration. Based on the undertaken analysis, proposals for better, more efficient and more coherent protection of the children's rights at the level of the EU are offered, including judicial protection by establishing a European Court for the Rights of the Child.

Key words: children's rights, Optional Protocol to the CRC, European Union

1. THE BENEFITS AND SCOPE OF THE CONVENTION ON THE RIGHTS OF THE CHILD

The Convention on the Rights of the Child (hereinafter: CRC)¹ has received a lot of praise. And for good reason. This international document has been ratified by most countries in the world, which itself warrants a deeper look into its benefits in order to find the reasons for its vast support.

On the eve of the promulgation of the CRC at the United Nations a quarter of a century ago it was clear that countries would be judged by their adherence to this document, which has indeed been the case.

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¹ 1577 UNTS 3 (CRC).

One of the benefits of the Convention lies in the fact that it has transposed the needs of the child emphasized by psychologists into rights². As far as legal theory is concerned, it has prompted jurists to ponder on the well-foundedness of children's rights, and their undisputable existence has been linked to reasons from the domain of natural law³. The fact that the existence of children's rights and the obligation to protect them is seen differently by different authors⁴ can be considered as richness in diversity, but that does not diminish the importance of the central fact – that the rights of the child do exist and they should be observed and protected.

A further benefit of the Convention is the fact that it has imposed a duty on its signatories to observe these rights and to undertake appropriate steps in order to protect the child⁵. This is reflected in the system of sanctions provided for in Part II of the Convention. Their primary aim is to command consent of the signatories to inspection by international bodies with regard to the respect of children's rights within their respective territories. The establishment of the Committee on the Rights of the Child, reported to by the signatories pursuant to the CRC, is of immeasurable importance. Numerous reports submitted over time by signatories have resulted in 21 General Comments, which form a body of desirable practices for all signatories. Individual comments are certainly most relevant for the addressee state, but at the same time, they help shape a more precise framework for the perception and respect of the rights of the child. On the other hand, the Committee has often been criticized by legal theorists⁶ for the absence of an effective mechanism for exerting pressure on signatories. This paper deals with a possible solution to this problem.

Another benefit of the Convention pertains to the raising of awareness of the existence of the rights of children as an especially vulnerable group, which can be explained by the fact that the Convention features a detailed list and clear descriptions of these rights.⁷

It can be argued without a doubt that the Convention has created a new system of values and defined new roles for parents and the state with regard to children, placing

² Goldstein, J.; Freud, A.; Solnit, A. J., 1973. *Beyond the Best Interests of the Child*. "What the child brings to them [parents] next are no longer only his needs for body comfort and gratification but his emotional demands for affection, companionship, and stimulating intimacy. Where these are answered reliably and regularly, the child-parent relationship becomes firm, with immensely productive effects on the child's intellectual and social development. Where parental care is inadequate, this may be matched by deficits in the child's mental growth. Where there are changes of parent figure or other hurtful interruptions, the child's vulnerability and the fragility of the relationship become evident." Retrieved from: <http://darkwing.uoregon.edu/~adoption/archive/FreudBBIC.htm> (05.04.2017).

³ See Hrabar, 1994, 16.

⁴ E.g. Hart H, Wellman C, McCormick N, Freeman M, Dworkin R, O' Neill O, Campbell TD, etc.

⁵ Hrabar, 2007, 225.

⁶ *Ibid.*, 196.

⁷ *Ibid.*, 191.

children in the focus. This system comprises: the principle of protection of the best interest of the child, common parental responsibility for the child's upbringing and development, and the requirement for the family as the most desirable environment for the child's upbringing.

Furthermore, it should be noted that the Convention has "opened the door" to creating new documents concerning the rights of the child, encouraging countries to take a more active role in providing legal protection for children. A good example on the global level are the two protocols – the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict and the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (both from 2000), and on the European level the European Convention on the Exercise of Children's Rights (1996), the Convention on Contact, etc. All recent documents have transposed the fundamental principles (the best interest of the child, non-discrimination) and the rights of the child (*e.g.* the right to express their views).

Considering that more than twenty-five years have passed since the adoption of this valuable international document, the question arises as to the extent in which the CRC has contributed to the improvement of the legal and general status of children worldwide, *i.e.* what the remaining issues are, if any. First and foremost, the significance of this international document is re-examined in terms of whether it does indeed constitute law (*ius*), considering the difficulties faced in its application. An undisputed fact is that the enforcement of the Convention is directly related to political will and that if any improvement is to be made in the status of children, vast resources need to be mobilized. On the other hand, this international agreement, like any other, represents for many signatories a legal act of supreme power (after the constitution), which applies directly on the principle of monism in many legal systems and imposes standards for harmonization of national law with its provisions. Moreover, the comprehensiveness of the Convention reflects a unified attitude of the global community regarding the existence of the rights of the child, the role and significance of the family and the parents in the rearing of children, as well as the roles of the state and the global community itself. Some criticism stems from the argument that the Convention actually provides overprotection of rights while at the same time reducing those rights. This would mean that the CRC is a conservative document, built on compromise and concessions, which is based on the repeated application of the provisions concerning human rights of children.⁸ However, in the author's view, the Convention does not overprotect. On the contrary, it is our belief that the implementation of protection is the weakest link of the Convention.

