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Convention on the Rights of the Child and Criminal Law

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THERE IS no doubt that the child has to enjoy special legal protection i.e., that the child as stated already in the Declaration of the Rights of the Child, adopted by the General Assembly in 1959 "by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth". The Convention on the Rights of the Child establishes a large number of rights of the child, as well as the obligation of states to recognize those rights and ensure their exercise. The Convention, however, does not specify which form of legal protection states should ensure in their legislation, and which type of legal sanctions they should envisage with a view to protecting those rights. This may be regulated by family, civil, administrative, labour and naturally, criminal law. On this occasion I intend to dwell on the possibilities of criminal law and the need of employing it for the purpose of protecting certain rights of the child envisaged by this Convention.

The fact is that criminal sanctions constitute the grave legal sanctions and should, therefore, be resorted to only when other types of legal sanctions are not efficient enough i.e., criminal law and punishment are *the last resort* i.e., *ultima ratio.* It is necessary to view from that aspect Convention and raise the issue of the need and legitimacy of their criminal-legal protection. In this context, we can speak about a *de lege lata* situation where attention will be drawn to some arrangements in the Yugoslav criminal legislation, which are basically similar to those in numerous European criminal legislations, and also point to *de lege ferenda* justifiability of establishing also criminal responsibility when graver violations of certain rights of the child are in question. Therefore, in respect of some basic rights of the child envisaged by the Convention, we have to ask whether they need also criminal-legal protection i.e., whether the existing general incriminations as well as those which protect only the rights of the child, are sufficient for the protection of the certain rights of the child and, if where special criminal-legal protection is not envisaged, that is in *de lege ferenda* terms necessary and justified. In that connection we should devote attention to the rights envisaged in articles 6, 19, 24, 26, 27, 33, 34, 35, 37 and 40 of the Convention. Are these rights sufficiently protected in national legislation i.e., should they enjoy criminal - legal protection which implies the prescribing of the strictest sanctions ? A further issue which could be of relevance, although rather controversial in principle is whether in some cases there is room and justification for envisaging criminal responsibility of legal persons also for violations of the rights of the child. These issues certainly merit serious

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consideration and the advancement of pros and cons, especially if we bear in mind the relativity of the concept of crime, which varies from society to society, within the same society at different times, and between different social groups. Therefore, the discussion here is confined only to a minimum which should not be disputable and in respect of which we can speak about a certain degree of consensus and universality.

When the instituting of criminal-legal responsibility for violations of certain provisions of the Convention is in question, Article 6 in particular merits attention. There is no doubt that in addition to extending other forms of protection, the inherent right of the child to life must be also protected by criminal sanctions. The right of the child to life may be violated in many ways and needs additional protection in comparison to elders (for instance, in Yugoslav criminal law inducing or abetting the suicide of a child is equalized with the criminal offence of murder). The right in item 2, article 6 of the Convention calls, *inter alia*, for criminal-legal protection. In the Yugoslav criminal legislation, this right is protected by several criminal-legal provisions. In addition to the abuse of a child i.e., a minor, the inducement with the aim of material gain, of a child to acts detrimental to its development is punishable. It is also a criminal act for a person entrusted with care for a child to leave the child without assistance in situations dangerous for his life or health. Through this and a number of other criminal-legal provisions, the Yugoslav criminal legislation like most European criminal legislations extends, under certain conditions, criminal-legal protection to the child against all forms of physical or mental violence, injury or abuse, maltreatment including sexual abuse as envisaged under article 19 of the Convention. However, adequate criminal-legal protection in the legislative field i.e., the very existence of criminal-legal provisions does not in itself mean efficient criminal-legal protection. The restricted possibilities of criminal law and the gap between the normative and reality is known. However, that is particularly expressed when some forms of child abuse are in question.

Article 24 of the Convention deserves special attention from the aspect of the need and legitimacy of using criminal-legal protection. Concerning the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. The obligation is determined to states to strive to ensure that no child is deprived of his or her right of access to such health care services, and in item 2 of this article this obligation is set forth in concrete terms. Criminal responsibility should be envisaged for grave violations of this right of the child. The denial of this protection should, under certain circumstances, be a criminal act, and a more grave form of a criminal act if the violation of this right of the child is carried out in an organized manner, vis-a-vis a larger group of children, resulting in more serious consequences. In the case of the violations envisaged in article 24, this article is related to articles 6 and 19 of the Convention.

