INTERNATIONAL LAW YEARBOOK

VOLUME 3 - 2010

ISSN 1916-3096

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Cite as (2010) 3 Int'l. L. Yrbk.

ISSN 1916-3096

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COMPLICITY IN THE NEW CRIMINAL LAW OF REPUBLIC OF SERBIA

DR. DRAGAN JOVAŠEVIĆ*

NOTION AND TYPES OF COMPLICITY

Complicity exists if several persons jointly perpetrate a criminal offense. Persons who perpetrate a criminal offense are called accomplices. Thus, the complicity implies participation of several persons in perpetration of one criminal offense and the accomplice is every person who participated in perpetration of that criminal offense[1]. Complicity[2] is not only a special type of criminal offense perpetration but also a special type of criminality, i.e. collective criminality, which is more dangerous for a society than a solitary crime. The collective criminality represents accumulation of criminal energy (criminal volition) due to joint volition of numerous persons in perpetration of one or several forbidden acts.

This joint volition of numerous persons in joint perpetration of a criminal offense gives this offense a special aspect of social jeopardy. Due to its special meaning, the complicity represents an institute that is regulated by definitions of general offense according to the new Criminal code of Republic of Serbia[3] from 2005. (articles 33-37)[4] .

For existence of the complicity, beside participation of several persons in perpetration of a criminal offense, it is necessary to be fulfilled another two conditions: objective and subjective relation. The objective relation means that every accomplice initiates some activity that contributes to perpetration of a criminal offense. All these activities that are initiated by accomplices, no matter to the fact whether they are perpetrated contemporaneously or not, and on the same place or not, must be related so that it leads to the same result – to cause a consequence. The consequence of a criminal offense must be a result of a joint activity of all accomplices. It means that a causal relation must exist between a consequence of criminal offense and every undertaken activity of several persons[5].

The subjective relation means that all accomplices possess knowledge about a joint activity that is directed towards perpetration of a certain criminal offense. It means further that accomplices know about each other and they know about perpetrators of that criminal offense. But they do not necessarily need to know each other personally. Personal acquaintance may, or may not exist, but it is not relevant for existence of complicity. The most important is that every accomplice knows that beside him/her

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[1] Many modern foreign criminal codes define on similar way a notion and characteristics of complicity. In such a way the Criminal code of Ukraine, in the article 19, defines the complicity as intentional joint participation of two or several persons in perpetration of a criminal offense. (M.I. Koržanskij, Popularnij komentar kriminolnogo kodeksu, Naukova dumka, Kiev, 1997.); The Criminal code of Slovenia in the article 25 considers that the complicity exists if two or several persons jointly commit a criminal offense so that they participate in perpetration or by some other activities they decisively contribute to its perpetration. (Lj. Selinšek, Kazensko pravo, Ljubljana, 2007.); the Criminal code of Spain, in the article 29, defines a notion of accomplice. So that persons are being considered as accomplices if participate in perpetration of a criminal offense, and also persons who undertake activities that precede to perpetration of a criminal offense, and in that way participate in perpetration of the criminal offense. (N.F. Kuznjecova, F.M. Rešetnikov, Ugolovnij kodeks Ispanii, Zercalo, Norma, Moscow, 1998)

[2] I. Simović Hiber, Thesis on complicity, Archive for law and social science, Belgrade, No. 1-3/1996, pgs. 573-581

[3] Official gazete of Republic of Serbia No, 85/2005 More : D. Jovašević, The Criminal code of the Republic of Serbia, Belgrade, 2007. pp.43-50

[4] D. Atanacković, Complicity in a criminal offense, Yugoslavian magazine for criminology and criminal law, Belgrade, No. 1-2/1995, pgs.5-69

[5] J. Tahović, Criminal law, General part, Beograd, 1961. page 287, D. Jovašević, Criminal law, General part, Beograd, 2006. pp. 187-213

there are other certain persons participating in perpetration of a criminal offense and a perpetrator of the criminal offense is from that circle of persons.

Participation of several persons in perpetration of a criminal offense may be realized by different activities and on several ways[6]. In such a way, accomplices are all persons who equally participate in perpetration of a criminal offense in a way that they jointly carry out an activity of perpetration of criminal offense or undertake some other activity that decisively contributes to perpetration of that criminal offense. In this case there is complicity. Several persons may participate in perpetration of a criminal offense in a way that some of them guide a perpetrator to undertake an activity of perpetration of a criminal offense while the others help him/her to undertake the activity and cause a consequence of the criminal offense. In the first case, there is incitement, and in the other case there is accessory. Unlike some other foreign criminal codes,[7] which define organizing in criminal organization as a type of complicity, this type of complicity does not exists in the legislation of Republic of Serbia.

All these types of accomplices may but also may not be represented in perpetration of one criminal offense taking into consideration the fact that complicity is optional in a process of perpetration of a criminal offense. From everything that was earlier mentioned one can conclude that there are three types of complicity: co-perpetration, incitement and accessory[8].

A law theory distinguishes complicity in narrower and broader sense. The complicity in narrower sense is incitement and accessory, while the complicity in broader sense, beside the earlier mentioned forms, is a co-perpetration.

CRIMINAL RESPONSIBILITY OF ACCOMPLICES

A criminal responsibility of accomplices is based on accountability and guilt and is the same as that of perpetrator of a criminal offense. There are no special rules for accountability, which would be valid only for accomplices. But as for the guilt, there are certain differences that do not refer on content of guilt elements but on forms of its demonstration. Namely, a perpetrator of a criminal offense, no matter is it one or more of them, i.e. accomplices, is always responsible for a criminal offense that was perpetrated with premeditation and as for carelessness only when it is defined by the law. However, an inciter and helper as well as accomplices, in narrower sense, are responsible only when a criminal offense was perpetrated with premeditation, what means that the premeditation is the only form of guilt for the accomplices in narrower sense.

The criminal responsibility of accomplices is a personal matter. Namely, every accomplice is independently and personally responsible. It means that criminal responsibility of one accomplice does not depend either on

[6] M. Tomić, Types of participation in perpetration of a criminal offense, Collection of papers at Law Faculty in Mostar, Mostar 2002, pgs. 85-98

[7] Organizing in criminal organization is known by articles 20-21 of the Bulgarian criminal code or the article 26 of the General criminal code (former Criminal code of SFR Yugoslavia from 1976.). The French Criminal code from 1992. in the article 450-1 defines a malicious criminal organization as organized group inclined to perpetrate criminal offenses for which was threaten a punishment in prison and forced labor of 10 years (F. S. Pierra, La Guide de la defense penale, Dalloz, Paris, 2003.). On the contrary, organizing a criminal organization as a type of complicity is not known to criminal codes of Macedonia, Croatia, Montenegro, Slovenia or Germany.

[8] Different types of complicity are known to a series of modern criminal codes. So that the French criminal code in the article 121-4-7 defines the following forms of complicity: 1) incitement, 2) managing a perpetration of a criminal offense, 3) production, acquiring and delivery of means for perpetration of a criminal offense, 4) providing accessory while perpetrating a criminal offense and 5) mutual cooperation towards perpetration of a criminal offense in a way of cooperation in activities that precede to action of perpetration and collaboration in that action; The Bulgarian criminal code in the articles 20-21. defines: incitement, accessory, organizing in criminal organizations and co perpetration; The Spanish criminal code anticipates in the article 17. a specific way of complicity under the name of "agreement or proposal for perpetration of a criminal offense". This type of complicity is punishable only when it is explicitly anticipated by the criminal code. The agreement exists when two or several persons agree or plan to perpetrate a certain criminal offense, and the proposal exists when a person who made a decision on perpetration of a criminal offense propose to another person or group of persons to perpetrate that criminal offense.

responsibility of offense perpetrator or responsibility of other accomplices. Thus, the criminal responsibility of accomplices is related to undertaking of an act of perpetration by the perpetrator but it is not related to his responsibility as well as responsibility of other accomplices[9]. The responsibility of accomplices, especially of inciters and helpers, is based on two principals:

1) everybody is responsible within the limits of own premeditation and it can not go above that, and

2) everybody is responsible up to the limit achieved by the perpetrator but also not below that.

These limits of responsibility of accomplices come from the article 36. of Criminal code of the Republic of Serbia.

Responsibility of accomplices within limits of own premeditation. The accomplices are criminally responsible only for premeditated participation in perpetration of a criminal offense. Their responsibility exists only within boundaries of their premeditation. It means that the accomplice will be criminally responsible for a consequence that was caused by a perpetrator only if it is comprehended by his own premeditation and in such way that he had anticipated. If the perpetrator commit a heavier criminal offense of the same type than the one that was comprehended by premeditation of accomplices, then the accomplice will not be responsible for that heavier criminal offense, but for the easier one that was supposed to be perpetrated by his premeditation.

However, the accomplice will be responsible for a heavier consequence that comes from the basic offense (offense qualified with a heavier consequence), if that heavier consequence can be imputed to his negligence. The accomplice will be responsible also for a qualified offense with special circumstances if those circumstances were known to him while participating in a basic offense, i.e. when he was undertaking his own activities in perpetration of a joint offense.

Responsibility of accomplices within limits of what was perpetrated. A perpetrator can do more than an accomplice wanted to do, but also he can do less than that. If the perpetrator do less than it was comprehended by premeditation of the accomplice, then the accomplice will be also responsible for the offense that was perpetrated or tried to be perpetrated by the perpetrator, and will not be responsible for the offense that had been comprehended by his premeditation. The accessory nature of complicity is fully expressed here, whereby the accessoriness is related to the perpetrated criminal offense[10].

If a criminal offense remained as an attempt, responsibility of accomplices will be also limited to the attempt. Therefore, less is done by the perpetrator, better will be for the accomplice. An exception to this rule exists if incitement is failed, but responsibility of inciter here is not based on accessory but on principal conception. In case that the perpetrator perpetrate completely another criminal offense, i.e. a criminal offense that is not homogenous with the one that was comprehended by premeditation of the accomplice, then the perpetrator will be the only one responsible for a such criminal offense.

Influence of personal features and circumstances. A personal reference, features and circumstances because of which the law excludes a criminal responsibility or permits a possibility for acquitting from a sentence or mitigating the one, can be taken into consideration only to a such perpetrator, accomplice, inciter or helper whom is found with such reference, features, and circumstances (article 36. of the Criminal code of the Republic of Serbia). However, there are exceptions where personal features or references that exist with a perpetrator can be a reason for establishing a criminal responsibility of accomplices. These are the cases when a personal feature is en element of nature of a criminal offense. Thus, in such cases, the

[9] B. Čejović, Some questions that concern limits of responsibility and punishability of accomplices, Serbia and European law, Book 3, Kragujevac, 1998, pp. 17-29.
[10] A.Schonke, H. Schroder, Strafgesetzbuch, Kommentar, 22.Auflage, Munchen, 1995, page 364; E.Foregger, E.Serini, Strafgesetzbuch StGB,9.Auflage, Wien, 1989, page.56 and further on.

personal features, references or circumstances that exist with a perpetrator can have an influence at the criminal responsibility of participants.

COMPLICITY

The heaviest form of complicity is a co-perpetration[11]. It exists in a way, according to the article 33. of the Criminal code of the Republic of Serbia, when several persons participate in perpetration of a criminal offense or in some other decisive way jointly commit a criminal offense[12]. It is consciously and willingly a joint participation in perpetration of activities that commit a criminal offense.

The main characteristics of complicity are in the fact that each of accomplices is shown as a perpetrator of a criminal offense, while the criminal offense itself is their joint act. It means that every person that participate in undertaking of activities that commit a criminal offense, in order to be an accomplice, must possess all those features that are required according to the law for a perpetrator of that criminal offense[13]. For existence of complicity it is necessary, beside the presence of several persons, to exist an objective and subjective relation between participants in perpetration of the criminal offense in order to classify that offense as a joint act[14].

The objective relation means that every accomplice undertakes some activity, which commits a criminal offense. Without undertaking of the activity there is no perpetration so that there is no complicity either because it considers attainment of the activity by all participants. In addition, it is not necessarily that all the accomplices participate from the very beginning in accomplishing the act of perpetration. In such a way, complicity will exist even when some of the accomplices undertake initial activities and others continue them but under the condition that there is a conscience about joint activity.

It is so called successive complicity. In the same way, it is not necessary that all of them participate in perpetration of all activities from which the act of perpetration is consisted of. The complicity exists when a single person undertakes a single activity and the other one undertake some other activity. Accomplices can divide activities in advance but they also can join in perpetration without any previous agreements.

The subjective relation consists of in existence of conscious of all perpetrators to jointly perpetrate an act of perpetration. If there is no conscious then there is no so-perpetration, but every person is occurred as an individual perpetrator of a criminal offense. The subjective relation between accomplices must be distinguished from guilt. The subjective relation between accomplices is a conscious on collaboration in a joint act, while the guilt is a psychical relation of each of them towards the act on which perpetration they worked. These relations must exist in the moment of perpetration of that act.

According to the article 33. of the Criminal code the complicity exists when several persons jointly perpetrate a criminal offense, by participating in the perpetration of a criminal offense or by taking

[11] More: B. Petrović, D. Jovašević, Criminal law of Bosnia and Herzegovina, General part, Sarajevo, 2005, pp. 253-259; D. Jovašević, The comentary of the Criminal law of FR Jugoslavia, Belgrade, 2002. pp.213-215

[12] D. Jovašević, Institute of complicity in the criminal law, Law, theory and practice, Novi Sad, No. 11/2001, pgs. 14-26

[13] Some other understandings about complicity can be found in the theory. In such way, S.Frank is of the opinion that complicity exists always when some person perpetrates some action that would have been done by the perpetrator if he would commit the offense alone.(S. Frank, Criminal law theory, General part, Zagreb, 1955, page 180); According to D. Atanacković, accomplice is a person that perpetrates an action without which there would be no perpetration of a criminal offense and which the perpetrator was not able to perform alone. (D. Atanacković, Complicity in a criminal offense, Yugoslavian magazine for criminology and criminal law, Belgrade, No. 1-2/1995, page 30). Again, LJ. Lazarević is of the opinion that complicity is a conscious and willing joint accomplishment of a criminal offense by several persons. (Group of authors, Comment on the Criminal code of SRJ, Belgrade, 1995, page 138).

[14] M. Đorđević, Complicity, Yugoslavian magazine for criminology and criminal law, Belgrade, No. 1/1988, pgs. 29-36

some other act by which a decisive contribution can be made to its perpetration. It means that the Criminal code of Republic of Serbia accepts the objective-subjective theory. Therefore, two categories of persons can be considered as accomplices:

1) persons that participated in the act of perpetration no matter if they wanted to commit that offense as their own or as somebody else's achievement, and

2) persons that have not participated in the act of perpetration but they participated in some other action by which a decisive contribution was made to the perpetration of that act and who consider the act as their own and as a mutual achievement[15].

Important element of complicity is in the fact that several persons jointly perpetrate a criminal offense. That joint perpetration is being made in a way that some of the participants perpetrate an action of perpetration described as a criminal offense, while the others participate "in some other decisive way". That way of participation "in some other decisive way" by which is being contributed to perpetration of a criminal offense means that persons who perform such activities that belong to a field of accessory, but which are narrowly related to the act of perpetration so that together they make a whole, will be considered as accomplices. The complicity as a conscious and willing joint participation of several persons in perpetration of a criminal offense may exists in almost all criminal offenses. However, there are such criminal offenses in which the complicity is not possible. They are: delicta propria and personal criminal offenses.