⁸ *McGoldrick, D.; LeBlanc, L. J.; Freeman, M., as cited in: Bainham, 2000, 77.*

One of the most important benefits of the Convention is its educational character and the recognition of children as persons capable of having rights. This fact has the power to transform not only entire childhoods, but also the lives of adults.⁹

In addition, considering that the Convention has encouraged the adoption of other international documents, focusing on some of the rights of the child, it may be concluded that the Convention on the Rights of the Child is a milestone of legal history which marks a redefinition of the legal status of children worldwide.

The latest advancement in the recognition of the special situation of children and the necessity to grow up within the family, which in turn strengthens the family, was achieved by the adoption of the Resolution of the Human Rights Council¹⁰ of 26 June 2014. The Resolution reaffirms that 'States have the primary responsibility to promote and protect the human rights and fundamental freedoms of all human beings, including women, children and older persons', recognizes that 'the **family** has the primary responsibility for the nurturing and protection of children and that children, for the full and harmonious development of their personality, should grow up in a family environment and in an atmosphere of happiness, love and understanding'. Further, it states that 'the **family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children**, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community' (emphasis by author).

2. THE APPLICATION OF THE CONVENTION ON THE RIGHTS OF THE CHILD IN PRACTICE

After 28 years of the Convention and a substantial number of international documents that have grown from its fertile ground, the issue is raised of its effectiveness and the overall system of children's rights in practice.

The provisions of the Convention enumerate many rights of the child, some of which are reserved for and applicable only to children (*e.g.* the right to upbringing in a family environment, the right to engage in play and recreational activities), while others also belong to adults (*e.g.* the right to life and the right to health) but are nevertheless emphasised for their importance. In addition, the CRC imposes the duty to imple-

⁹ *Eekelaar*, 1992, 234, says: "... the lives of millions of adults of the next generation would be transformed. It would be a grievous mistake to see the Convention applying to childhood alone. Childhood is not an end in itself, but part of the process of forming the adults of the next generation. The Convention is for all people. It could influence their entire lives".

¹⁰ Available on: [https://www.spuc.org.uk/documents/familyprotectionresolution20140626\(07.04.2017\)](https://www.spuc.org.uk/documents/familyprotectionresolution20140626(07.04.2017)).

ment and elaborate these rights in national law, not only on the level of family legislation, but also on the level of the entire legal system.

Considering that a legal system includes not only a set of general legal rules, but also the application of those rules in practice¹¹, the issue is raised as to the extent to which the Convention has gained a foothold in practice, *i.e.* as to the type of protection the rights of the child are provided in signatory states (on the level of principle for the purposes of this paper), *i.e.* how active a role signatories take in the protection of these rights. The protection of the rights of the child lies primarily in the hands of states, while in each individual case, it is the parents who have the primary responsibility for the upbringing and development of the child (see CRC Articles 4, 5 and 18).

However, it is our belief that the adoption of the third Protocol - Optional Protocol to the Convention on the Rights of the Child on a communications procedure¹² – is a clear sign that the provisions of the Convention are not observed and that the protection of children on the global level remains questionable.

The rights of the child represent a complete system of rights particular to children, as the most vulnerable and dependent individuals, and today, 28 years later, there is no doubt whatsoever as to the existence of these rights. However, notwithstanding the fact that they are a sub-species of human rights¹³, the rights of the child should be viewed as a set of individual subjective rights which give the child, as was the intention of the Convention, legal subjectivity and legitimacy in achieving the goal: a healthy development and a happy childhood. Owing to the Convention, the child has the status of a legal subject. In spite of this, on the theoretical and practical everyday level, a number of issues are raised that can be related to all bearers of rights. As with any other rights, the problem of protection and exercise remains. In the case of children as bearers of the rights of the Convention on the Rights of the Child, the central problem is the dependence and immaturity of children, and the crucial role of adults (especially parents) and the community, on whom the exercise of those rights depends.

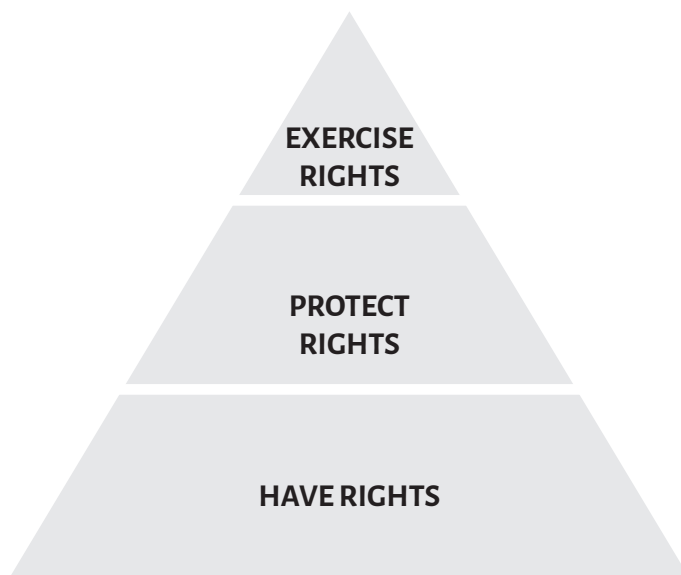
The seriousness of the lack of uniformity in the protection of rights is indicated by the Concluding Observations and Recommendations of the Committee on the Rights of the Child. Awareness of the obstacles is increasing, as is the fact that they should be reduced, if not completely removed. In essence, the age of children and their depen-

¹¹ Legal system is defined as “the set of laws of a particular country and the way that they are used” in MacMillan Dictionary. Retrieved from: <http://www.macmillandictionary.com/dictionary/british/legal-system> and similarly as “the set of laws of a country and the ways in which they are interpreted and enforced” in Collins Dictionary. Retrieved from: <http://www.collinsdictionary.com/dictionary/english/legal-system> (11.05.2017).