Article 27, item 4 of the Convention expressly envisages the obligation of states "to secure the recovery of maintenance for the child from the parents of other persons having financial responsibility for the child, both within the State Party and from abroad". The evasion of that obligation is, like in many other criminal codes, also a criminal offence under the Yugoslav criminal legislation. Regrettably, the embargo on payment transactions imposed on FR Yugoslavia, includes this obligation also in numerous cases where the person having financial responsibility for the child lives abroad. This prevents the giving of effect to the provisions of article 27, item 4 of the Convention.

Articles 33, 34, 35 and 37 envisage in-

disputable obligations which are, for the most part, already envisaged under appropriate Conventions. The Yugoslav Criminal Law as well as other European laws envisage a number of criminal offences punishable by strict sentences, with a view to protecting the child against such forms of violation and the endangering of his rights. When protection against other forms of exploitation harmful to the child is in question (article 36), because of the subsidiary nature of criminal law i.e., the fact that it constitutes *ultima ratio*, it is necessary to envisage punishment only for the gravest forms of exploitation, while protection against other forms of exploitation should be extended through other branches of the law i.e., in other ways.

Article 40 envisages a number of rights of children and minors in criminal proceedings. Actually, minimum standards are in question and the Yugoslav legislation in this area goes considerably beyond the obligations envisaged in this article.

On this occasion some remarks are made concerning the need and justifiability of protecting only some of the rights of the child envisaged by the Convention. There is no mention about a number of rights in connection with which the issue of criminal-legal protection against different forms and modalities of their violation could be raised (such as the right of the child to living standard, social security, education). It is certain that criminal-legal intervention would also be justified for the gravest violations of those rights.

It is necessary to establish universal legal protection without any exceptions and discrimination in respect of the inalienable fundamental rights of the child. The sanctions of the international community against any state whatsoever can be neither a justification nor ground for ruling out criminal responsibility (and especially moral responsibility) for violations of the rights of the child. There is also justification for introducing the criminal responsibility of corporations, organizations and other legal persons for grave violations of the right of the child.

When criminal law and its links with the right of the child are in question, attention is drawn to the problem of collective punishment. Although collective responsibility and collective punishment are something unacceptable in criminal law, some measures of the international community actually boil down to that i.e., have such effect, namely, the punishment of entire states by the international community through the imposing of an economic embargo and through other measures, affect the most vulnerable and most innocent, primarily children. Even if we proceed from the fact that responsibility and guilt of the political structures of a country exists, it is clear that it in no way justifies the punishing of the entire population of that country. The consequences of such measures in respect of children may be so grave that over the long term they imperil the survival of the people itself. If those deciding on such measures or implementing them at least agree to serious violations of the right of the child (such as their life, health, survival, development) i.e., if possible deliberate intention (*dolus eventualis*) is in question, then criminal responsibility according to the usual standard of the science of criminal law is inescapable. The invocation of humanitarian aid exempted from the embargo cannot be the grounds for excluding that subjective element, because it is evident that in practice that relief does not mean much and that it mitigates the legal effects on the basic rights of the child hardly at all. If that subjective element were even more expressed i.e., if direct intent, awareness or intention existed to subject children to living conditions as imperil their survival, then it would indicate the existence of the crime of genocide.

In that connection, the proposal is jus-

tified to supply the Convention with new instruments (optional protocol), although its interpretation would anyhow result in such a conclusion, to ensure that children must be exempt from the punitive measures taken by the international community against a country and grave violations of the right of the child in the implementation of such measures constitute crime against humanity and international law.

Criminal law and the criminal justice system are only parts of the mechanisms for the control of undesirable behaviour and protection of rights of individuals and other values in the society. Especially when the protection of the rights of the child is in question, formal and informal social control extends to almost every conceivable social, legal, private and public institution, including most prominently the family and the school. Despite this, the criminal-legal protection of the rights of the child is in certain situations irreplaceable and unavoidable and it is in that light that the role of criminal law in the implementation of the rights envisaged by the Convention on the Rights of the Child should be viewed.

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