As for the delicta propria or criminal offenses with a special subject, the complicity can exist only when several persons, who have special features that are required by the law for a perpetrator of such offense, participate in its perpetration. It is the case of real official and military criminal offenses, especially where is required a feature of plenipotentiary or commanding officer. The complicity is not also possible with personal criminal offenses, i.e. those offenses that can be perpetrated just by a certain person and only personally. So that, the complicity is not possible with a criminal offense of making a false statement because of that agreed false testimony is not considered as complicity due to the fact that everybody make a statement individually. It is a similar case with infanticide that can be perpetrated only by mother of the child.

A law theory distinguishes several forms of complicity: illusory, successive and unavoidable complicity:

1) Illusory, unreal or parallel complicity exists when several persons participate in perpetration of a criminal offense but without decision on joint perpetration of the activity, so that every person is shown individually as an independent perpetrator,

2) Successive or subsequent complicity exists when several persons who participate in perpetration of a criminal offense replace each other in perpetration of the criminal offense, i.e. when the offense is being perpetrated in phases or shifts or if one person who started perpetration of a criminal offense is joined by another person before the criminal offense is completed, then there is a successive complicity and

3) Unavoidable complicity, the complicity is an institute of optional nature in the most of criminal offenses, it means that it may exist or not. But there are some criminal offenses that can not be perpetrated by one person and it is necessary for two or several persons to participate in its perpetration. Then, there is an existence of unavoidable complicity. With some criminal offenses of unavoidable complicity, actions that are perpetrated by necessary accomplices are being carried out opposite to each other, i.e. it encounters each other. Those are criminal offenses of encountering or divergent criminal offenses (bigamy, incest). Second group criminal offenses of unavoidable complicity make offenses where actions of complicity are being carried out in the same direction and blend together. Those are so called criminal offenses of attainment or

[15] D. Jovašević, Institute of complicity in the criminal law, Law, theory and practice, Novi Sad, No. 11/2002, pgs. 14-26

convergent criminal offenses (mutiny in arms, mutiny of persons deprived of freedom).

An accomplice is criminally responsible within the limits of premeditation or negligence. Even if the complicity is by rule a willing, i.e. agreed joint perpetration of a criminal offense, in other words premeditated, but it does not mean that a negligible complicity is not possible to occur. The negligible complicity is possible to happen not only compared to a heavier consequence as qualified circumstance, but also compared to basic consequence. Responsibility is within boundaries of premeditation, i.e. negligence, it means that one accomplice either is not responsible for an excess of another accomplice or for actions that the one has perpetrated outside of an agreement. A negligible responsibility may exist only when the law anticipates it to exist for the offense in question.

Criminal responsibility of an accomplice is independent. Responsibility of one accomplice is not dependable on responsibility of other accomplices. All perpetrators do not have to have the same type of guilt, therefore some of the perpetrators act with premeditation and other with negligence while perpetrating the same criminal offense. The guilt must be independently established for every accomplice. It means that form and level of responsibility must be established for every accomplice. Personal relations, features, and circumstances may benefit or jeopardize only to such perpetrator who possesses all of that but not to the other accomplices. So that, an accomplice who voluntary prevent perpetration of a criminal offense may be relived from a sentence issued by the law.

INCITEMENT

The incitement is premeditated inciting of another person to commit a certain criminal offense (article 34. of the Criminal code of the Republic of Serbia). An action of inciter must be directed to provoke or determine a decision at another person to undertake an action by which will be caused a consequence of a criminal offense. Therefore, there is no incitement if the perpetrator already had a firm decision for perpetration of a criminal offense.

However, if there was a decision that was not firm enough, i.e. hesitation, and such decision had to be firmed up, then there is an incitement. From the point of view of causality, the incitement occurs as causing of decision of perpetrator to undertake an action of perpetration and accomplish a consequence of a criminal offense. But, if incitement is a reason for decision, it is not a cause for consequence itself. The cause of consequence is an action of perpetration so that the incitement is shown compared to a consequence as its condition.

An action of incitement is consisted of undertaking of activities by which is being influenced on will of other person with an aim to make him perpetrate a criminal offense[16]. Activities by which the incitement is being carried out can be different. So that, the incitement can be made by persuading, showing an interest, giving gifts and promises, abuse of position or special relation towards a person that is being incited, misleading a person or keeping a person mislead, threat, pointing out a situation that might be unfavorable for a person that is being incited if such person does not perpetrate a criminal offense, etc. Sometimes, the incitement can be made by illusory dissuading from undertaking an action of perpetration but in such way by which it foments to its perpetration.[17].

An incitement is an active activity so that it can be made only by doing it. It can be done by words (in written form or orally), gestures, signs, mimics and concludent actions. In order to have an incitement

[16] The incitement is, according to the article18, of the Spanish criminal code, direct motivation of a person to perpetrate a criminal offense by public publications, radio and other means for mass communication or popularization of a criminal offense in front of gathered citizens on a public place.
[17] D. Jovašević, Incitement as form of complicity in criminal law, Law collection, Podgorica, No. 1-2/1999-2000, pgs. 118-134

there must be a certain relationship between inciter and person that is being incited as well as between inciter and criminal offense that is being incited[18] .

Inciting on perpetration of a criminal offense must be directed towards one certain person or certain group of people taking into consideration that incitement cause or make firmer a decision of another person so that an inciter must have a possibility to influence on such decision. Such possibility may be if an inciter comes in contact with one certain person or with a certain group of people. Thus, it is not necessary that the inciter has to know exactly the person who is about to perpetrate a criminal offense that is incited by him, but it is sufficient to know that one of the persons from the group, anyone, will perpetrate the criminal offense. On contrary, there is no incitement if an invitation was directed to uncertain group of people, e.g. by advertisement. This type of incitement can have a character of independent criminal offense or propaganda but in that case it is not considered as incitement.

The incitement must be directed towards perpetration of a certain criminal offense. There is no incitement if the incitement refers to perpetration of uncertain criminal offense. Then, there must be a criminal offense of propaganda but not incitement as a form of complicity[19]. Finally, for existence of incitement it is necessary that incitement of some person on perpetration of a certain criminal offense is done with premeditation. It means that negligible incitement that may exist in practice does not come under criminal responsibility.

The incitement can be direct and indirect. The direct incitement exists when an inciter alone incites another person (incited one) on perpetration of a criminal offense, and the indirect incitement exists when an inciter uses other persons for inciting of the incited person on perpetration of a criminal offense. With the indirect incitement, one person (inciter) incites another person to incite the third person (incited one) to commit a certain criminal offense.

The direct incitement can be made not only by one but several persons. In the case that several persons consciously make a joint incitement of one person to perpetrate a certain criminal offense then a co-incitement exists. For the existence of the co-incitement two elements are necessary: joint participation in incitement of another person to perpetrate a certain criminal offense and conscious about that joint action. The indirect incitement occurs always as a co-incitement, especially as successive co-incitement.

There may be also a co-incitement on accessory. Considering the fact that the law considers as an inciter a person who incites on perpetrator to perpetrate a criminal offense, in such way this case is considered as accessory.

Te inciter is criminally responsible only for premeditated incitement, inciting of another person on perpetration of a criminal offense. Premeditation of the inciter must have a conscious about the incitement of another person to make a decision to perpetrate a certain criminal offense and a wish to make such decision and then to perpetrate an action that commits a criminal offense. Besides the conscious on incitement, inciting of another person to perpetrate a criminal offense, the premeditation of inciter must consist a conscious of all actual circumstances (attributes) of a criminal offense on which the incitement is referred to.

However, compared to a conscious of perpetrator that comprehends concrete forms of some characteristics in its realization, the conscious of inciter must comprehend only basic contours of some characteristics and even the whole

[18] For existence of incitement it is necessary that the incited person did not have a firm decision on perpetration of a criminal offense at the time of perpetration and that decision was formed just under influence of the inciter while the incited person does not have to be aware of the fact that the decision was made under influence of the inciter (sentence of the Supreme Court of Serbia, Kž. 875/86 dated October 14, 1986)

[19] Incitement can be made by leading only on perpetration of a certain criminal offense. Therefore, in the situation when the inciter and perpetrator of a criminal offense are on the opposite sides in conflict and have different interests, the inciter could not influence on decision of the perpetrator to perpetrate the criminal offense. (Sentence of the Supreme Court of Kosovo, Kž. 174/78 dated September 6, 1979)

criminal offense itself. In other words, the conscious of inciter must refer to perpetration of a certain criminal offense by comprehending the action, causative relation and causing of a consequence in its general form and not in its concrete accomplishment with all the details.

An element of will at premeditation of the inciter is represented in a wish of the inciter to provoke, by his actions, a decision of the incited person to perpetrate a criminal offense, i.e. in acceptation that under his influence such decision is being made by the incited person and then in his wish to undertake such action and cause a consequence of a certain criminal offense. For existence of premeditation of the inciter is not important whether an immediate perpetrator, while committing a perpetration, was acting with premeditation or with negligence.

It is possible that the inciter with premeditation incites the perpetrator to perpetrate a criminal offense but the perpetration was made with negligence. In the case when the law seeks an intention or motive as en element of a criminal offense, then such intention or motive does not have to exist at the perpetrator but it is sufficient to exist at the incited perpetrator while the inciter is aware of its existence only. If such intention does not exist at the perpetrator but exists at the inciter, then the inciter is considered as indirect perpetrator of a criminal offense.

The inciter, according to the article 34. of the Criminal code will be punished for a criminal offense on which the perpetrator was incited as if the inciter had perpetrated such offense. In other words, the inciter is being punished for a criminal offense by punishment that was anticipated for a perpetrator. This equalization in punishment of inciter with perpetrator comes from the fact that the inciter is intellectual author of a criminal offense while the perpetrator is only physical, factual implementer. Punishing of inciter depends on perpetrated criminal offense in boundaries of its premeditation.

So that, if a criminal offense was perpetrated on which the perpetrator was incited then the inciter will be punished by a sentence that was anticipated for perpetration of such offense. If the offense remained as an attempt then the inciter will be punished for an attempt if an attempt of such offense is punishable. In such case the inciter and perpetrator may be punished less severe then it would be in the case of perpetration. The inciter may be relieved from a sentence in the case if he voluntary prevents perpetration of a criminal offense.

NEGLIGIBLE INCITEMENT THAT IS PRACTICALLY POSSIBLE IS NOT PUNISHABLE.

An unsuccessful incitement exists in the following three case[20]s:

1) when the inciter with his incitement fails to create, i.e. to make firmer a decision of the incited person,

2) when the inciter succeed to create or make firmer a decision of the incited person, but the person never perpetrated a criminal offense for any reason, and

3) when the inciter creates or make firmer a decision of the incited person but the person perpetrate completely some other criminal offense independently from the action of incitement.

According to the article 34. paragraph 2. of the Criminal code of the Republic of Serbia[21] the unsuccessful incitement is punishable if for a criminal offense, which was incited to be perpetrated, can be imposed a punishment of imprisonment for a term of three years or even more severe punishment. According to the article 34., paragraph 2. of the Criminal code, the unsuccessful incitement is punishable only if the action of inciter was directed towards perpetration of a criminal offense for which can be imposed a punishment of imprisonment for a term of five years or even more severe punishment, and the criminal

[20] D. Jovašević, Criminal law, General part, Belgrade, 2006. pp. 188-189
[21] Lj. Lazarević, B. Vučković, V. Vučković, Commentary of Criminal code, Cetinje, 2004. pp. 94-97 ; D. Jovaševuć, Criminal code of the Republic of Serbia, Belgrade, 2007. pp. 49-50

offence has never even been attempted.Then, the unsuccessful inciter is being punished as if he had attempted to perpetrate a criminal offense.

In some cases the criminal codes anticipates that leading to perpetration of a criminal offense is the same as an action of perpetration of independent criminal offense. In such cases the incitement is not considered as a form of complicity, but as a form of independent criminal offense.

Such criminal offenses are the following: organizing of a group and incitement on perpetration of criminal offenses of genocide, crimes against humanity and war crimes, incitement on suicide and accessory in a suicide, calling for a violent change of constitutional structure. If the incitement is considered as a criminal offense by the law then the action of incitement itself represents an independent criminal offense that can be achieved as an accomplished offense or it can remain as an attempt.

The criminal offense is accomplished if the action of incitement is completed and that is in the case when the incitement was made on a incited person while at this matter it is not significant if that incitement was successful or not. Thus, successful and unsuccessful incitement is considered as an accomplished criminal offense of incitement. An attempt of incitement exists in the case when the action of incitement is undertaken, but for any reason it has not made an influence on a will of a person who was incited (e.g. when a written letter was addressed and sent but it never reached hands of addressee).

ACCESSORY

The accessory is a premeditated undertaking of action by which is contributed to a perpetrator to perpetrate a certain criminal offense[22] (article 35. of the Criminal code of the Republic of Serbia). The action of helping is consisted of undertaking such activities by which the action of perpetration is not accomplished, but it is contributed to its accomplishment. Compared to perpetration, helping does not cause a reason but a condition of a consequence. Activities that make accessory are outside of action of perpetration[23]. Thus, helper does not participate in perpetration of a criminal offense but it contributes to a successful accomplishment of the perpetrator. That contribution consists of making favorable conditions and assumptions for undertaking the action of perpetration and causing a consequence of a criminal offense[24].

The accessory can exist only when a perpetrator already had a decision to perpetrate a criminal offense. From there, if there is no such decision then there is any accessory. In such case there could be an incitement but not the accessory. From there, the basic difference between incitement and accessory comes from, because of the fact that the incitement can exist until a decision for perpetration of a criminal offense is not made and the accessory can exist only after such decision was made by the perpetrator of a criminal offense. From the other side, the accessory may exist before and during perpetration of a criminal offense but not later. Exceptionally, the accessory can exist even after the action of perpetration is undertaken, but before occurrence of a consequence of a criminal offense. It is so called inter-accessory. Helping that is provided after perpetration of a criminal offense has a character of independent criminal offense. But in this case it can be accessory if that accessory was promised in advance before perpetration of a criminal offense[25].

Even for the accessory it is necessary that a certain relationship exists between helper and perpetrator of a criminal offense as well as between helper and the criminal offense, which is being assisted. The helper must know that there is a person who will perpetrate a criminal offense and who is a person to be provided with accessory by undertaking activities that will enable or make easier to a perpetrator to perpetrate a criminal offense. While at that matter it is

[22] B. Pavišić, V. Grozdanić, P. Veić, Commentary of Criminal code, Zagreb, 2007. pp.169-173
[23] D. Jovašević, Institute of accessory in perpetration of a criminal offense – theoretical and practical aspect, Journal of AK Vojvodina, Novi Sad, No. 7-8/1999, pgs. 223-241.
[24] See: D. Petrović, Accessory as a form of complicity, Belgrade, 1994.
[25] Lj. Selinšek, Criminal law, Ljubljana, 2007. pp. 216-219

not necessary that he knows personally a perpetrator, it is sufficient to know that it would be a person from a certain circle[26].

From the other side, the accessory must be directed towards perpetration of one certain criminal offense. A helper should know that he contributes to perpetration of a certain criminal offense. Finally, for existence of accessory it is necessary an existence of premeditation of helper.

Considering the fact that accessory can be undertaken by different activities, the criminal code defined in the paragraph 2. that the following, in particular, shall be considered as helping in the perpetration of a criminal offence:

1) giving advice or instructions as to how to perpetrate a criminal offence,

2) supplying the perpetrator with tools for perpetrating a criminal offence,

3) removing obstacles to the perpetration of criminal offence and

4) prior to the perpetration of the criminal offence, to conceal the existence of the criminal offence, to hide the perpetrator, the tools used for perpetrating the criminal offence, traces of the criminal offence, or items acquired by perpetration of the criminal offence.