¹² GA resolution 66/138.

¹³ See *Hrabar*, 1989, 865-873.

dence on adults could be a serious obstacle to the exercise of rights. Adults are the dominant part of the community and are primarily responsible for their conduct towards children. However, signatories to the Convention are almost invariably invited to ensure the application of the various measures (administrative, legislative, judicial) in order to protect the rights of the child. Protection of a right ultimately leads to its exercise. Having this in mind, the rights of the child face a challenge which can be referred to as the reference triangle:



It can be said that the Convention on the Rights of the Child was the first and the most important step, which is the reality of enumerating, allocating and recognizing the rights of the child. It can certainly be argued, in terms of natural law, that any human being can be allocated a right, considering that human rights, and thus the rights of the child, belong to children by their nature. However, it is still necessary for an organisation (such as the United Nations) to transpose that natural requirement onto paper, which was done in 1989.

The question that is now raised is: how do we protect children's rights? The Convention on the Rights of the Child does not include a concrete enforcement mechanism comparable to that found in other international documents pertaining to human rights, adopted under the auspices of the United Nations. The Committee on the Rights of the Child provides interpretations of the Convention by way of Concluding Observations and Recommendations; however, these do not have the weight of a convention, or a similar type of protection of subjective rights. The addressees of the Convention are children, but their procedural status, *i.e.* legal legitimacy are not of a kind that they may actively protect their endangered rights. It is our belief that the third Protocol to the Convention addresses this issue.

3. OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF THE CHILD ON A COMMUNICATIONS PROCEDURE

Optional Protocol to the Convention on the Rights of the Child on a communications procedure (hereinafter: Protocol) was adopted on 19 November 2011¹⁴ and has been in force since 14 April 2014, having been signed by 51 signatories, *i.e.* ratified or acceded to by 36 signatories.

In the introductory provisions the Protocol refers to some provisions of the Charter of the United Nations, namely the recognition of the inherent dignity and the equal and inalienable rights of all human beings, non-discrimination as the basic principle, and other universally accepted values. It should be noted that the child is referred to “as a subject of rights ... with evolving capacities” and that its “special and dependent status”, linked to the difficulty in the protection of the rights upon their violation, is recognized. It is for this reason that the Protocol opens a new door for children, claiming that it will enable national legislatures and regional organisations to submit complaints in the event of violations of their rights. The Protocol raises awareness of the fact that the key factor in the protection of children's rights is each national legal system and thus recommends the establishment of national mechanisms which would provide children whose rights have been violated access to effective legal remedies, with a possible significant role played by national specialized human rights institutions.

The title of the Protocol – on communications – should be interpreted as more than a simple communication, but rather as an act that guarantees and protects the possibility for a child to submit a complaint if his or her rights have been endangered.

This solves the problem of the lack of a communications procedure of the CRC. The Protocol provides for two new ways for children to challenge violations of their rights committed by states: (a) *a communication procedure*, which enables children to submit complaints about violations of their rights to the UN Committee on the Rights of the Child, if they have not been fully resolved in national courts, and (b) *an inquiry procedure* for grave and systematic violations of the child's rights.

The impact of the Protocol on legal mechanisms for considering children's rights protection both in Europe and worldwide is unavoidable. The Annex includes a consideration that “... *the present Protocol will reinforce and complement national and regional mechanisms allowing children to submit complaints for violations of their rights*”.

The Protocol defines the competence of the Committee on the Rights of the Child only for the signatory states. In applying the Protocol the Committee must be guided

¹⁴ A/HRC/17/L.8.

by the principle of the best interest of the child and consider the rights and views of the child in accordance with its age and maturity.

The Protocol further obligates the Committee to draw up rules of procedure for responding to submissions by children, and providing guarantees for observing child-sensitive procedures and the prevention of manipulation with children by persons acting on their behalf. Certainly, the child's best interest takes precedence in this Protocol as well. The Committee may refuse to examine any communication if it considers that it is not in the child's best interest. The Committee will thus without a doubt have to devise a special system (whose scope is as yet unclear) which would provide guarantees for a complete protection of children.

Submission of various types of complaints always carries the risk of retribution. This is especially dangerous for children as they are dependent on adults, whether they be parents, teachers or caretakers. For this reason the Protocol contains a rule concerning confidentiality of the person submitting a communication, unless there is express consent for revealing his or her identity.

Communications can be submitted to the Committee by children individually or in groups if they believe and claim that there has been a violation of a Convention right by a signatory state of the CRC, the Optional Protocol to the Convention on the sale of children, child prostitution and child pornography, or the Optional Protocol to the Convention on the involvement of children in armed conflict. The child or group of children may be represented by a third person acting on their behalf even without their consent. For many states this would likely be the ombudsperson for children.

Sometimes the content of the communication may prompt an emergency interim action by the Committee. The Protocol provides for the possibility for the Committee to take interim measures (to be considered by the Committee in an emergency procedure) with regard to the signatory in question, even though they do not necessarily entail a positive judgment on the merits of the communication. The purpose of these measures is to prevent possible irreparable damage.

The Committee will find a complaint inadmissible if it is anonymous, not in writing, if it represents an abuse of the right to submit a communication or if its content is incompatible with the provisions of the Convention on the Rights of the Child or the Protocols, if it would constitute a violation of the *ne bis in idem* principle (*i.e.* if the case is already being considered by the Committee or another international body), if all national legal remedies have not been exhausted, except if the procedure has been unreasonably prolonged or unlikely to bring effective relief, if the complaint is unfounded or not sufficiently substantiated, or if the facts that are the subject of the communication occurred prior to the entry into force of the present Protocol for the State party concerned, unless those facts continued after that date. The last bar

to admissibility pertains to communications submitted later than one year after the exhaustion of domestic remedies. This deadline does not apply in exceptional cases, *i.e.* if the author can prove that it was not possible to submit the communication within the time limit.

The drafters of the Protocol were aware of various political situations which are contrary to democratic processes and provided for confidential communication with the state party concerned, imposing the obligation of reply as soon as possible and no later than within six months.

The Protocol aims to resolve matters in a friendly manner and provides for the involvement of the Committee, which certainly adds a new dimension to its function.

According to the Protocol, the Committee must convey its views and recommendations regarding the communication without delay to all parties and, where necessary, request further information from the state concerned about any measures it has undertaken, as instructed by the Committee.

State parties must submit to the Committee a prompt written reply concerning such measures within six months, which constitutes a follow-up system.

The provision allowing communications by one state with regard to another state which has (allegedly) violated the Convention or its Protocols is interesting from the international viewpoint. It should be noted that a state must declare that it recognises the competence of the Committee to consider complaints of a state against itself. This declaration may be withdrawn at any time once it has been deposited with the Secretary-General of the United Nations.

Part III of the Protocol pertains to the examination of the information contained in the communication. Pursuant to Article 13 the Committee has the power to take an active role in the inquiry procedure and may designate one or more of its members for a visit to the state concerned with its consent. The Protocol provides for the possibility to express reservations as to the competence of the Committee¹⁵. The entire procedure is carried out confidentially, in co-operation with the state concerned, which provides comments and recommendations, and which must respond to the Committee and send its observations within six months. A follow-up system is also envisaged by the Protocol.

The final provisions (Articles 15-24) regulate the matters of international co-operation and assistance (in terms of transfer of competence from the Committee to UN specialised agencies, among which UNICEF funds and programmes seem to be the

¹⁵ Declarations on the recognition of the Committee's competence have on 1 September 2017 been submitted by 12 states: Albania, Belgium, Chile, Czech Republic, Finland, Germany, Italy, Liechtenstein, Portugal, Slovakia, Switzerland and Turkey.

most appropriate), Committee reports to the General Assembly of the UN (every two years), the obligation to make known and disseminate the Protocol, in particular to adults, children and children with disabilities, and finally the procedures of signature, ratification and accession to the Protocol, which are identical to those pertaining to the Convention on the Rights of the Child and the other Protocols. The closing provisions pertain to denunciation and deposit of the Protocol.

According to its express provisions, the Protocol may only apply to events and communications relating to violations of children's rights (laid down in the Convention on the Rights of the Child and its two Protocols) which occurred after its entry into force.

The Optional Protocol to the Convention on the Rights of the Child on a communications procedure is most likely only the first step and a good idea how to overcome the obstacle of the impossibility to punish states pursuant to the Convention on the Rights of the Child and its two Protocols. The choice to accede to the Protocol and the speed of such a decision will surely indicate a state's readiness and determination to improve the situation of children's rights on their territories. Naturally, it is only the first communications submitted by children or persons acting on their behalf that will prove or disprove its purpose and effectiveness. Let us hope for the best.

4. THE PROBLEM OF CHILDREN'S RIGHTS IN EUROPE

In discussing the problem of children's rights in Europe the fact that as many as 5.4 million children are born in Europe every year¹⁶ strengthens the need for a serious answer to the question as to whether we have done everything for the children of Europe.

The problem of legal regulation of children's rights in the framework of European integration should be observed considering that these are only the early steps and that the issues of how to formulate children's rights and how to apply and support them still need to be addressed¹⁷.

The legal status of children is quite inconsistent and their legal protection is still unclear.

Legal and political measures of the EU as regards children's rights must be based on the Treaties due to the limited competence conferred on the Union by its mem-

¹⁶ Eurostat, 2011. However, it is believed that statistical data relating to children do not reflect the situation of children in the EU in a satisfactory way; see *Stalford*, 2012, 14.

¹⁷ *Stalford*, H. in: *Stalford*, 2012 claims that: "... it is fair to say that EU seems an unlikely context within which to pursue children's rights".

ber states, and the provisions concerning children's rights in the Treaties are very modest. Primary legislation of the EU comprises the Treaty on European Union¹⁸, the Treaty on the Functioning of the European Union¹⁹, and the Charter of Fundamental Rights of the European Union²⁰ as binding documents, while the number of soft law documents continues to grow and thus, it is our belief, adds to the instability of the system from the inside, and reflects the weakness of the EU in ensuring better rights of children on its territory.