In the matter of undertaking the activity by which is contributed to perpetration of a criminal offense, helping is accomplished and several persons may participate in perpetration of a criminal offense so that there is so called co-accessory[27] .

There are several types of helping considering the following: character of activity, way of extending a help, time of help and way of perpetration of the helping activity.

Considering the character of activity, helping can be physical and psychical. The physical helping exists when activates of physical, material character are undertaken by which is contributed to perpetration of a criminal offense (acquiring means for perpetration of a criminal offense, removing obstacles, surveillance of facilities where will be perpetrated a criminal offense, accommodation of a perpetrator before perpetration of a criminal offense). The psychical accessory exists when the activities of psychical nature are undertaken (giving advices and instructions for perpetration of a criminal offense, encouraging a perpetrator to persist in perpetration of criminal offense, giving promises in regard with concealing the traces of the criminal offense or items acquired by perpetration of the criminal offence)[28].

According to the way of extended help, the accessory can be direct and indirect. The direct accessory exists when a helper alone undertakes activities by which he enables, make easier or contribute to a perpetrator to perpetrate a criminal offense. The indirect accessory, however, exists when a helper provides accessory through somebody else, i.e. indirect helper. The indirect accessory exists even when one person provides help to indirect helper or indirect inciter. So that, the indirect helper will be a person who gives advices and instructions to an indirect helper how to assist a perpetrator in perpetration of a criminal offense. The incitement on helping is also an indirect helping as well as helping in the incitement.

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[26] For the accessory in perpetration of criminal offense it is not necessary that helper personally knows a perpetrator of a criminal offense but it is sufficient to know that there is a conscious of helping other persons in perpetration of a criminal offense, i.e. it is not significant if the previous agreement between perpetrator and helper existed or not as well as whether they had a mutual relation or not (sentence of the Supreme Court of Serbia, Kž. 232/86 and sentence of the Supreme Court of Monte Negro, Kž. 240/80)

[27] M. Tomić, Accessory in perpetration of a criminal offense, Advocacy, Belgrade, No. 12/1986, pgs.27-33

[28] D. Jovašević, Institute of accessory in perpetration of a criminal offense – theoretical and practical aspect, Journal of AK Vojvodina, Novi Sad, No. 7-8/1999, pgs. 223-241.

Considering the time of helping, one can distinguish a previous, simultaneous and subsequent accessory. The previous accessory exists when a helper undertake activities on providing a help to a perpetrator of a criminal offense before the perpetrator undertook an action of perpetration. The simultaneous accessory exists when a helper provides a help to a perpetrator during perpetration of a criminal offense. The subsequent accessory exists when a helper, after a perpetrator perpetrated a criminal offense, provides a shelter, hide things, remove traces, etc. This subsequent accessory is considered a complicity only if it was promised in advance.

There is one more special case of extending a help to a perpetrator after perpetration of a criminal offense, which is called a contact with a criminal offense, concealing (or supporting). A contact can be made in several ways: hiding a perpetrator of a criminal offense, traces of criminal offense, tools used for perpetrating a criminal offence, items acquired by perpetration of a criminal offence but also concealing a criminal offense itself. Concealing was considered in the earlier legal theory as accessory in the real sense of that word. But lately, this understanding was abandoned because it is practically impossible to participate in a criminal offense that was already perpetrated, where there was already a forbidden consequence. In such case any conditionality of occurred consequence is excluded.

Concealing can be: actual (where traces or items of a criminal offense are hidden) and personal (helping a perpetrator of a criminal offense not to be discovered and arrested, i.e. convicted). Therefore, the concealing itself does not represent accessory in a criminal-law sense, but a promised concealing if it was done before perpetration of a criminal offense represents accessory as a form of complicity. If the concealing was not promised priory, to a perpetrator, it is punishable only if the law anticipates it as an independent criminal offense.

Finally, compared to a way of perpetration of activity, it can be positive and negative. The positive accessory is achieved by doing it (active action), and the negative accessory is helping by doing nothing. Helping by doing nothing can be achieved only in a case when there is an obligation of helper to do it.

A criminal responsibility of helper according to the article 35. paragraph 1. of the Criminal code, exists only if a perpetrator acts with premeditation. A negligible accessory does not represent accessory in a criminal sense. Helping can be done with direct or possible premeditation. The direct premeditation exists only in a case when a helper knew that by his actions contributes to a perpetration of a criminal offense and he wanted to achieve his contribution by doing so. The possible premeditation exists in a case when a helper was aware that his actions can contribute to perpetration of a criminal offense so he agrees to achieve that contribution by doing so.

Premeditation of a helper must contain a conscious about all characteristics of a criminal offense. In other words, the helper must be aware of all those actual circumstances of the offense, of which the perpetrator of the criminal offense is aware of as well. A conscious about illegality of helping in a criminal offense of the perpetrator, about his personal features and circumstances, is demanded only when illegality, personal features or circumstances are shown as an element of a certain criminal offense. Criminal offenses for which is required an intention or motive, for responsibility of a helper it is sufficient that the intention or motive existed with a perpetrator and that it was known to him. If in this case the intention or motive exists with a helper and not with a perpetrator, then the helper will not be hold responsible for a such offense but for the offense that will hold a perpetrator responsible. The helper can not be indirect perpetrator of a criminal offense except in special cases anticipated by the law.

A helper has to know that his actions assist a perpetrator to achieve a criminal offense and it means that he had to know for perpetrator's presence, but he does not have to know him necessarily. But for establishing an existence of criminal responsibility of helper, it is not decisive that a perpetrator acted with premeditation while perpetrating a criminal offense. He can be criminally responsible even when a perpetrator perpetrated a criminal offense with negligence. If a perpetrator perpetrated a criminal offense then a helper will be punished that offense as if he perpetrated it alone, but he may be also punished less severe.

A possibility for less severe punishment of helper comes from the fact that he is not intellectual or factual author

of a criminal offense, but a person who contributed to perpetration of a criminal offense. Less severe punishment of helper is optional. It means that its application depends on judgment of the court in each concrete case. If a criminal offense remained as an attempt, the helper will be punished for an attempt, under the condition that an attempt of that offense is punishable by the law.

Finally, the helper can be relieved from a sentence if he voluntary prevents perpetration of a criminal offense (article 36. paragraph 2. of the Criminal code).

Unsuccessful accessory exists when a helper achieves an action of helping and the assisted perpetrator does not undertake an action of perpetration or perpetrate a criminal offense independently from the helping action. Unsuccessful accessory is not punishable.

In some cases anticipated by the law, helping is incriminated as independent criminal offense. It means that by taking an action of helping there is a criminal offense for which the law imposes a certain type and size of punishment. Such is the case of e.g. criminal offenses: leading into suicide and helping in suicide, allowing conclusion of prohibited marriage, allowing enjoyment of narcotics, financing terroristic activities, accessory to a perpetrator after perpetration of a criminal offense.

Helping may be incriminated as a criminal offense even in the case when a perpetrator is not being punished. Such is the case in helping in suicide that remained as an attempt, although a person who attempted a suicide is not being punished. Or in the case of illegal termination of pregnancy, it is incriminating to help a pregnant woman to make an abortion, although the pregnant woman is not being punished for making an abortion over herself. These two cases are exception from the rule that a helper can not be an indirect perpetrator.

The accessory as a type of complicity and accessory as a criminal offense are excluding each other and there can not be a concurrence. If the accessory was promised in advance, and even extended after perpetrated offense, then the accessory will exist as complicity, and if the accessory was not promised in advance then the accessory will exist as independent criminal offense, i.e. as accessory to perpetrator after perpetration of a criminal offense.

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ANALYSIS ON THE LEGAL DEVELOPMENT OF THE PROTECTION OF CHILDREN'S RIGHTS AND THE RIGHT TO EDUCATION IN THE INTER-AMERICAN SYSTEM

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INTRODUCTION

As human rights are substantive rights fundamental to an individual's existence, such rights are guaranteed to a person through international human rights instruments. Accordingly, a nation that adheres to an international convention that protects and promotes human rights will, with respect to the convention, provide the individuals living in that nation their entitled rights. As utopian as it may be perceived, providing such rights is neither instantaneous nor easily practical. However, objectively speaking, providing measures to implement these rights is indeed achievable. Ideally, the international community has a duty to protect those whom are defenceless, and preserve their rights as human beings. Nevertheless, throughout history, many have suffered and witnessed a lack of legal recognition of one's fundamental rights.

For one, children are one of many vulnerable groups in society that have been deprived of their human rights.[1] Thus, the United Nations have established international conventions such as the *Universal Declaration of Human Rights* and the *Convention on the Rights of the Child* to protect the human rights of children.[2] As this notion takes legal maturity in the international community, emphasis is placed on the legal importance of recognizing children's rights equally in the universal system as well as within different regional systems across the world. Moreover, children's rights have gained a greater legal importance in the international agendas of nations across the world. As a result regional systems have also acknowledged, through their internal conventions, protective measures to support the rights of children.

Essentially, providing developmental rights to children such as the right to education is a basic requirement in international law.[3] For instance, in the universal system, the international community adheres to the UDHR and the CRC which specifically dedicates that everyone, including children, has the right to education.[4] Nevertheless, in parallel to the universal system, regional human rights systems such as, the Organisation of American States (hereinafter OAS), the Council of Europe (hereinafter CE) and the Organisation of African Unity (hereinafter OAU) have also adopted legislative measures to legally accentuate children's developmental rights.[5]

This being said, as all children's rights are significantly important, this paper shall focus on children's rights in the Americas in relation to their educational right. Studies conducted by *United Nations Education, Scientific and Cultural Organization* have demonstrated that in 2006, the region had 2.6 million out of school children.[6] Moreover, "Latin Americans receive an average of six years of schooling compared to nine-and-a-half years in the Organization of Economic Cooperation and Development counties".[7] Thus, the right to education as free and compulsory for primary, secondary, and higher levels of education, is fundamentally important for children to further allow them to develop to their full potential.[8] Nonetheless, considering that children living in the Americas have not been fully allocated their rights as human beings as well as their developmental right to education, when direct and indirect violations by State Parties of the OAS occur, due to the absence of strong legislation, the Inter-American system does not effectively remediate the violations. In such event, it would be ideal to have the Inter-American system develop a standard, with the influence of the universal and other regional systems, which would encourage an effective problem solving mechanisms to prospectively implement the right to children and the right to education.

Firstly, this paper allows one to explore the protective measures used in the Americas in regards to children's rights as human beings and children's developmental right to education. Essentially, international instruments such as, the *American Declaration on the Rights and Duties of Man* and the *American Convention on Human Rights* have been established to support human rights protection.[9] Conversely, these international instruments have a limited legal recognition that has resulted in directly violating the rights of children as human beings and indirectly violating children's right to education.

Secondly, it allows one to examine the practical issues pertaining to violations of the developmental rights of children in the Inter-American system comparatively to those of the universal system and other regional systems. As such, objectively examining systems will ultimately help strengthen the Inter-American system regionally and within the international community. Essentially, the objective focuses on helping the Americas reach their respected international and regional obligations towards the protection of children's rights and the right to education. Ideally, members to the OAS are legally, morally and politically pressured by the American Declaration and the American Convention to cooperate within the hemisphere and provide assistance in ensuring the respect of children's rights and their right to educational development.

I. The Protection of Children's Rights as Human Beings and the Right to Education in the Americas: the American Declaration on the Rights and Duties of Man of 1948 and the American Convention on Human Rights of 1969

Essentially, today's children are tomorrow's future. This premise is supported by the fact that society is living in an era based on the protection of human rights and the power of knowledge. The protection of children's human rights and the right to education are fundamental in the Americas. Evidently, the notion of children's rights are of a general concern that has been undertaken by the international community; however the right to education has not been as effectively discussed as it continues to revolve around political and economical issues. As such, it is imperative to acknowledge that education helps children develop wisdom, knowledge and understanding and "enhances human development, peace, democracy, and the respect of the rule of law". [10]

For children living in the Americas, 'availability, accessibility, adaptability and acceptability' of education are difficult to reach.[11] In fact, States have general obligations to help people provide for themselves however, in exceptional circumstances, States are required to provide for those whom are unable to subsist to their own needs. Therefore, proper legislation implemented in the Americas could help overcome such difficulties. Essentially, assuring a special form of protection for the rights of children and the right to education, the Americas have initiated the beginning of many more milestones to be conquered regarding children and education.[12] As such, members of the OAS have established international instruments such as the American Declaration of 1948 and the American Convention adopted in 1969, which legally recognizes the rights of children and the right to education.

A. The American Declaration on the Rights and Duties of Man 1948 : cornerstone in American law limited to an effortless protection of children and their right to education

In 1948, the adoption of the American Declaration was a significant development in American law as it allowed members of the OAS to achieve international protection of human rights.[13] In theory, ratifying parties to the American Declaration have accepted to acknowledge a legal recognition of the human rights of children and the right to education. Although legal recognition does not necessarily

impose contractual obligations on State Parties, however it does entail moral and political obligations that pressure members of the OAS to respond to human rights violations. Unfortunately, as rights declared in the American Declaration have no legally binding effects in international law, it rests that in practice, basic principals adopted by the American Declaration contain certain discrepancies that offset the purpose of the declaration. [14] Consequently, the legal effect of the American Declaration has limited practical application in actuality since it only recognises to some extent the rights of children and the right to education.

i. Rights Declared to Protect Children Living in the Americas : Acknowledging a Limited Legal Protection

In the American Declaration, article VII is an explicit provision which has recognised that children are entitled to 'special protection, care and aid' in the Americas.[15] One may accept the interpretation that children require "assistance and care due to their status as minors". [16] However, the American Declaration omitted in defining the legal terms enclosed in this article, like care, duty, minor; thus, this oversight created two different legal standing points. On one hand, the omission is subject to a legal gap between theory and practice meaning that, States recognise that a 'special protection, care and aid' associated to children is indeed a right, but measures on how to provide this right is left implicit and perhaps to a State's own discretion. Whereas on the other hand, not specifically defining the special measures of 'care and aid to children' includes all aspects of a child's life; thus, making States liable for every phase of a child's life that require care and aid.