In family law, there is always the issue of justifiability and permissibility of encroaching upon its essence²¹, considering how carefully national family legislations guard their own traditions. Soft law²² is the “answer” for the regulation of the legal status of children in the EU, probably because the Treaty on the Functioning of the European Union does not provide for the EU's general competence as concerns the rights of children, nor does the Court of the EU deal with cases from that field.

As is the case with some other private law matters, the EU relies on the Council of Europe as a competent body in the area of human rights. These two organisations have come closer together²³, but at the same time their powers overlap to a certain extent.

The European Convention for the Protection of Human Rights and Fundamental Freedoms guarantees protection to family members (Articles 8 and 12), but does not contain any provisions pertaining to the rights of children. However, the Strasbourg Court seems to refer to the Convention on the Rights of the Child with increasing frequency so that some legal theorists speak of the phenomenon of cross-fertilisation of international documents in terms of compensating for the lacking provisions concerning children in the European Convention for the Protection of Human Rights and Fundamental Freedoms on the one hand, and on the other, increasing the legal strength of the Convention on the Rights of the Child²⁴.

The Treaty on European Union stipulates on a declaratory level that the Union promotes the rights of children. This pertains to Article 3, paragraph 2 of the **Consolidated version of the Treaty on European Union**: “*It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child ...*”.

¹⁸ Consolidated version of the Treaty on European Union, OJ C 326, 26.10.2012.

¹⁹ Consolidated version of the Treaty on the functioning of the European Union, OJ C 326, 26.1.2012.

²⁰ Charter of fundamental rights of the European Union, OJ C 326, 26.10.2012.

²¹ Majstorović, 2013, 78.

²² In this paper we refer to the *EU Guidelines for the Promotion and Protection of the Rights of the Child*, the Council of Europe Strategy for the Rights of the Child (2012-2015), *EU Agenda for the Rights of the Child*, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions* COM (2011); for more on this see Hrabar, 2013a, 53-71.

²³ Majstorović, 2013, 78.

²⁴ See Kilkelly, as cited in Stalford, 2012, 39.

In paragraph 5 of the same Article it is noted that the Union shall uphold and promote the protection of human rights, particularly the rights of the child²⁵.

Some authors believe the **Charter of Fundamental Rights of the EU** to be the 'pinnacle of effort of the European Union in the protection of human rights... of the European Union'.²⁶ It lists the basic principles and rights of EU citizens which represent the common values²⁷, and is considered to be on a par with the Treaty on EU in terms of legal strength.

A significant contribution of the Charter lies in the fact that it has recognised the rights of children independently and separately from other (adult) citizens of the EU or of the family in general. A further value of the Charter in relation to children lies in its impact on EU law and children-related policy making, making it a cornerstone for legislative proposals and national procedures to be analysed by institutions in terms of consistency with fundamental rights.²⁸ And finally, the Court of the EU makes references²⁹, with increasing frequency, to some of the rights of the child protected by the Charter.

The following provisions have an impact on the legal status of children³⁰: rights of the child (Article 24), education (Article 14/2), prohibition of age-based discrimination (Article 21), and the prohibition of exploitation of children (Article 32). A large number of provisions imply their applicability on children³¹. A more detailed analysis of these provisions would go beyond the scope of this paper.

However, the provision of Article 24 pertaining to the rights of children should be noted. It runs as follows:

²⁵ "... 5. In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter. "

²⁶ Majstorović, 2013, 86.

²⁷ It is exactly the term 'common values' (from the Preamble) that we consider important in terms of recognisability of the rights of children as part of the public order not only in the EU, but also in nation states. As a matter of fact, most of the 54 articles correspond to the rights and principles laid down in the constitutions of EU member states and international documents.

²⁸ Stalford, 2012, 41.

²⁹ As concerns Article 24 of the Charter, see e.g. Case C-149/10 *Zoi Chatzi v. Ypourgos Oikonomikon* (2010) 2010 I-08489, C-491/10/PPU *Joseba Andoni Aguirre Zarraga v. Simone Pelz* (2011) 2010 I-14247; Case C-400/10 PPU *J McB v L.E.* (2011) 2010 I-08965 etc. Retrieved from: www.curia.europa.eu.

³⁰ For an analysis of the European documents in relation to the rights of children see *Hrabar*, 2013a.

³¹ The provisions of the Chapter on justice (Chapter VI) pertain first and foremost to adults, but also to children when they are part of a judicial process. This refers to the right to an effective remedy and a fair trial, the presumption of innocence and the right of defence, the right not to be tried or punished twice in criminal proceedings for the same criminal offence, etc.

1. *Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.*
2. *In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.*
3. *Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.*

The provision is phrased in a broad sense in order to include several principles and substantive rights from the Convention on the Rights of the Child.³² Only several rights of the child are mentioned – the right to protection and care, the right to free expression of views, and the right to maintain direct contact with both parents, with the key criterion for treating children being their best interest. Finally, the age and maturity of the child are to be taken into account when considering the child's views³³.

The right to free expression of views, relativised by the child's age and maturity, is a broadly accepted standard in international agreements.

The right to a relationship and contact on a regular basis with both parents is not as broad as the other above mentioned rights, but the Charter probably mentions it due to the fact that there is an increasing number of divided families and children who face the difficulty of growing up without one of the parents, where legal systems, institutions and the other parent often make provisions for contact with the separated parent³⁴.