Moreover, in article XXX the American Declaration also entails the reciprocal duties of children and parents towards one another.[17] Indeed, this article is subject to a questionable argument. For one, one must question if "the right of one kinship member is the duty of the another kinship member"?[18] If so, by placing a duty of honor on children towards parents, it might negatively impose that, in the act of disrespect, parents may lack in their duty towards children, such as providing aid, support, education and protection. If not, it is plausible to believe "that parents are not entitled to withdraw their protection if a child fails in his or her duties".[19] Essentially by placing duties on parents to assure support, education and protection for their child, such articles implicitly imposes that States may disregard a child's duty towards the parents but are still obliged to ensure that parental duties are being respected. This being said, States impose, in regards to the educational rights of children, the fact that parents are considered the main insurers of this right. This is imperative since in international law, as children are the primary beneficiaries of education, the focal point is limited to "the right of parents to exert a degree of control over a child's education", which can in return, depending on certain circumstances, jeopardize a child's educational development.[20]

In addition, the fact that children in the Americas are subjected to an international declaration that ambiguously phrases their rights, has consequently left State Parties puzzled in the practical world of respecting and protecting the human rights of children without violating them. In essence, the absence of legal effect of the American Declaration has effectively enabled members of the OAS to lack in their international obligations of safeguarding children and their educational development.

ii. Declared Rights Associated to Educational Development : Concerns Regarding the Legal Stance of the American Declaration and the Right to Education

In the American Declaration there are two main articles that discuss educational development. The first one provides a right to education and the other one, a duty to obtain education. Firstly, the

American Declaration guarantees in article XII the right for everyone to have an education.[21] Paragraph one discuss' the rights and the principles governing everyone's right to education. Moreover, paragraph two and three illustrate how an indiscriminate right to education could empower members of society who have attained this right. Finally paragraph four, recognizes that free education at the primary level. Essentially, at first glance, one may observe that this article generally surrounds all important aspects of the right to education. However, in analysing article XII, it is perceived to have neglected the beneficiaries of this right from certain important aspects of the right to education. Firstly, it fails to describe how children will attain this right. Essentially, excluding to stipulate how children can access education "implies that states are under a corresponding duty to provide education at specific levels even where schools do not exists".[22] Secondly, the only obligation imposed on the State is a progressive one due to the fact that, the State is only required to provide this right according to the State's 'available resources'. And thirdly, UNESCO has stated in their 2009 Global Monitoring Report that "expanding secondary and tertiary education is a key concern for the region"; however this is difficult since the American Declaration lacks in the protection and recognition of other forms of education such as, secondary and higher levels of education.[23] In addition, the legislation mentions the free factors but neglected the compulsory factor of education thereby providing a partial protection of this right.[24]

Secondly, article XXXI declares that: "it is the duty of every person to acquire at least an elementary education".[25] Imposing this burden on children or parents of children living in the Americas is heavy. Objectively speaking, considering that the OAS members of the Inter-American region are economically unstable, this duty is burdensome on a person. Therefore, it is practically unachievable since only elementary education is free and not compulsory. In addition, for the reasons stated above, this article is not sustainable since measures should be put in place by the OAS to assure that this duty can be fulfilled and not impose such a duty on every person.

Hence excluding specific stipulations on the means of availability and accessibility of the right to education ironically portrays how the OAS "have two faces: they are the principal protectors as well as the principal violators of human rights".[26] Nevertheless, as the American Declaration is limited in recognizing the protection of the human rights of children and their developmental right to education, it cannot be seen as an unsuccessful declaration. This is due to the fact that, following the adoption of the American Declaration, the American Convention was drafted to uphold the rights found in the American Declaration. On one hand, since the American Convention is a binding treaty that encloses twenty six articles concerning the protection of children's rights, it is viewed as having a greater legal affect in the international community than the American Declaration. However, on the other hand, educational development is not independently guaranteed in the same manner through the American Convention as it is in the American Declaration. Notwithstanding such flaws, children have attained through the American Convention an advanced legal protection as human beings.[27]

B. The American Convention on Human Rights 1969: A Legal Development Towards the Protection of Children and the Right to Education

The development of the American Convention in 1969 provided the Inter-American hemisphere with leverage in the protection of children's human rights. Thus, the absence of legal affect that the American Declaration was lacking was thereafter strengthened by the adoption of the American Convention due to the fact that it is a legally binding treaty.

Essentially, articles one and two of the American Convention concern "the obligation of states parties to respects the rights recognized in the American Convention and to ensure the excise of these rights on a non-discriminatory basis".[28] Hence, the American Convention imposes the reality that states must

assume the obligation to protect each of the rights in the American Convention and "if one of those rights has been infringed [this] necessarily implies that article 1(1) of the [American] Convention [which imposes the respect of all rights declared], has also been violated".[29] Consequently these two articles created a positive impact on the developing rights of children in international law particularly because, the American Convention specifically dedicated an article to the rights of children as well as other articles aimed at protecting children. In addition, by establishing a compulsory legislation, the legal stance that the American Convention has undertaken in the international community has objectively created a wider protection for children rights and to some extent a sufficient protection for the right to educational development.

i. Compulsory Provisions Established to Protect the Rights of Children: An Explicit Advanced Legal Protection for Children in the Americas

Effectively, the American Convention in article 19 the rights of the child as: "Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state".[30] This special scope of protection in the regional system has established a more sustainable foundation for the protection of the rights of children. Considering that human rights violations effectively deprive children of their rights as human beings, when the State does not fulfill the obligations cited in article one and two of the American Convention, members of the OAS that have ratified the convention are held liable for the violations.

Moreover, the protection guaranteed to children in the American Convention is a step forward from the American Declaration. In the American Convention article 19 provides children with protective measures, however, similar to the American Declaration, it lacks in defining the term 'child'.[31] Thus, defining the term child is essential to allow the notion of protection to evolve with time. "Traditionally a child has been defined as a comparative negative: a child is an individual who is not yet an adult."[32] Subsequently, the notion of 'child' was further developed in international law by the Inter-American Court of Human Rights (hereinafter Inter-American Court). The Inter-American Court held that "for the purpose of the American Convention a "child" was "every human being who has not attained 18 years of age" "unless, by virtue of an applicable law, [the child] shall have attained his majority previously"".[33]

Furthermore, the American Convention contains a unique article that imposes a double responsibility on States to assure protective measures for children during emergencies. In international law, during a crisis, States may "suspend obligations in highly exceptional circumstances in which certain human rights are restricted or limited".[34] Article 27 (2) of the American Convention enumerates articles that do not allow States to suspend their protective obligations, to which article 19 is included.[35] In comparison to the American Declaration, there is no derogative clause that protects children the same way than in the American Convention. Thus, the emphasis put on the derogation clause that includes article 19 and other human rights associated to children, has heightened the importance of the protective measures utilized for children.

In addition, the American Convention goes beyond the protections associated to children in the American Declaration.[36] Nevertheless, it does not exclude other human rights associated to children as human beings within the convention. However, it does not associate the notion of children and the developmental right to education, as seen in the American Declaration.

ii. Optional Provisions Imposing the Right to Education in the Americas : Gradually Attaining Education Through Implicit Provisions

As the American Convention before all is a civil and political treaty, State Parties have accepted the obligations associated to the respect to educational development of children. Essentially, as seen through the American Declaration, the right to education is a guarantee associated to every person. Given the fact that the American Convention was indeed influenced by the American Declaration, it would be ideal to find such a right guaranteed in the same manner or even complimentary to the one found in the American Declaration. In the American Convention, the right to education is not as explored as it is in the American Declaration; however the right to education exists through the Preamble of the American Convention and certain provisions that are complimentary to the American Convention.

Firstly, the Preamble of the American Convention states in subparagraph 6 that the incorporation of the Charter of the OAS established the standard for the 'economic, social and educational rights' while the inter-American Convention determines 'structure, competence, and procedure of the organs responsible for these matters'.[37] Essentially, the OAS Charter was adopted in 1948 but then amended in 1970 to include "a number of provisions relating to the economic, social, scientific and cultural development of Member State".[38] For instance, article 49 of the OAS Charter discusses the right to education and the obligations accorded to State members to ensure implementation measures.[39] "Use of the term 'right' is for the most part incidental and more often than not can only be inferred from the existence of state obligations."[40] This being said, the Preamble of the American Convention establishes the OAS Charter as a normative foundation but imposes that the American Convention develop proper standards accordingly.

Secondly, the development of the educational standard through article 26 of the American Convention and article 49 of the OAS Charter allowed the right to education to achieve a wider protection since it establishes provisions that include primary, secondary and higher levels of education, elements which were neglected in the American Declaration. Essentially, the achievement is partially satisfying since it is only a progressive standard that is effective through time and to the available resources of the State, to which in practice children have not been witnessed to.[41]

Furthermore, it was not until 1988 with the adoption of the *Additional Protocol to the American Convention on Human Rights in the area of Economic, Social, and Cultural Rights* that the right to education was sufficiently protected in a legislative framework.[42] Article 13 of Protocol San Salvador establishes the important elements of the right to education in a detailed manner.[43] Firstly, education is a right guaranteed to everyone. Secondly, the protocol discusses the objectives of education as a positive development towards children. Thirdly, it recognizes that in order to achieve the full exercise of the right to education, it must include different levels and types of education. Fourthly, parents have the right to choose the type of education that their child will obtain. Lastly, the freedom of individuals shall not be interpreted as a restriction in conflict with domestic legislation of State Parties. Objectively, one can see the legal advancement that the right to education has attained in the Inter-American system. The Protocol of San Salvador has adequately supported this right, but it rests that it is only applicable for 14 States that have ratified the protocol.[44]

Consequently, as the American Convention is only subject to adopting measures progressively and to the State's available resources, according to article 26 of the American Convention and in addition to the excluding States that have not ratified Protocol San Salvador, one can see where the issue of educational deficiencies have since risen. Given that the legal affect of the American Declaration is only to affirm certain principles whereas the legal influence of the American Convention is binding to

ratifying members, it is ironic that the provision concerning the right to education is only guaranteed to some extent within the American Declaration, the non binding legislation, and not in the American Convention, the binding legislation. Alternatively, pros and cons seen in both international instruments have ignited controversial arguments that judge the practical application of the instruments. Thus, as the legal affect of these instruments is imperative, in practice they are upheld by the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights as legitimate sources in international law, which have positively been influenced throughout the universal system and other regional systems across the world.

II. Practical Issues Pertaining to the Violation of the Interrelated Rights of Children and their Developmental Right to Education in the Americas: Comparative Analysis to the Universal System and the African and European Regional Systems

Indeed, the Inter-American system is moving forward in the international development of recognizing and allocating children's rights. However, the system has yet overcome the barriers associated with allocating children their right to education. According to studies conducted by UNESCO in 2000 to 2006, 75 million children of primary school age are not in school.[45] As previously noted, the American Declaration and State Parties to Protocol San Salvador both guarantee this level of education; thus making it imperative that children receive the basic knowledge offered through primary education. Once children have reached the age of maturity, the educational background that they carry is indeed beneficial for them as individuals in society, but as well for society as a whole.

As primary education is a pre-requisite for secondary and higher levels of education, this means that if children are not receiving primary instruction, they will not be able to attain the other levels of education. Additionally, this is clearly a direct violation to children's educational right as stated in the American Declaration and Protocol San Salvador. Since a child's educational right in the Americas has not been vastly developed into a sustainable legal framework applicable to every members of the OAS, it is rare that the violation of a child's educational right happens in a *prima facia* manner. However, children living in the Americas have primarily witnessed an indirect violation of their educational right. Ideally this means that by directly violating a child's basic fundamental right, like the right to life as guaranteed in article 4 of the American Convention, the violation also indirectly affects a child's right to educational development since it does not allow children to create a life plan for oneself.[46] Nonetheless, the case of educational deficiencies in the Americas is not fruitless; the notion governing legal changes is based on the "mixture of both principle and pragmatism".[47] Thus the legal institutions adopted in the Americas help overcome direct and indirect violations associated to the right of children and to their right to education. Objectively, as it is an international responsibility for all States to assure these types of protection, the universal and other regional systems could help inspire and aspire the American regional system to reach beyond international declarations and conventions to protect children and the right to education.

A. Sustainable Legal Institutions Overseeing the International Development of the Protection of Children's Right to Education

Essentially, the Inter-American regional system is coordinated through two institutions. Firstly the Inter-American Commission on Human Rights (hereinafter IACHR) was adopted to promote the American Declaration.[48] Secondly, the Inter-American Court of Human Rights (hereinafter Inter-American Court) was established to be the legitimate implementing body of the Inter-American system

that applies the American Convention.[49] Hence, these two organs are competent in "matters relating to the fulfillment of the commitments made by the State Parties".[50]

Effectively, these two institutions are seen as the semi-closure of the legal gap found between theory and practice. Thus, their importance in international law and in the Americas is fundamental towards the development of children's rights as well as the development in the right to education. While the IACHR communicates protective views to help members of the OAS avoid direct or indirect violations of children's rights and their right to education, the Inter-American Court encourages the views of protection to effectively establish sustainable measures in the Americas.

i. Communicating Views of Protection of Children and their Right to Education: Inter-American Commission on Human Rights

The IACHR has dealt with situations where the comprehensive views of child protection have been darkened by violations of their human rights. Essentially, the IACHR has been helpful in shedding some light on issues pertaining to the matter of children and their protective rights through internal recommendations. For one, providing children with education is on its own a form of protection. Thus, by helping children understand human rights teaching, they are "able to resist those who violate their rights".[51] Essentially, it is pertinent to note certain cases where the IACHR has objectively examined direct violations of children's rights which have consequently resulted in indirect violation of their right to education. Nevertheless, recommendations put forth by the IACHR have created a regional awareness into human rights violations of children, in addition to having initiated legal discussions and also having established legal precedent regarding the right to education.

Firstly, the case of *Jehovah's Witnesses vs. Argentina 1978* was an issue regarding school aged children who were denied their right to primary education by either being expulsed from schools or were not being permitted to register in schools due to their religious beliefs.[52] Essentially, the claims were based on the fact that rights guaranteed in the American Declaration, were being denied. Thus, the IACHR concluded that Argentina had violated the right to freedom of religion and worship declared in the American Declaration and as a result had also "violated the right to equal opportunities for education".[53] In addition, the recommendation given by the IACHR to members of the OAS was to cease these types of persecution. [54] As such, the underlying message was that children would have access to school in Argentina, regardless of their religious beliefs; thus, States would not be in violation of either right.

Moreover, the nature of the statement declared by the IACHR is objectively important in the evolution of American law and the relevant legislation governing the children and their right to education. For one, it may be perceived to have only been a violation *inter alia*, of the right to education, but the importance of legal recognition in practice, is still reasonably conventional in international law as it sets a legal precedent within the Inter-American region. This being said, it places moral and political pressure on the States to act but also react in a respected manner. As such, allowing this type of precedent constitutes a revolutionary change in the Inter-American approach on the right to education.

Secondly, in the case of *Yean and Bosico vs. Dominican Republic 2001*, the issue was introduced to the IACHR as a petition from the girls Yean and Bosico whom have been denied from the government of the Dominican Republic their Dominican nationality.[55] Since their nationality was not acknowledged, the girls were missing their official documents to allow them to enrol in school.[56] The petition alleged that article 19 of the American Convention on the rights of the child and article XII of the American Declaration that enshrines the right to education were violated. Thus, the IACHR judged

that although the American Convention does not protect the right to education it is protected in the American Declaration. Effectively, article 29.4 of the American Convention is applicable in such a case since it states that no provision of the American Convention should be interpreted as: "excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have".[57] In the end, the IACHR adopted precautionary measures to prevent the girls' deportation and to guarantee their return to school. As such, the case was referred to the Inter-American Court, where after it was judged in 2005 to have been a violation.

Essentially by imposing precautionary measures on a State, this automatically creates a regional awareness within the hemisphere. Effectively, States will become more responsive to human rights violations as they keep in mind that all rights are interconnected in many ways; thus where a direct violation of a right may occur, this can also negatively indirectly affect another right. As such, while the IACHR is the means of communication for victims of human rights violation and the organ that recognizes a State's neglectful duties towards the protection of human rights, the Inter-American Court supports such views and upholds them as legal responsibilities that States are required to sustain within the development of the Inter-American regional law.

ii. Sustaining Views of Protection of Children and their Right to Education: Inter-American Court for Human Rights

The Inter-American Court is the judicial organ of the OAS that upholds the protection of children's human rights.[58] Essentially, when direct or indirect violations occur, the Inter-American Court tends to move away from a soft law application of the American Declaration and applies and interprets the hard law of the American Convention to enforce the notion of protection to the rights of children. Certainly, in regards to children's rights found in article 19, this approach has allowed the international community to witness at first hand the use of the Inter-American Court's application and interpretation of the notion of best interests of the child. Effectively, to determine a violation "the sole requirement is to demonstrate that the State authorities supported or tolerated infringement of the rights recognized in the convention".[59] Hence, certain judgements of the Inter-American Court are relevant to mention as they have allowed children to achieve a greater legal importance in their educational right.

Firstly, in 1999 the case of *Villagrán Morales et al.* was the first case to initiate legal discussions on article 19 of the American Convention.[60] This case raised the issue of the 'street children' who were the object of acts of violence, particularly by members of the police force. These children were at risk and "fought to survive alone [in a] fearful [...] society that did not include them, but rather exclude them".[61] As such, the Inter-American Court examined this case in light of article 19 of the American Convention and declared that there was a clear violation of children's right. Essentially, "when States violate the rights of at-risk children, such as 'street children', [...] it makes them victims of a double aggression".[62] On one hand, they are deprived of the "minimum conditions for a dignified life" and on the other, "their physical, mental and moral integrity and their lives", are violated.[63] Consequently, these direct violations have impacted the development of the right to education in the Americas. The Inter-American Court determined that special protection obligations imply the existence of an additional, complementary right of children, supported by the specificity of these obligations. Thus, the protective measures referred to in Article 19 of the Convention should include special care for a proper education allocated to children.

Effectively, the Inter-American Court noted that the children "all came from disadvantaged backgrounds, had been educated only to primary school level or below".[64] Fundamentally, this is the reason why children need to be allocated their right to education. Education should be viewed as the founding pillars in society and that if encouraged through the best interest of the child, can positively

impact children whom prospectively will form a well educated society. As such, through the Inter-American Court, interpretation of legislative measures can help overcome children whom are victims of legislative deficiencies and State negligence and help accentuate the importance of the best interest of the child. In this context, it must be imposed on States to maintain their duty to adopt positive measures to ensure the full exercise of the child's human rights.

Secondly, the 2004 case of *Juvenile Reeducation Institute v. Paraguay* the issue concerned detained children.[65] Consequently, this case enlarged the application of article 19 of the American Convention and shed an unusual light on the inadequate educational programs established for detained children. The conditions of the institution were contrary to international human rights standards.[66] In essence, article 19 was evaluated in light of the special protection of children to which to the State has obligations to fulfill. The Inter-American Court noted that, "article 19 of the American Convention should take into account that the measures of which this provision speaks go well beyond the sphere of strictly civil and political rights".[67] One can see that through this, the Inter-American Court is thereby including a child's right to education as an addition to the rights declared in the American Convention. However, concerning the lack of educational programs in the center, the Inter-American Court noted that the State had the obligation to protect the right to education of a child as required under Article 13 of Protocol San Salvador.[68] Effectively, the Inter-American Court recognized that when a State "fails to provide an adequate education [this] limits [the child's] chances of actually rejoining society and carrying forward their life plans".[69]

Objectively, one may suggest that delinquency which has caused children to be caught in a juvenile institution was due to the lack of education that a child may have been deprived of outside juvenile institutions. Essentially where institutional policy is deficient in its applicability, the issues concerning the material conditions (such as the violations that occur) are relevant and cannot be divorced from the issues concerning the legal environment (i.e where the child lives). As such, it is the legal environment that may enable the material conditions to arise and demonstrate the unpromising application of the American Convention. Nonetheless, to enhance the Inter-American Court's legitimacy in the Inter-American region, it would be ideal to reach beyond restrictive regional laws towards legislation used in the universal systems and other regional systems such as the African system and the European system. Effectively this will help improve the legal environment of the Inter-American system in respect to the protection of the rights of the child and the right to education.

B. Improving the World's Legal Systems to Reach their Respected International Goal in the Protection of Children's Rights and the Right to Education

Given the significant evolution that the Inter-American system has witnessed, it has yet to become a flawless regime. As certain deficiencies may affect in practice the protection of children's rights and the right to education, in retrospect it does imply that in theory there are certain discrepancies that have not been effectively questioned. Thus, where certain questions have not been examined or answered, approachable solutions should not be refuted in international law. From the legal stance of the legislative documents utilized in the Americas, one can see that the American Declaration and the American Convention and the IACHR and the Inter-American, are all complimentary to each other in supporting the notion of protection of children and the right to education. However the Inter-American system does not have successful normative standards detailing measures to adopt these rights accordingly. Essentially, at this end, it becomes imperative for the Inter-American system to coexist with other international human rights systems to not only to develop an internationally known standard, but to help improve the world's regional systems in a likewise manner.[70] As previously mentioned, in the Inter-American regime there exists a substantial gap between theory and practice; however, the gap should not prevent the effective utilization of international instruments found in the

universal system and other regional systems, like the Council of Europe (hereinafter European system) and the Organisation of African Unity (hereinafter African system), to answer to the difficulties of establishing new standards.

i. A Universal System Applicable to All : The Founding Pillars of the Children's Rights and the Right to education

In the universal system, to protect the rights of a child and the right to education, there are two pertinent legislations, the UDHR of 1948 and CRC of 1989. Essentially both universal instruments could be compared to the Inter-American instruments. On one hand, the UDHR is not legally binding in international law much like the American Declaration, but the other hand, the CRC has indeed in international law a legal affect on the protection of children and the right to education similar to the American Convention. However, as the CRC is specifically dedicated only to the rights of children, therefore it holds a greater legal importance in international law.

The UDHR fundamentally legislates that "all human beings are born free and equal in dignity and rights" and that "everyone is entitled to all the rights and freedoms set forth in this Declaration".[71] Essentially, given that children are human beings, they may benefit from this form of protection that legally recognizes them as bearers of rights. In regards to specific protection for children, article 25 (2) of the UDHR assures that "Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection".[72] However, much like the American Declaration there are no additional details concerning the special care and assistance. Nonetheless, the international community adheres to article 26 of the UDHR, which is specifically dedicated to the right to education.[73] There are three main points to this article. Firstly, that everyone has the right to education but it goes beyond the American Declaration and discusses the different levels of education which are for some free and/or compulsory. Secondly, it makes reference to the purpose of education and entails that education, as a universal human right, is beneficial to children and to society, an objective that the American Declaration was lacking. Lastly, education formally entails this right to children but informally allows States and parents to impose over a child's interest, their views on education.

Moreover, the CRC is an international renowned innovation for the specific protection of the rights of children. Essentially, the CRC deals with "civil, political, economic, social and cultural rights".[74] The right to education is enclosed in the CRC in article 28 which recognizes children's right to education and article 29 which focuses on the aims of education.[75]

Article 28 (1) of the CRC declares that "States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity."[76] In practice, the term 'progressively' delays a State's action plan to successfully acquire education; however, much like the previous dispositions studied, it is all a progressive approach that is undertaken by the State Parties. Essentially, supporting education must be approached actively and effectively in order to be properly implemented in practice. In addition, the article examines the matter of different levels of education. Effectively, one can see that article XII of the American Declaration, article 13 of Protocol San Salvador and article 26 of the UDHR, the protection of the education and different levels is indeed stronger in the CRC since it examines all types and levels of education and it is internationally accepted as the norm. Moreover, the CRC states in article 28 (2) and 28 (3) that during the course of a child's academic experience, there must be appropriate measures put into place to assure that the child's human dignity is respected to generate international cooperation to encouraged by State Parties to help promote education.[77]As this is a positive obligation for State Parties, countries should learn from each other how to best educate children as a form of encouragement. Furthermore, article 29 of the

CRC, reflects a general consensus derived from State Parties concerning the aims of education; therefore, accordingly to the article, providing education is directed towards developing certain aspects of a child's life. Article 28 and 29 of the CRC are significant because the child's right to education is not only a matter of access but also of content, such as the curriculum provided by the State. However, where certain areas in the curriculum is lacking, article 29 of the CRC helps the States manage such inadequacies of the education to help strengthen educational programs.

Thus there are five reasons why the CRC was an improvement in the protection of children and their right to education in the international law. Firstly, it defined a child in article 1 as "a child means every human being below the age of eighteen years" and associated the child as a barer of rights where no such rights existed, like the right to education.[78] Secondly, the CRC is a global treaty; therefore every protective right related to children is enshrined in this instrument.[79] Thirdly, the CRC is legally binding to State Parties whom have ratified it.[80] Fourthly, the CRC "imposes new obligations in relation to the provision and protection of children" and their right to education.[81] Lastly, CRC obliges State Parties "not to discriminate against children in their enjoyment of the [CRC's] rights".[82] Effectively, as these improvements take legal maturity in international law and reach towards regional systems, it is through the notion of *corpus juris* that regional systems are able to utilize sustainable concepts developed in international law and vice versa. As such, this principle recognizes fundamental norms established universally or regionally that are interlinked together to support the protection of the rights of the child and the right to education. Consequently, the notion of *corpus juris* has indeed left a positive impact in international law and in the Inter-American system. For instance, in the case of the Street Children, the Inter-American Court recognized that the when analyzing article 19 of the American Convention, the court considered that "both the American Convention and the [CRC] are part of a very comprehensive *corpus juris* on protection of children which should be used by [the Inter-American Court] to determine the content and scope of the general provision".[83] Moreover, the definition of child given to article 19 of the American Convention was interpreted through article 1 of the CRC. As such, it is necessary to mention that the notion of *corpus juris* helps continue the evolution of the protection of a child and the right to education. This being said, the CRC or UDHR are interpretive tools that emphasize the matter that global interdependence between the world's legal systems, ensures a strong protection of human rights of children. Essentially, as the universal system is effectively developed, it suffices to say that its application in the Inter-American system is too wide to uncover a sustainable solution. Thus, it is more practical to inquire on a regional stand point than on a universal stand point, to reach an effective approach. Hence, a simple solution to help strengthen the Inter-American system may be found by examining through the other regional systems.[84]

ii. Outlook On Different Regional Human Rights Systems : Inspiring Regional Cooperation

To effectively analyse the strengths and the weaknesses of the Inter-American system, it is necessary to provide a general outlook of the protection of children's rights and the right to education in other regional systems such as the African system and the European system.

In 1990, the *African Charter on the Rights and Welfare of the Child* was adopted intentionally to support the rights of children as seen in the CRC.[85] On a regional basis, the African Charter is a model to other regional systems for two reasons.

Firstly, given by the title, the African Charter "adds the affirmation of the "welfare" of the child, to highlight the inextricable link that exists between respect for the rights of the child and welfare".[86] Essentially, this is the only regional charter that recognizes the protection of children's rights to a fuller extent than the Inter-American region. This being said, the protective rights found in the African

Charter contain general provisions, such as the requirement of States to assure protection, and other provisions that target certain areas to which children are particularly vulnerable.[87] Effectively, one can see that the African system provides a protection similar in the universal system, but it also differs from the Inter-American system.

Secondly, education is a right recognized in the African Charter for the good fortune, health, happiness, and prosperity of the child. Indeed, article 11 (2) of the African Charter sets out the same rights and objectives concerning child education as article 28 and 29 of the CRC, but with respect to African values, traditions, and culture.[88] Moreover, article 11 (1) of the African Charter mentions, similarly to the universal system and the Inter-American system, that every child has a right to receive education.[89] Through an objective point of view, one can see that the instruments found in the universal system and the Inter-American system are not as detailed as the African Charter. The African Charter highlights specific key elements that the countries are required to provide for education. However, one must question if all these elements are achievable in practice. Clearly, the African Charter promotes the importance of education in Africa, as it indoctrinates an "awareness of 'African morals, traditional values and cultures'". [90] Therefore, countries in the African region are able to relate to the factors established by the African Charter rather than those found in the CRC. Essentially, this begs the question if this is what the Inter-American system should establish to promote the right to education in the region?

In regards to free and compulsory education, the Charter has established obligations similar to the one imposed by the CRC.[91] While it is indeed arguable that using the phrases '*appropriate measures with a view to achieving the full realization of this right'* is optimistic; on one hand it is clear that African States have the desire to realise the objectives established at the different levels of education. However on the other hand, the African Charter does not envision the full realization of primary, secondary, and higher education at a free and compulsory stage.

Furthermore, paragraph 4 ensures the respect of the parents and the religious and moral education of the child, which are the same objectives mirrored by article 29 (1) c) and d) of the CRC.[92] And paragraph 5 discusses protecting the child's human dignity like article 28 (2) of the CRC.[93] In addition, there is also clear distinction to be made between the African Charter and the CRC. For one, it envisions factual situations that are very likely to happen to children. Article 11 (6) of the Charter imposes a positive obligation on the State to protect pregnant young girls and their right to education, one that the CRC does not provide protection for nor does the Inter-American system. [94] Once again, to solicit such an approach in the Americas is in reality achievable since there are certain cases, much like the case of the Street Children where children living in the Americas are bound to live a life on the street without education due to certain external factors. In the event that there was provisional measures established in the Americas to examine specific cases of this nature, generally speaking, it would be in theory be a great approach. Thus, it is due to the fact that a newer approached based on the cultural values and practices of the Inter-American region, would firstly, assure the protection of children, secondly it would deter the specific nature of the case at hand and thirdly, it would help avoid the indirect violations occurring against the right to education.

In regards to the European system, it was in 1950 through the Council of Europe, the European human rights system was developed to promote the rule of law, human rights and democracy.[95] Essentially, the *Convention for the Protection of Human Rights and Fundamental Freedoms*, also known as the European Convention on Human Rights, does not provide any specific protection to the children like the American Convention limited to the Protocol San Salvador or the African Charter that provide provisions which are child-centered.[96]

At first, the Parliamentary Assembly of the Council of Europe recommended in 1979 to adopt a 'European Charter on the Rights of the Child'. [97] However, through political and judicial

deliberation, the charter was not adopted. Essentially, this does not imply that children's rights do not exist in the European human right system. Although the ECHR does not provide protection similar to the other regional systems or the universal system, it is through the *European Social Charter* adopted in 1961 and revised in 1996 that children's rights are effectively allocated.[98]

The ESC is a natural complement to the ECHR to which it guarantees social and economic human rights. For one, children were provided "special protection against the physical and moral hazards to which they are exposed".[99] Moreover, provisions concerning the minimum age and conditions of employment were dedicated for children.[100] In addition, "articles 8 and 17 of [ESC] are also concerned with the economic and social measures, both direct and indirect, which are necessary to protect children".[101] Objectively, on a legal standing point, the protection of children is not as developed and strong as the protection found in the other regional systems or the universal system. However, needless to say it is still a form of protection that is required to be effectively implemented in the region. Although it provides a different type of protection that is based on the 'physical and moral hazards', it leaves space for interpretation. Such interpretation may be associated with the best interest of the child and through the implementation of the notion of *corpus juris* previously discussed. Then again, the problem rests in the fact that there are only 42 States that have ratified the ESC.[102] Therefore, for those whom have not ratified the ESC, the ECHR is the only applicable mechanism in the regional system, keeping in mind that the universal system is as well applicable given the circumstance, which contains very limited protective rights to children.

Furthermore, the ECHR guarantees civil and political human right, however it does not guarantee the right to education. Effectively, the ECHR established in Protocol 1, article 2 that guarantee to certain extent the right to education.[103] Thus, although it recognizes that denial of education is contrary to the right to education, "this negative formulation was adopted because at the time [there was] a general education system and it was unnecessary to require member states to establish such a system".[104] In the event that States were to adopt a positive formulation, this imposed a duty on States to assure "effective action to enable every person to have access to instruction".[105] However, it was thereafter upheld by the European Court of Human Rights (hereinafter European Court) in the *Belgian Linguistics* case that: "the right to education does not imply a duty on State Parties to provide free or subsidised education of specific type or a specific level".[106] This may seem destructive to the right to education in practicality only because Protocol 1 article 2 lacks in not guarantying any levels of education. As such, it is through the ESC that the right to education in Europe is effectively promoted. Article 17 of the ESC includes a general right to education. It requires States to establish and maintain an education system that is free of charge while guaranteeing different levels and quality of education.[107] Moreover, European Commission on Human Rights (hereinafter European Commission) and the European Court have had an impact on developing the right to education with abundant cases regarding education. Thus, a special distinction between schooling '*droit à l'instruction*' and education '*droit à l'éducation*' was made in the European Court in the case of *Campbell and Cosans v. United Kingdom* in 1982.[108] For one, education is referred to as being the transmission of belief, culture and other values from a society to a child and "instruction refers in particular to the transmission of knowledge and intellectual development".[109] Essentially, it may be useful to establish such distinctions in the Inter-American system to help comprehend exactly what the right to education entails, and if necessary amend certain provisions that are contrary to the right.