From the phrasing of the provision of Article 24 of the Charter the following conclusions can be drawn: children's rights belong to children as independent and autonomous subjects³⁵, the rights of children are laid down in more specific terms than in other international agreements, with an emphasis on the most endangered rights of children in the European Union. The right of the child to care and protection implies the need for active and broad engagement both of the European society and institutions, and national institutions, in providing support for children in their development.

³² *McGlynn*, 2002, criticizes the Charter as a superficial and difficult compromise between different concepts of children's rights features in various international documents; as cited in *Stalford*, 2012, 42.

³³ From the Convention on the Rights of the Child to more recent documents (*e.g.* the Convention on Contact, Revised Convention on Adoption, etc.) the right of the child to express his or her view has become one of their fundamental rights.

³⁴ *Stalford*, 2012, 91 states that in the EU approximately 2.4 million marriages are concluded, of which 13 per cent have an international character. In 2007 there were 1 047 427 divorces, of which 13 per cent with an international character. This certainly affects the relationships between the child and the separated parent.

³⁵ See also European Commission Communication (COM (2011) 60 final 3.

5. THE HARMONISATION OF LEGAL PROTECTION OF CHILDREN'S RIGHTS

After all that has been said above, the question that arises is – where do we go from here? How do we protect the rights of children in the EU in a better, more efficient and more comprehensive way? The answer should be sought in the division of legislative and judicial powers of European institutions.

Namely, within the framework of the EU, there is the area of freedom, security and justice. The area of justice from Chapter V of the *Treaty on the Functioning of the EU*, undoubtedly relates to the law in force, in the sense of laws, and not just justice. This fairly wide area, subject to the regulation of European institutions, could, in our opinion, pave the way to better protection of children's rights at the European level, which has not yet reached the desired level.

It is of utmost importance to protect subjective rights by way of their realization *via* court jurisdiction. If we consider the protection of children's rights in national legislations, we notice that it exists, with certain differences, and the results of protection certainly differ due to varying substantive legislation governing children's rights, different types of (non-) specialized courts for family matters, the effectiveness of the ombudsperson for children, the degree of social and legal awareness of children's rights etc.

Certainly, there exists a certain amount of willingness to improve the status of children³⁶ but we see it only as the beginning of a legislative and active approach to children. In fact, we see a lack of concrete legislative and court assistance, and vast room for new forms of more complete and more unified protection of children's rights at the level of the European Union.

The problems of children in Europe vary, but they are characteristic of the Western society and they are specific³⁷ in comparison with the problems of children in undeveloped or developing countries. Although all children's rights³⁸ are incorporated in the Convention on the Rights of the Child, to which all EU member states are party, and their protection lies in the field of national legislations and the Ombudsperson for Children, we still believe that it is necessary to oblige EU member states, in a specific manner, on the level of joint principles, to ensure stronger and more harmonised legal protection of children's rights. By this we mean that there is a need to create a

³⁶ Stalford, 2012, 5.

³⁷ On European problems of children's rights see Hrabar, 2013a. The author mentions three aspects of the problem: sociological (integration of children of asylum seekers, immigrants, Roma children), psychological (children separated from their parents), and children in the justice system (as victims of crime, violence and paedophilia).

³⁸ There are more than 60 children's rights, which are in fact their needs - daily, occasional, regular and exceptional. For more about this: Hrabar, 2007, 224 *et seq.*

binding document for all EU members. This means that it would be necessary to prepare an appropriate piece of legislation (probably a regulation, as it is usual in the European political and legal system) which, on the basis of the Convention on the Rights of the Child, would elaborate the rights of children who are the most vulnerable in the European context, based on their needs, and which would at the same time be binding (under the threat of sanctions) on member states. This, in our opinion, should be the first step towards better protection of children's rights. The reason why this is necessary is the fact that the EU is not a party to the Convention on the Rights of the Child, nor can it become one due to the express provisions of Articles 46 and 48³⁹. Indeed, we believe that such activity by the EU would contribute to a clearer definition of this integration, and the realization of its aims, since the European Union considers itself to be “... among other things, a legal system established to deal with a series of contemporary problems and realise a set of goals that individual states felt unable to manage alone”.⁴⁰

6. EUROPEAN INSTITUTIONS WITH POWERS TO ACT ON CHILDREN'S RIGHTS

As concerns the governing institutions of the EU, the Commission with its power provided for in Article 17 of the Treaty on European Union is of key importance for children's rights and their “codification”. This Article gives the Commission the so-called legislative and quasi-legislative powers⁴¹, of which we point out the following: “*Union legislative acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise. Other acts shall be adopted on the basis of a Commission proposal where the Treaties so provide*”. Further, the Commission ‘has a monopoly over the power of legislative initiative’⁴², which we consider to be the key element in the adoption of specific European legislation concerning children's rights. However, the Commission does not have a monopoly in instituting legislative procedure, because it may also be instituted by the Parliament, Member States or the Council of the European Union.⁴³

The Council of the European Union, together with the Parliament, has some limited executive powers in relation to legislation (pursuant to Article 16 paragraph 1), and receives proposals for legislation from the Commission⁴⁴.