Objectively, one can see that, the rights of the child in both systems are at two different extremities. Thus, the Inter-American system prevails over the European human right system as it does contain a legal provision specifically for the protection of children within their applicable convention. However, in regards to the protection of education through the European human rights system is similar to the one found in the Inter-American system since firstly, they are both dependent on complimentary legislations and secondly, since they are both binding convention, the States are required to act accordingly to the provisions, however, still the provisions lack in defining how to attain the right to

education. Essentially, this does weight on the impact of the application of the right to education. However, it does not alter the fact that they have been regionally recognized and thus their importance as fundamental rights is beginning to gain value in international law.

CONCLUSION

In sum, historically children were perceived as vulnerable, weak, and defenceless members of society. As a result, the rights of a child and the right to educational development were left in legal limbo for a long period of time. However, as the importance of the protection of children and the universal right to education grew into the international community, this created a general awareness which has in return initiated in different regional systems, a desire for legal advancement in regards to these rights. UNESCO's Director-General Koïchiro Matsuura states that:

> When financial systems fail, the consequences are highly visible [...]. When education systems fail the consequences are less visible, but no less real. Unequal opportunities for education fuel poverty, hunger, and child mortality, and reduce prospects for economic growth. That is why governments must act with a greater sense of urgency.[110]

This desire stems from the premise that regional systems should exceed in acquiring viable human rights laws because "law is symmetrical, and rights cannot exist without corresponding governmental obligations".[111] As such, although indirect violations of the right to education do not occur very often, it does not preclude the fact that it is a right guaranteed universally and regionally that States are obliged to assure. Therefore, to bridge the gap between theory and practice, the regional communities must act upon their desire and operate as catalysts of a legislative reform.

Essentially, as the prospective developments for children's rights and educational rights in international law have taken legal maturity, members of the OAS have undertaken the obligations imposed by the American Declaration and the American Convention. The Americas have been obliged to assure children a special form of protection and are effectively developing progressively the notion of the right to education. This being said, evidently the challenges that the Inter-American system faces concerning the protection of children and their educational right is complex, because not only does it require the region to recognize and allocate such right, there is also a need for a follow up mechanism that highlights inconsistencies of State Parties. Hence, it is not erroneous to highlight inconsistencies in international and different regional protocols since it will promote the development of effective laws utilized in practice. In the Inter-American system, the supporting institutions such as the Inter-American Court and the IAHC, will help towards the expansion of the legislative framework and will thereafter sustain through their institutions the initial objective envisioned.

Moreover, considering that the universal system has established a founding basis for regional systems and the Inter-American system's educational journey is a lengthy and intense process, it would be ideal to have regional cooperating. As such, it is plausible to believe that the African system is a model to which other regional systems may interpret or utilize certain objectives or legislative dispositions. Essentially, it will to establish a stable legal framework that the American and European system may instil in their region to allow bearers of these rights to relate within their own system's values. As such, while the Inter-American system is progressively developing legal precedent in regards to the rights of the child, education as a basic development right has not been ignored but rather has been welcomed positively within the system. Therefore, objectively one may predict that the Inter-American system will demonstrate by way of example, that the right to education for children is

acceptable, adaptable, accessible and available. Thus, by acquiring the right to education is an achievement that sets the precedent to which education need not be a privilege, but a respected right allocated to children living in the Americas.

[1] Ludovic Hennebel, *Preface* by Antonio Agusto Cançado Trinidade, La Convention Américaine des Droit de L'Homme. Mécanismes de Protection et Étendue des Droits et Liberté 600 (Publication de l'Institut International des Droits de L'Homme 2007).

[2] Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948) [hereinafter UDHR]; Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

[3] R. BRIAN HOWE & KATHRINE COVELL, EMPOWERING CHILDREN'S RIGHTS EDUCATION AS A PATHWAY TO CITIZENSHIP 5 (UNIVERSITY OF TORONTO PRESS INC. 2005).

[4]*See* UDHR, *supra* note 2, art. 26 ((1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit. (2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace. (3) Parents have a prior right to choose the kind of education that shall be given to their children.); *See* CRC, *supra* note 2, art. 28 ("1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular: (a) Make primary education compulsory and available free to all; (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need; (c) Make higher education accessible to all on the basis of capacity by every appropriate means; (d) Make educational and vocational information and guidance available and accessible to all children; (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates. 2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention. 3. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries."); and art. 29 ("1. States Parties agree that the education of the child shall be directed to: (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential; (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations; (c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own; (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin; (e) The development of respect for the natural environment. 2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.").

[5]Geraldine Van Bueren, The International Law on The Rights of The Child 22 (Martinus Nijhoff Publishers 1995).

[6] United Nations Education, Scientific and Cultural Organization, *Education For All Global Monitoring Report. Overcoming Inequalities: Why Governance Matters. Regional Fact Sheet: Latin American and the Caribbean*, 2009, *available at* http://www.unesco.org/education/gmr2009/press/Factsheet_LAC.pdf [hereinafter UNESCO].

[7] World Fund, Education Gap: The Realities of Education in Latin America, 2006, *available at* http://www.worldfund.org/Education-Gap.html.

[8] Van Bueren, *supra* note 5, at 232.

[9] American Declaration of the Rights and Duties of Man, O.A.S. Official Rec., OEA/Ser. L./V./II.23, doc. 21, rev. 6 (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82, doc. 6, rev.1 (1992) [hereinafter American Declaration]; American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention].

[10] RICHARD PIERRE CLAUDE ET AL., HUMAN RIGHTS IN THE WORLD COMMUNITY: ISSUES AND ACTIONS 211 (3d ed. UNIVERSITY OF PENNSYLVANIA PRESS 2006).

[11] Office of the United Nations High Commissioner for Human Rights, Contributions sought for the 2010 annual report of the Special Rapporteur on the right to education, *available at* http://www2.ohchr.org/english/issues/education/rapporteur/contributions.htm.

[12] KATRINA TOMASEVSKI, EDUCATION DENIED COSTS AND REMEDIES 136 (2d ed. LONDON AND NEW YORK UNIVERSITY PRESS LTD DHAKA 2003).

[13] Thomas Buergenthal et al., Protecting Human Rights in the Americas: Selected Problems 4 (Kehl, Germany: Arlington, N.P. Engel 1982).

[14] DAVID HARRIS & STEPHEN LIVINGSTON, THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS 292 (OXFORD UNIVERSITY PRESS 1998).
[15] *See* American Declaration, *supra* note 9, art. VII ("All women, during pregnancy and the nursing period, and all children have the right to special protection, care and aid.").
[16] Inter-American Commission on Human Rights, The Rights of the Child in the Inter-American Human Rights System, par 20 (2d ed. Oct. 29, 2008) OEA/ Ser.L/V/II.133, Doc 24 [hereinafter IACHR Report].
[17] *See* American Declaration, *supra* note 9, art. XXX ("It is the duty of every person to aid, support, educate and protect his minor children, and it is the duty of children to honor their parents always and to aid, support and protect them when they need it.").
[18] Van Bueren, *supra* note 5, at 68.
[19] *Id.*, at 77.
[20] *Id.*, at 232.
[21] *See* American Declaration, *supra* note 9, art. XII ("1.Every person has the right to an education, which should be based on the principles of liberty, morality and human solidarity. 2. Likewise every person has the right to an education that will prepare him to attain a decent life, to raise his standard of living, and to be a useful member of society. 3. The right to an education includes the right to equality of opportunity in every case, in accordance with natural talents, merit and the desire to utilize the resources that the state or the community is in a position to provide. 4. Every person has the right to receive, free, at least a primary education.").
[22] TOMASEVSKI, *supra* note 12, at 234.
[23] UNESCO, *supra* note 6.
[24] *Id.*
[25] *See* American Declaration, *supra* note 9, art. XXXI ("It is the duty of every person to acquire at least an elementary education.").
[26] TOMASEVSKI, *supra* note 12, at 9.
[27] IACHR Report, *supra* note 16, ¶ 21.
[28]*See* American Convention, *supra* note 9, art. 1 ("1.The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition. 2. For the purposes of this Convention, "person" means every human being.") *See* art. 2 (Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms."); Buergenthal et al., *supra* note 13, at. 17.
[29] Velasquez Rodriguez Case, 1988 Inter-Am. Ct.H.R. (ser. C) No. 4 (1996); Hélène Tigroudja et Ioannis K. Panoussis, La cour inter américaine des droits de l'Homme. Analyse de jurisprudene consultative et contentieuse 155 (Edition Nemesis Bruylan, 2003).
[30] American Convention, *supra* note 9, art. 19.
[31] Monica Feria Tinta, The Landmark Rulings of the Inter-American Court of Human Rights on the Rights of the Child Protecting the Most Vulnerable at the Edge 13 (Martinus Nijhoff Publishers 2008).
[32] Van Bueren, *supra* note 5, at 33.
[33] Tinta, *supra* note 31; The Inter-American Court of Human Rights will further be discussed.
[34] IACHR Report, *supra* note 16, ¶ 46-51.
[35] *See* American Convention, *supra* note 9, art. 27 (2) ("The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights.").
[36] IACHR Report, *supra* note 16, ¶ 46-51 (It states that minors have a right to protection when it comes to capital punishment, a right to human treatment in accordance with their status as minors during criminal proceedings, a right to think freely and express themselves while being morally protected from public entertainment and a right to be protected in case of a family dissolution as well as a right to be recognised equality between children born from wedlock and those born in marriage.).
[37] *See* American Convention, *supra* note 9, Pmbl ("Considering that the Third Special Inter-American Conference (Buenos Aires, 1967) approved the incorporation into the Charter of the Organization itself of broader standards with respect to economic, social, and educational rights and resolved that an inter-American convention on human rights should determine the structure, competence, and procedure of the organs responsible for these matters.").
[38] HARRIS & LIVINGSTON, *supra* note 14, at 290.
[39] *See* Organization of American States, Protocol of Amendment to the Charter of the Organisation of American States ("Protocol of Buenos Aires"), art. 49, Feb. 27, 1967 ("The Member States will exert the greatest efforts, in accordance with their constitutional processes, to ensure the effective exercise of the right to education, on the following bases: (a) Elementary education, compulsory for children of school age, shall also be offered to all others who can benefit from it. When provided by the State it shall be without charge; 9 (b)Middle-level education shall be extended progressively to as much of the population

as possible, with a view to social improvement. It shall be diversified in such a way that it meets the development needs of each country without prejudice to providing a general education; and (c) Higher education shall be available to all, provided that, in order to maintain its high level, the corresponding regulatory or academic standards are met.") [hereinafter OAS Charter].

[40] HARRIS & LIVINGSTON, *supra* note 14, at 290.

[41] OAS Charter, *supra* note 39.

[42] Organization of American States, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador"), Nov. 16, 1999, A-52 [hereinafter Protocol San Salvador].

[43] *See id.* art. 13 ("1. Everyone has the right to education. 2. The States Parties to this Protocol agree that education should be directed towards the full development of the human personality and human dignity and should strengthen respect for human rights, ideological pluralism, fundamental freedoms, justice and peace. They further agree that education ought to enable everyone to participate effectively in a democratic and pluralistic society and achieve a decent existence and should foster understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups and promote activities for the maintenance of peace. 3. The States Parties to this Protocol recognize that in order to achieve the full exercise of the right to education: a. Primary education should be compulsory and accessible to all without cost; b. Secondary education in its different forms, including technical and vocational secondary education, should be made generally available and accessible to all by every appropriate means, and in particular, by the progressive introduction of free education; c. Higher education should be made equally accessible to all, on the basis of individual capacity, by every appropriate means, and in particular, by the progressive introduction of free education; d. Basic education should be encouraged or intensified as far as possible for those persons who have not received or completed the whole cycle of primary instruction; e. Programs of special education should be established for the handicapped, so as to provide special instruction and training to persons with physical disabilities or mental deficiencies. 4. In conformity with the domestic legislation of the States Parties, parents should have the right to select the type of education to be given to their children, provided that it conforms to the principles set forth above. 5. Nothing in this Protocol shall be interpreted as a restriction of the freedom of individuals and entities to establish and direct educational institutions in accordance with the domestic legislation of the States Parties.").

[44] Department of International Law, Organization of American States, Washington D.C., General Information of the Treaty: A-52, *available at* http://www.oas.org/juridico/english/sigs/a-52.html (Countries that have ratified Protocol San Salvador : Argentina (2003), Bolivia (2006), Brazil (1996), Colombia (1997), Costa Rica (1999), Ecuador (1993), El Salvador (1995), Guatemala (2000), Mexico (1996), Panama (1992), Paraguay (1997), Peru (1995), Suriname (1990) and Uruguay (1995)).

[45] UNESCO, *supra* note 6.

[46] *See* American Convention, *supra* note 9, art. 4 ("1.Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.").

[47] Van Bueren, *supra* note 5, at 378.

[48] Tigoudja & Panoussis, *supra* note 29, at. 7.

[49] Buergenthal et al., *supra* note 13, at 22.

[50] *Id.*

[51] HOWE & COVELL, *supra* note 3, at 33.

[52] Jehovah's Witnesses vs. Argentina, Case 2137, Inter-Am. C.H.R., (http://www.cidh.org), OEA/Ser.L/V/II.47, doc. 13, rev.1, (1978); IACHR Report, *supra* note 16, ¶ 73-75.

[53]*Id.*

[54]*Id.*

[55] Dilcia Yean and Violeta Bosica vs. Dominican Republic, Case 12.189, Inter-Am. C.H.R., Report No. 28/01, OEA/Ser./L/V/II.111, doc. 20 rev. (2001); IACHR Report, *supra* note 16, ¶ 86-92.

[56] *Id.*

[57] *See* American Convention, *supra* note 9, art. 29.4 ("No provision of this Convention shall be interpreted as: 1.permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein; 4.excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have."); (In regards to the 4A's, the Dominican Republic is thus violating Dominican children's of Haitian descent right to education, by not making it available on a basis of equal opportunity; by not making it accessible, when discriminating on the basis of descent; by not making it acceptable, when offering a discriminatory and inferior education to Dominican children of Haitian descent; and by not making it adaptable, when failing to respect, protect and fulfil the rights of children and minorities.).

[58] HARRIS & LIVINGSTON, *supra* note 14, at 133.

[59] Tinta, *supra* note 31, at 17.

[60] Villagrán Morales et al. Case, 1997 Inter-Am. Ct. H.R. (ser. C) No. 32 (1999).

[61] *Id.* at. 184.

[62] Id. at. 191 (In this case the rights that were violated were: Right to life (Article 4), humane treatment (Article 5), personal liberty (Article 7), a fair trial (Article 8), judicial protection (Article 25), and the rights of the child (Article 19)).

[63] Tinta, *supra* note 31, at 14.

[64] *Id.*

[65]*See* Juvenile Reeducation Institute v. Paraguay Case, Inter-Am. Ct. H.R. (ser. C) No. 112 at 134.34 (2004) ("Essentially the institute is used to detain minors, some 90% of whom are in pretrial detention and have not been sentenced. The IACHR made a request to the Inter-American Court because on July 25, 2001, a fire had broken out at the Panchito López Institute.

One youngster, Benito Augusto Moreno, was shot by a guard during the fire and died on August 6, 2001. Thus, the alleged rights that were violated were the right to life, right to humane treatment, right to personal liberty, right to a fair trial, and rights of the child.").

[66] *See Id.* at 140 ("the conditions of detention at the Center included, *inter alia:* overpopulation; overcrowding; commingling of inmates awaiting or standing trial with those already convicted; lack of sanitary conditions; poor diet; lack of proper medical, dental and psychological care; lack of adequate education programs; lack of recreation, lack of fire safety and prevention measures; too few and poorly trained guards; no control of physical and mental violence; inhumane treatment and torture, which included the existence of a torture chamber and solitary confinement cell; lack of disciplinary and criminal investigation of cases of mistreatment and torture, with the result that such cases went unpunished; and transfer of children to adult prisons as a form of punishment or because of lack of space;").

[67] *Id.* at 149.

[68] *Id.* at 174.

[69] *Id.*

[70] IACHR Report, *supra* note 16, ¶ 52.

[71] *See* UDHR, *supra* note 2, art. 1 ("All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."); *See* art. 2 ("Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.").

[72] *Id.* art. 25 (1).

[73] *Id.* art. 26 (1).

[74] Van Bueren, *supra* note 5, at 16.

[75] CRC, *supra* note 2, art. 28 and 29.

[76] *Id.* art. 28 (1).

[77]*Id.* art. 28 (3).

[78] Van Bueren, *supra* note 5, at 16.; *See* CRC, *supra* note 2, art. 1 ("For the purposes of the present Convention, a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.").

[79] *See* Van Bueren, at 16.

[80]*Id.* (CRC has not been ratified by the United States and Somalia).

[81]*Id.*

[82]*Id.*

[83] IACHR Report, *supra* note 16, ¶ 39-45.

[84] *Id.*

[85] African Charter on the Rights and Welfare of the Child, Nov. 29, 1999, OAU Doc. CAB/LEG/24.9/49 (1990) [hereinafter African Charter].

[86] Raoul Kienge-Kienge Intudi, The Application of the International Convention on the Rights of the Child in Africa: When the Law is Tested by the Reality, *in* The UN Children's Rights Convention: Theory Meets Practice. Proceedings of the International Interdisciplinary Conference on Children's Rights, 18-19 May 2006, Ghent, Belgium 25 (A. Alen, H. Bosly, M. De Bie, J. Vandelanottte, F. Ang, I. Delens-Ravier, M. Delplace, C. Herman, D. Reynaert, V. Staelens, R. Steel, M. Verheyde eds., Intersentia at 23-31) (2007).

[87] Julia Sloth-Nielsen, Strengthening the Promotion, Protection and Fulfilment of Children's Rights in the African Context, *in* The UN Children's Rights Convention: Theory Meets Practice. Proceedings of the International Interdisciplinary Conference on Children's Rights, 18-19 May 2006, Ghent, Belgium 96-97 (A. Alen, H. Bosly, M. De Bie, J. Vandelanottte, F. Ang, I. Delens-Ravier, M. Delplace, C. Herman, D. Reynaert, V. Staelens, R. Steel, M. Verheyde eds., Intersentia at 81-99) (2007).

[88] *See* African Charter, *supra* note 85, art. 11 (2) ("The education of the child shall be directed to: (a) the promotion and development of the child's personality, talents and mental and physical abilities to their fullest potential; (b) fostering respect for human rights and fundamental freedoms with particular reference to those set out in the provisions of various African instruments on human and peoples' rights and international human rights declarations and conventions; (c) the preservation and strengthening of positive African morals, traditional values and cultures; (d) the preparation of the child for responsible life in a free society, in the spirit of understanding tolerance, dialogue, mutual respect and friendship among all peoples ethnic, tribal and religious groups; (e) the preservation of national independence and territorial integrity; (f) the promotion and achievements of African Unity and Solidarity; (g) the development of respect for the environment and natural resources; (h) the promotion of the child's understanding of primary health cares.").

[89] *Id.* art. 11(1) ("Every child shall have the right to an education.").

[90] Van Bueren, *supra* note 5, at 255.

[91] *See* African Charter, *supra* note 85 art. 11 (3) ("3. States Parties to the present Charter shall take all appropriate measures with a view to achieving the full realization of this right and shall in particular: (a) provide free and compulsory basic education; (b) encourage the development of secondary education in its different forms and to progressively make it free and accessible to all; (c) make the higher education accessible to all on the basis of capacity and ability by every appropriate means; (d) take measures to encourage regular attendance at schools and the reduction of drop-out rates; (e) take special measures in respect of female, gifted and disadvantaged children, to ensure equal access to education for all sections of the community.").

[92] *See id.* art. 11 (4) ("States Parties to the present Charter shall respect the rights and duties of parents, and where applicable, of legal guardians to choose for their children's schools, other than those established by public authorities, which conform to such minimum standards may be approved by the State, to ensure the religious and moral education of the child in a manner with the evolving capacities of the child."); CRC, *supra* note 2, art. 29 (1) c) and d).

[93] *See* African Charter, art. 11 (5) ("States Parties to the present Charter shall take all appropriate measures to ensure that a child who is subjected to schools or parental discipline shall be treated with humanity and with respect for the inherent dignity of the child and in conformity with the present Charter."); *See also* CRC, art. 28 (2).

[94] *See id.* African Charter, art. 11(6) ("States Parties to the present Charter shall have all appropriate measures to ensure that children who become pregnant before completing their education shall have an opportunity to continue with their education on the basis of their individual ability.").

[95] Van Bueren, *supra* note 5, at 22.

[96] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ. T.S. No.5 [hereinafter ECHR].

[97] Van Bueren, *supra* note 5, at 22.

[98]Council of Europe, European Social Charter (Revised), May 3, 1996, Europ. T.S. No.163 [hereinafter ESC]; Van Bueren, *supra* note 5, at 22.

[99] *See* ESC, *supra* note 98, part.1(7) ("Children and young persons have the right to a special protection against the physical and moral hazards to which they are exposed.").

[100] Van Bueren, *supra* note 5, at 22.

[101] *Id.* at. 22.

[102] Member States of the Council of Europe and the European Social Charter, Nov. 6, 2009, *available at* http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/Overview_en.asp.

[103] *See* Council of Europe, Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2, Mar. 20, 1952, Europ. T.S. No.9 ("No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religions and philosophical convictions.").

[104] Van Bueren, *supra* note 5, at 233.

[105] *Id.*

[106] *See* Van Bueren, at 233 ; 'In the case "relating to certain aspects of the laws on the use of languages in education in Belgium" v Belgium', App. No. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64), Eur. Ct. H.R. No. 6 (ser. A) (1968).

[107] *See* ESC, *supra* note 98, art. 17 ("With a view to ensuring the effective exercise of the right of children and young persons to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities, the Parties undertake, either directly or in co-operation with public and private organisations, to take all appropriate and necessary measures designed: (1) (a) to ensure that children and young persons, taking account of the rights and duties of their parents, have the care, the assistance, the education and the training they need, in particular by providing for the establishment or maintenance of institutions and services sufficient and adequate for this purpose; (b) to protect children and young persons against negligence, violence or exploitation; (c) to provide protection and special aid from the state for children and young persons temporarily or definitively deprived of their family's support; (2) to provide to children and young persons a free primary and secondary education as well as to encourage regular attendance at schools.").

[108] Van Bueren. *supra* note 5, at 233.

[109] *See* Van Bueren, at 233; Campbell and Cosans v. United Kingdom, App. No. 7511/76; 7743/76, Eur. Ct. H.R. No. 48 (ser. A) (1982).

[110] Press Release, UNESCO, Inequality Undermining Education Opportunities for Millions of Children (Nov. 25 2008).

[111] Tomasevski, *supra* note 12, at. 129.

THE COMMAND RESPONSIBILITY IN CRIMINAL LAW

- International criminal law and criminal law of the Republic of Serbia -

DR. DRAGAN JOVAŠEVIĆ*

ABSTRACT : After a long historical development, the second half of the 20 th century has inaugurated the new, latest branch of the punitive law – international criminal law. By its legal nature and characteristics it is somewhere between the national criminal law and international public law, maintaining its peculiarity and indenpendence. The basic and most important notion and institute of this branch of law is certainly the international criminal act. In the theory of law, there are several views on the notion and contents of the international criminal act. However, it can be concluded that this notion implies a socially dangerous, illegal act committed by the perpetrator and defined as a criminal act whose perpetrator is to punished as prescribed by the law. Such a defined notion of the international criminal act includes its basic elements, and these are as follows : 1) the act of a man (including the act of an adult person that can be committed in three forms : acting, non-acting and failure to provide proper supervision), effect and causality, 2) social danger, 3) unlawfulness, 4) definition of an act by rules and 5) guilt of the perpetrator. There are two kinds of international criminal acts : international criminal acts in a narrow sense and international criminal acts in a broad sense. The most significant are certainly the international criminal acts in a narrow sense that are directed towards violation or endangering of the universal, general civilisation values – international law and humanity – what is actually the subject of protection from these criminal acts. Apart from the international criminal act, the theory of law also includes a foreign criminal act (any criminal act with a foreign element). By all this, these two notions coincide largely, but are also considerably different from each other. In this papet the author has analysed theoretical and practical aspects of command responsibility in international legal acts and in new criminal code of the Republic of Serbia (former FR Yougoslavia).

KEY WORDS : international legal documents, international criminal law, criminal act, responsibility, court, sanction

DEFINITION AND ELEMENTS OF CRIMINAL RESPONSBILITY

1. Responsibility of a state

The principle of individual (personal) criminal responsibility for the criminal offence that represents the violation of the rules of international law is generally accepted in international criminal law of today. However, it is still disputable in theory whether a state (as a collective) should also be responsible for crimes against international law. This question seems reasonable, since crimes against international law are most frequently committed during war, armed conflict or occupation on the behalf and for the account of a particular state[1].

Therefore, it has been discussed whether political, civil and criminal responsibility of a state for crimes against international law should exist along with the responsibility of an individual. Actually, political and civil responsibility of a state emerges from the illegal acts of its institutions (authorities). Furthermore, every state in the international community of today has got certain obligations whose breach draws certain form of responsibility i.e. liability for punishment and requires specific forms of punishment such as: compensation, economic penalties, international condemnation and even military or humanitarian intervention to be applied[2].

Nevertheless, a series of reasons that support the introduction of criminal liability of a state for crimes against international law is pointed out in legal theory. It is considered that the state, as well as the persons that act on its behalf, should bear criminal liability for serious violations of international law, which are placed in the category of criminal offences according to the general opinion of civilized

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[1] N.A.Combs, Guilty pleans in international criminal law, Stanford, 2007. pp.178-192.

[2] V.Đurđić, D.Jovašević, Međunarodno krivično pravo, Beograd, 2003. pp.67-71.

nations due to their graveness, brutality and disparagement of human life. A state should not be allowed to remain unpunished for the most serious forms of crimes against international law because the individuals who unite in order to form states immeasurably amplify the possibilities to cause evil.

It is also emphasized as a logical and rational argument that not only individuals but states as well should be responsible for the gravest crimes that violate the rules of international law, such as crime against peace and crime against humanity[3]. Otherwise, the purpose of criminal punishments and the aims of repression could not be accomplished, since the actual threat of recidivism (repeated perpetration of the same criminal offences) would continue to exist in the unpunished state. The fact that world peace and security of mankind are predominantly threatened, not by individuals but by the states themselves and their attitudes and activities, is often pointed out as a final argument that would justify the introduction of criminal responsibility of a state for crimes against international law. Since this threatening of peace is actually derived from the state's power, the measures intended to prevent and suppress criminality in international relations that would affect only individuals, could not lead to the required result.

In spite of numerous reasons that speak in the favor of state's responsibility under international criminal law, the present level of society's development does not allow such form of liability to be accepted. According to the ancient Roman maxim: *societas delinquere non potest*, it is accepted that a legal person (including a state) cannot be a perpetrator and, hence, cannot bear criminal responsibility. A state could bear criminal responsibility only if its guilt could be declared, which is impossible. That is the reason why even the Nürnberg Judgment recognizes the standpoint that the perpetrators of crimes against international law can be only natural persons and not legal entities such as states[4].

1.2. Responsibility of a natural person

Criminal responsibility of individuals as natural persons under international criminal law, includes a group of subjective circumstances that determine the mental state of the perpetrator and his psychological attitude towards the crime against international law he has committed. Due to such circumstances, the perpetrator can be considered as mentally competent and guilty[5]. Accordingly, criminal liability under international criminal law is also comprised of three elements (paragraph 25. subpart 1. of The Rome Statute).

These are:

a) being above the age of 18,

b) mental competence and

c) guilt.

These elements of criminal responsibility are assessed in each individual case according to the time of conduct of the actual criminal offence. As such, they represent the grounds of subjective and personal (individual) criminal responsibility, which is a precondition for the enforcement of penalty to the

[3] N.Jorgensen, The Responsibility of States for International Crimes, Oxford, 2000.pp.45-58.
[4] M.Marković, Pitanje odgovornosti za zločine protiv čovečnosti kao povrede najbitnijih ljudskih prava, Jugoslovenska revija za kriminologiju i krivično pravo, Beograd, No. 4/1968. pp.545-550.
[5] Lj.Lazarević, Komentar Krivičnog zakonika Srbije, Beograd, 2005.pp.67-71.

person who committed some of the crimes against international law[6].

Furthermore, it is prescribed in paragraph 27. of The Rome Statute that it shall apply equally to all persons without any distinction based on their official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility nor shall it, in and of itself, constitute a ground for reduction of sentence. For that reason, immunities based upon national or international laws (in accordance with the provisions of The Vienna Convention) do not represent an obstacle for The International Criminal Court to exercise its jurisdiction[7].

RESPONSIBILITY OF A SUPERIOR (COMMAND RESPONSIBILITY)[8]

Under international criminal law as well, subjective criminal responsibility (Јовашевић, 2006:109-136), based upon age, mental competence and guilt, represents a precondition for the enforcement of criminal sentences to the offenders against international criminal law. This is personal (individual) subjective responsibility that excludes criminal responsibility for the acts of another person i.e. objective responsibility. After having taken into consideration all the examined personal and material evidence, the international criminal judiciary authority in charge has to assess whether all psychological elements (elements of consciousness and elements of will) were encompassed by the offender (perpetrator or accomplice) at the time of conduct in each particular case. That is a rule[9].

However, the nature and the character of crimes against international law caused one more ground for punishing the perpetrators of these criminal offences known as the responsibility of a superior. A consistent terminological definition of this term has not yet been established in legal theory. Hence, the following terms are being used: superior responsibility, responsibility for conduct of subordinates, indirect superior responsibility, responsibility for failure to act and liability of a commander for the acts of his subordinates. This form of criminal responsibility under international criminal law is nowadays provided by paragraph 28. of The Rome Statute.

1. Historical development of responsibility of a superior

The first indicators of the existence of responsibility of a superior as a special form of criminal responsibility (responsibility *sui generis*) can be found much earlier. It the year 1439. the French king Charles VII announced an order from Orléans, according to which "each commander or his deputy is responsible for maltreatments, felonies or misdemeanors conducted by the members of their military units".