³⁹ Article 46 prescribes: “*The present Convention shall be open for signature by all States. Article 48. reads: The present Convention shall remain open for accession by any State*” The EU, at least at its current stage of development, is not a state, not even a federal state or a confederacy, since first of all the members themselves are opposed to the idea, which has been shown amongst other things, by the “fate” of the European Constitution.

⁴⁰ Chalmers; Davies; Monti, 2010.

⁴¹ See *Ibid.*, 59.

⁴² *Ibid.*, 61.

⁴³ *Ibid.*, 112.

⁴⁴ *Ibid.*, 69.

The European Parliament has limited legislative powers. However, it may forward a proposal to the Commission in the form of its own initiative report⁴⁵.

EU legislation abounds in different types of acts⁴⁶ mentioned and described in Article 288 of the Treaty on the Functioning of the European Union. Regulations “are the most centralising of all EU instruments and are used wherever there is a need for uniformity. As they are to have general application, they do not apply to individual sets of circumstances, but to an ‘objectively determined situation and produce(s) legal effects with regard to categories of persons described in a generalised and abstract manner’. The other hallmark of Regulations is their direct applicability. From the date that they enter into force, they automatically form part of the domestic legal order of each Member State and require no further transposition ... the fact that it is the Regulation which is the direct source of their rights and obligations”⁴⁷. Therefore, a Regulation would be the most appropriate form for the realization of children's rights on the European level.

EU legislative procedure is regulated separately in Article 29 of the Treaty on the Functioning of the European Union and basically, as concerns children's rights, the key role is played by the so-called trilogy - the Commission, the European Parliament and the Council. We should also mention the so-called *Joint Declaration on Practical Arrangements for the [Ordinary Legislative] Procedure [2007] OJ 145/2* on cooperation between institutions in the context of joint decision-making on the level of tripartite meetings, which demonstrate the “*democratic quality of law-making*”.⁴⁸ The separate legislative procedures: (a) the Commission submits a proposal to the Council, (b) the Council consults the Parliament and (c) the Council adopts the measures - exist in order to create institutional balance⁴⁹ from which we may conclude that there is a need for these bodies to be united in their engagement also in this case, which we propose should be resolved by a Regulation.

7. WHAT ARE THE NEXT STEPS?

Having in mind all the afore stated, the question arises – how to move forward? How to protect the children's rights at the level of the EU even better, more efficiently and more coherently? The answer stems from the division of legislative and judicial

⁴⁵ *Ibid.*, 86.

⁴⁶ Chalmers *et al.* write: ‘Regulations were the most widely used of all, accounting for 31 per cent of all legislation. Decisions addressed to a party accounted for a further 27 per cent, with decisions not addressed to anybody accounting for 10 per cent of all measures. Directives and international agreements each accounted for 9 per cent of all legislation’. *Ibid.*, 98.

⁴⁷ *Ibid.*, 98 etc.

⁴⁸ *Ibid.*, 109.

⁴⁹ *Ibid.*, 110.

authorities of European institutions, in particular within the Area of freedom, security and justice. This concept, as we have argued before,⁵⁰ could open the path to a better protection at the European level and by that we mean in particular the judicial level.

One can easily notice that all children's rights⁵¹ are incorporated in the Convention on the Rights of the Child, to which all EU member states are party. One can also easily notice the differences in legal systems regulating the protection of children's rights as well as consequent differences in procedures and the scope of the protection guaranteed to children within national legislations. One can furthermore easily notice the will of the national states to improve the status of children.⁵² Nevertheless, all this is not nearly enough. To our mind, the lack of concrete judicial assistance to children in different legal situations is the main obstacle on the only path towards real improvement of the protection of children.

We have already advocated the creation of a binding piece of EU legislation, probably a regulation, which would further elaborate the rights of children⁵³ and consequently make significant contribution to strengthening the Union. Having in mind the legislative and quasi-legislative powers of the European Commission,⁵⁴ we consider it as the potential key contributor in the development of a more coherent and more efficient system for the protection of the rights of the child. Namely, we believe that a new regulation of this kind would be the best legal instrument for improving the standards within the EU regarding the children's rights. Pursuant to Article 288 of the Treaty on the Functioning of the European Union, regulations have general application and are binding in entirety as well as directly applicable in all Member States.

Such a development would presume the creation of a system which would make the abstract rights more concrete, while one can easily conclude from every-day life and legal experience that the mere existence of a right is not enough. If one does not have the possibility of protecting one's own subjective right it is only dead letter, without any meaning or worth whatsoever. The full and impartial court protection should hence be the priority of all future efforts.

It should be further stressed that the rights belonging to children belong to them by the argument of *iure naturali*. The children, along with all other vulnerable groups, need special protection from all, and in particular by the state, which has to secure

⁵⁰ See Hrabar, 2014, 181-198.

⁵¹ As already mentioned, there are more than 60 children's rights.

⁵² Stalford, 2012, 5.

⁵³ One should mention that the EU is not a party to the Convention on the Rights of the Child, nor can it become one due to the express provisions of Articles 46 and 48, which stipulate that the Convention is open for signature and accession by any state.

⁵⁴ See Chalmers *et al.*, 2010, 59.

that a system which is established provides a genuinely effective protection. This level of protection should be globally standardised and the special responsibility lies on Europe. The global means of harmonising the implementation of the CRC is already functioning. Namely, the Committee on the Rights of the Child receives the reports from the states, makes recommendations and conclusion, as well as publishes general comments on the most important issues. Also, the Third Protocol is a clear sign at the global level that all children's rights should be taken seriously, and consequently, that their protection requires a further headway. Now, the turn is on the EU.

8. THE ESTABLISHMENT OF A EUROPEAN COURT FOR THE RIGHTS OF THE CHILD AS A POSSIBLE SOLUTION

As we have pointed out before,⁵⁵ the time is ripe to take a step forward and establish a European Court for the Rights of the Child. Such a court would be a counterpart institution to the Courts in Strasbourg and Luxembourg, adjudicating on complaints by children against their own state in cases of violation of their rights.⁵⁶ It would by no means be a *superfluum*, nor an institution established just for its own sake. On the contrary, the new court would finally be a concrete confirmation of the devotion of European states as well as the EU itself to the protection of children, so many times declared as a priority of European actions.

As we see it, the new court should be established as a specialised court, with judges specially educated and sensibilised to all layers of issues deriving from the special legal position of children. Also, the children should be represented by equally specialised attorneys, with experience and knowledge in the field of children's rights. Hence, by diminishing the workload of the European supranational courts and also providing the children a fair and real opportunity to be represented and heard before a supranational court, the new court *in spe* would be a significant contribution to the development of European legal order. The Latin expression *ubi ius ibi remedium* should find its contemporary meaning in the joint European document on the rights of the child, as well as the establishment of the new court. The latter development would mark closing the circle: possession of rights - protection of rights - realization of rights.⁵⁷

Therefore, we can only hope this will become a reality, rather than an academic initiative. One should admit that the European Union at this point does not have a positive obligation to actively develop the area of children's rights,⁵⁸ but we nevertheless

⁵⁵ *Hrabar*, 2014, 191 *et sq.*

⁵⁶ *Ibid.*, 193.

⁵⁷ *Ibid.*, 196.

⁵⁸ *Stalford*, 2012, 46.

see it 'as a matter of maturity, readiness and political responsibility on the level of European institutions to take a new step towards judicial protection of children's rights, at the same time with respect for the principles contained in the more recent documents adopted for the protection of children by the Council of Europe.'⁵⁹

9. CONCLUDING REMARKS

The Convention on the Rights of the Child is a powerful document which, we believe, serves as the fundamental standpoint from which to observe children's rights and consider possible future steps to be taken for the improvement of their position in the society. There have been no negative reactions to the Convention to date and we do not expect there will be any, as it represents a well-rounded system of children's rights. On the contrary, we believe that the Convention has opened the door to a better and more sophisticated engagement of various groups for creating a better and more caring world for children.

We believe that there are different paths to achieving this goal. There is open space for new regional conventions which would be built on the principles, requirements and provisions of the Convention on the Rights of the Child (addressing region-specific problems, such as the right of the child to potable water and food, etc.) or which would deal with global issues faced by all communities (*e.g.* the Convention on Contact concerning Children or the Convention on the Exercise of Children's Rights).

Regardless of the large number of children's rights that have found their place in the Convention on the Rights of the Child, some of them do not require additional elaboration in new legal instruments (*e.g.* the right to play and engage in recreational activities). However, the application and control of the application of children's rights in practice remains an open question and puts before us the task of finding the most efficient approach to the exercise of all children's rights.

Another path which we find to be very important would be to strive to achieve better communication with children when they have something to say, *i.e.* when they believe their rights have been violated. The Optional Protocol is certainly an excellent starting point in which we put a lot of faith, and we believe that its adoption and entry into force marked the beginning of a new era for the rights of the child. This is particularly important considering the fact that the Protocol gives new powers to the Committee on the Rights of the Child.

However, we still see a large problem in human nature. The factual adult supremacy over children, although useful in many ways, can present a debilitating factor. There-

⁵⁹ See: *Hrabar*, 2014, 193. and also *Hrabar*, 2013b, 277–300.

fore, we advocate the establishment of regional courts for children's rights in order to remove the threat of adults endangering children, regardless of the fact that their rights are embodied in international documents and national regulations.

It is, therefore, time for a new milestone and concrete steps forward. Europe could be the one to show the world that children's rights courts have their place in society.

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Sažetak

PREMOŠĆIVANJE NEDOSTATNE ZAŠTITE DJEČJIH PRAVA FAKULTATIVNIM PROTOKOLOM UZ KONVENCIJU U POSTUPKU POVODOM PRITUŽBI I OSNIVANJEM EUROPSKOGA SUDA

Svrha je rada razmotriti dosege i značenje Konvencije o pravima djeteta, njezin doprinos poboljšanju pravnog i općeg položaja djece te analizirati poteškoće koje nastaju u primjeni tog za prava djece najvažnijega međunarodnog dokumenta. U radu se, nadalje, analizira Fakultativni protokol uz Konvenciju o pravima djeteta o postupku povodom pritužbi a posebice se razmatra pitanje pravnoga uređenja i učinkovite zaštite prava djece u europskome okviru. Na temelju provedene analize daju se prijedlozi koji bi mogli doprinijeti boljoj, učinkovitijoj i sustavnijoj zaštiti dječjih prava na razini Europske unije, što uključuje i onu sudsku, a koja bi se mogla ostvariti osnivanjem Europskog suda za prava djece.

Ključne riječi: prava djece, Fakultativni protokol uz Konvenciju o pravima djeteta, Europska unija