The Hague Convention dating from 1907. was the first written international legal source to prescribe obligations as well as responsibilities of military commanders for the conduct (act and failure to act) of his subordinates. It is explicitly prescribed by paragraph 1 of its Annex 4 that militia or volunteer corps needs to be commanded by a person responsible for his subordinates if intending to obtain the status of

[6] D.Jovašević, Krivično pravo, Beograd, 2006. pp.217-219.
[7] More : D.Jovašević, Krivični zakonik Republike Srbije sa uvodnim komentarom, Beograd, 2007.
[8] There are authors who prefer to use terms such as "commanding" responsibility, responsibility of a superior, responsibility of a commander and responsibility for the act of another person instead of the term "command" responsibility.
[9] B.Petrović, D.Jovašević, Krivično (kazneno) pravo Bosne i Hercegovine, Opći dio, Sarajevo, 2005. pp.223-226.

a lawful party to the conflict and to enjoy the legal protection provided by the Hague Convention. Moreover, paragraph 43. of The Hague Convention prescribes the duty of the commander to take all the necessary measures in his power to restore and ensure, as far as possible, public order and safety, as well as the laws in force in the occupied territory[10].

Further theoretical and practical development of responsibility of a superior[11] under international criminal law is linked to the case of General Tomoyuki Yamashita, the commander of Japanese forces at the Philippines, who was accused by The USA Military Commission in 1945. of crimes committed on battlefields in the Far East during The World War II, since "the crimes were so widespread that Yamashita must have known about them, but he neglected and failed to fulfill his duty as a commander to supervise the conduct of his army by allowing it to commit serious crimes and violate the laws of war". The court found General Yamashita guilty as charged and sentenced him to death by hanging executed on February 23rd 1946.

Liability of a commander for the acts of his subordinates was explicitly implemented in a national criminal legislation for the first time by The US Army Field Manual adopted in 1956. Responsibility for acts of subordinates is clearly defined in paragraph 501. of The Manual. Former Yugoslavian Manual on implementation of the provisions of the international law of war in the armed forces of SFRJ adopted in 1988.[12] was familiar with the same form of responsibility-responsibility for the acts of the subordinates. Some cases of responsibility for the acts of subordinates are enumerated in paragraph 21. of The Manual[13]:

1. A military commander is personally responsible for the violations of the laws of war if he knew of could have known that forces or individuals under his command were preparing to breach those laws, but failed to undertake measures to prevent it.

2. A military commander is personally responsible if he knows that the breach of the laws of war has already been committed but fails to accuse the persons responsible for such violations of laws.

3. A military commander who is not empowered to accuse these persons and who failed to report them to the military commander in charge is also personally responsible and

4. A military commander is responsible as a perpetrator or as an inciter if, by failing to undertake measures against the perpetrator under international law, enables his subordinates to continue the commission of such criminal offences.

Subsequently, Protocol 1. Additional to the Geneva Conventions on the protection of the victims of international armed conflicts of 1977. also mentioned responsibility of a superior in its paragraph 86. subpart 2. According to this provision, the fact that a criminal offence that represents the breach of the Conventions was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility under the following conditions[14]:

[10] B.Lukšić, Genocide and command responsibility, Zbornik Pravnog fakulteta u Splitu, Split, No. 4/2001, pp.283-291.
[11] When the nature of responsibility of a superior in concerned, a consistent standpoint has not yet been established in legal theory. So, according to the theory that originates from common law, responsibility of a superior is considered as a form of responsibility for a crime committed by another person (i.e. by a subordinate). This standpoint is adopted in the practice of The Hague Tribunal and The Rwanda Tribunal as well. According to another standpoint, responsibility of a superior represents responsibility for a particular criminal offence that differs from the crime committed by a subordinate. Actually, this is the case of responsibility for failure to act, i.e. for failing to conduct the necessary supervision by the commander.
[12] Official Military Gazette of SFR Yugoslavi No. 10/1988.
[13] D.Jovašević, Međunarodna krivična dela – odgovornost i kažnjivost,. Niš, 2010. godine, pp.182-187.
[14] B.Kozjak, Zapovjedna odgovornost u međunarodnom i hrvatskom kaznenom pravu, Odvjetnik, Zagreb, No. 5-6/2001.pp. 37-40.

a) if they knew, or had information that should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and

b) if they did not take all feasible measures within their power to prevent or repress such act.

Paragraph 7. subpart 3. of The Statute of The Hague Tribunal[15] also deals with responsibility of a superior. To be exact, the fact that a crime against international law was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was involved with the commission of such act or had committed it and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof. Responsibility of a superior is defined in the same way by paragraph 6. subpart 3. of The Statute of The International Tribunal for Rwanda located in Arusha, Tanzania.

All the above mentioned sources of international criminal law clearly indicate that responsibility of a superior does not represent a form of objective responsibility for committed criminal offence. Namely, the character of this form of responsibility has two layers[16]:

a) responsibility for failure to act and

b) responsibility for acting negligently.

Therefore, a military or other superior cannot be responsible for a criminal offence committed by his subordinate just because of the fact that he was "superior to his subordinate who was the direct perpetrator", but it should be confirmed in each individual case that he knew or could have known that the subordinate was about to commit a crime against international law or had done so and failed to take the necessary and reasonable measures to prevent such acts or to conduct an appropriate procedure after having been informed about them[17].

2. Responsibility of a superior according to The Rome Statute

Entire paragraph 28. of The Rome Statute is dedicated to responsibility of commanders and other superiors. A military commander or person effectively acting as a military commander is criminally responsible for crimes against international law committed by forces under his effective command and control, as a result of his failure to exercise control properly over such forces, in two situations[18]:

1. When he either knew or, owing to the circumstances at the time, should have known that his forces were committing or about to commit such crimes or

2. When he failed to take all necessary and reasonable measures within his power to prevent the

[15] The accused person is individually responsible if he or she really knew or had a reason to believe through the reports he or she received or otherwise that the troops or other persons under his or her control were preparing to commit or committed such offences, but the accused person failed to undertake necessary and reasonable steps to prevent such offences (The Judgment of The International Tribunal for Former Yugoslavia in case IT-96-217 from November, 6th 1998).
[16] B.Brkić, Zapovjedna komandna odgovornost i načelo zakonitosti u međunarodnom kaznenom pravu, Hrvatska pravna revija, Zagreb, No. 8/2001. pp.80-82.
[17] B.Brkić, Zapovjedna kaznena odgovornost – mogući teoretski i praktični aspekti, Hrvatska pravna revija, Zagreb, No. 2/2002. pp.111-116.
[18] D.Derenčinović, Kritički o institutu zapovjedne kaznene odgovornosti u međunarodnom kaznenom pravu, Zbornik Pravnog fakulteta u Zagrebu, Zagreb, No. 1/2000. pp.23-44.

commission of such crimes or to submit the matter to the competent authorities for investigation and prosecution.

The superior shall also be criminally responsible for the criminal offences committed by his subordinates under his effective control, as a result of his failure to exercise control properly over such subordinates in the following cases[19]:

1. When the superior either knew, or consciously disregarded information which clearly indicated that the subordinates were committing or about to commit such crimes,

2. When the crimes concerned activities that were within the effective control and responsibility of the superior and

3. When the superior failed to take all necessary and reasonable measures within his power to prevent the commission of the crimes or to submit the matter to the competent authorities for investigation and prosecution.

According to the standpoints adopted in legal doctrine, several conditions have to be fulfilled cumulatively in order to constitute responsibility of a superior[20]:

1. That an individual or an entire military unit, subordinated to a particular military superior or political superior in the state hierarchy, committed a crime against international law within the jurisdiction of the permanent International Criminal Court whose seat is at The Hague,

2. That the subordinate (who is the direct perpetrator) was under his superior's effective control at the time of conduct, i.e. that the superior had actual power over the subordinate,

3. That the superior neither ordered the commission of a crime against international law nor participated in it as a co-perpetrator or an accomplice,

4. That the superior either knew or, owing to the circumstances at the time, could have known that his subordinate was committing or about to commit a crime against international law and

5. That the superior failed to undertake all the necessary and reasonable[21] measures within his power to prevent the commission of a crime against international law or to initiate criminal prosecution of the perpetrator if the criminal offence had already been committed[22].

3. Responsibility of a superior according to the law of The Republic of Serbia

Criminal legal system of The Republic of Serbia decisively supports the standpoint according to which criminal responsibility as a personal (individual) and subjective responsibility of a perpetrator or an accomplice represents the ground for enforcement of penalties and other criminal sentences. Apart

[19] D.Kos, Zapovjedna kaznena odgovornost, Zbornik radova, Aktuelna pitanja kaznenog zakonodavstva, Zagreb, 2004.pp.42-60.
[20] Ž.Burić, Zapovjedna odgovornost, Hrvatska pravna revija, Zagreb, No. 11/2004. pp.75-79.
[21] This is a special form of failure to act comprised of failing to undertake necessary and reasonable measures against the direct perpetrator of crimes against international law.
[22] P.Novoselec, Temeljne crte Novele Kaznenog zakona (Zapovjdedna odgovornost), Hrvatski ljetopis za kazneno pravo i praksu, Zagreb, No. 2/2003. pp. 258287.

from subjective criminal responsibility, the latest Criminal Code[23] from 2005. is familiar with the institution of responsibility of a superior as well. Actually, responsibility of a superior as a form of "objective" responsibility is also provided by the Statute of the permanent International Criminal Court and can be applied by national judiciary authorities in criminal proceedings against the persons who committed some of the criminal offences from Chapter 34. of The Criminal Code entitled "Criminal Offences Against Humanity And Other Rights Guaranteed by International Law"[24].

In accordance with these solutions, the new Criminal Code of The Republic of Serbia from 2005. actually stipulates criminal responsibility and liability for punishment in the case of "responsibility of a superior" in its paragraph 384. under the title "Failure to Prevent Crimes against Humanity and other Values Protected under International Law". In fact, this provision stipulates a particular crime against international law that is comprised of failure to act[25]. There are several forms of this criminal offence.

This legal provision also stipulates a particular form of criminal responsibility of a person who does not undertake the necessary measures to prevent the commission of the following criminal offences against humanity and other rights guaranteed by international law[26]:

1) genocide,

2) crime against humanity,

3) war crime against the civilian population,

4) war crime against the wounded and sick,

5) war crime against the prisoners of war,

6) employment of prohibited means of warfare,

7) unlawful killing and wounding of enemy,

8) unlawful appropriation of objects from bodies,

9) violation of protection granted to bearer of flag of truce/emissary,

10) cruel treatment of the wounded, sick and prisoners of war and

11) destroying cultural heritage.

These acts actually represent the preparation for the commission or the commission of the gravest criminal offence of today.

The first form of this criminal offence can be committed by a military commander or a person who in practice is discharging such function. It is therefore a criminal offence that can be committed only by a perpetrator with particular characteristics i.e. *delicta propria*. This criminal offence includes the

[23] Official gazette of the Republic of Serbia No. : 85/2005, 88/2005, 107/2005, 72/2009 and 111/2009. More. D.Jovašević, Krivični zakonik Republike Srbije sa uvodnim komentarom, Beograd, 2007.
[24] V.Đurđić, D.Jovašević, Krivično pravo, Posebni deo, Beograd, 2006. pp. 278-281.
[25] D.Jovašević, Leksikon krivičnog prava, Beograd, 2006. p. 319.
[26] D.Jovašević, Međunarodna krivična dela – odgovornost i kažnjivost, Niš, 2010. pp.190-192.

following three elements[27]:

1) That the perpetrator was aware or conscious of the fact that other persons were conducting preparations or directly committing the enumerated crimes against international law,

2) That crimes against international law were committed by the persons who entered the forces within the perpetrator's command or control and

3) That the perpetrator did not undertake (failed to undertake) the measures that he could have and was obliged to undertake in order to prevent the commission of the abovementioned crimes against international law, which actually resulted in their commission.

The punishment prescribed for this criminal offence is the same punishment that would be imposed on the direct perpetrator of some of the enumerated crimes against international law.

Hence, the fact that some of the above mentioned criminal offences were committed by a subordinate does not absolve his superior from criminal responsibility.

The second form of this criminal act from paragraph 384. of The Criminal Code of The Republic of Serbia is related to the failures of other superiors to act, which resulted in the commission of the mentioned crimes against international law. This criminal offence requires that three following elements are met[28]:

1) That the perpetrator knew or was aware of the fact that other persons were preparing or directly commencing the commission of the enumerated crimes against international law,

2) That these crimes against international law were committed by perpetrator's subordinates, i.e. the persons who were subordinated to him in the execution of their tasks and

3) That the perpetrator did not undertake (failed to undertake) the measures that he could have and was obliged to undertake in order to prevent the commission of the above mentioned crimes against international law, which actually resulted in the commission of these acts.

The punishment prescribed for this criminal offence is the punishment of imprisonment that can be imposed on the direct perpetrator of one of the enumerated crimes against international law. If one of the forms of this criminal offence was committed by negligence as a form of guilt, an imprisonment of six months to five years is prescribed[29].

COMMON CRIMINAL DESIGN (JOINT CRIMINAL ENTERPRISE)

When criminal responsibility is concerned, a special form of responsibility for crimes against international law called common criminal design[30] , common purpose[31] or joint criminal enterprise has

[27] V.Đurđić, D.Jovašević, Krivično pravo, Posebni deo, Beograd, 2006. pp.336-337.
[28] M.Despot, Omisivna krivična dela kao ratni zločini, Jugoslovenska revija za međunarodno pravo, Beograd, No. 1-2/1996.pp.165-176.
[29] D.Jovašević, Međunarodna krivična dela – odgovornost i kažnjivost, Niš, 2010. pp.190-191.
[30] This term was first created in the English law of the 14th century and then transplanted and further developed in the American criminal law, especially in the provisions related to organized crime. It is based upon the effort to make the proving of grave criminal offences easier, which enables the group of possible perpetrators to be expanded by including persons who otherwise could not be considered as perpetrators of such criminal offences. This is also a way of creating a new form of common

lately been more and more frequently discussed in the theory and even more in the practice of international criminal law.

These standpoints (theories) are based upon the fact that the majority if crimes against international law do not represent a result of a single person's conduct or decision. In fact, crimes against international law committed in those situations represent a result, i.e. a consequence of joint enterprise of several persons who either directly perpetrated these criminal offences or inspired others to do so or planned or otherwise facilitated direct commission of these criminal offences. The use of this ground for criminal responsibility under international criminal law implies that all the members of the group acting with a "common purpose" are considered as responsible for a crime against international law[32].

According to the practice of The Hague Tribunal (Tadić case) [33] common criminal purpose exists if the following constitutive (objective) elements are fulfilled[34]:

1. Presence of several persons [35] on a specific level of cohesion. Such cohesion does not necessarily have to indicate the presence of a consistent organization with the form of a military, police, political or administrative structure, but a certain form of joint enterprise is required,

2. The presence of a common project, plan, conception or purpose that includes the commission of a crime against international law. Such plans or purposes do not necessarily have to be strictly arranged or previously formulated. They can also be "improvised" or even "accepted on the spot" by the persons acting together and

3. The participation of the perpetrator in such common criminal design (the contribution of the perpetrator). Such participation does not have to be confirmed by the commission of a criminal offence. The act of the perpetrator comprised simply of helping or facilitating or other contribution to the process of the commission of a common plan or purpose is considered as sufficient.

The Statute of the International Criminal Court (The Rome Statute) also prescribes joint criminal enterprise in its paragraph 25, subpart 3, point "d". According to this provision, a person shall be criminally responsible for a crime within the jurisdiction of the Court if that person contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose[36]. Such contribution shall be considered as intentional and shall either[37] :

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or collective guilt.

[31] It is thought that this institution was implemented for the first time in the appeals judgment of The Hague Tribunal in the Tadić case in 1999.

[32] B.Ivanovišević, G.Ilić,T.Višnjić,V.Janjić, Vodič kroz Haški tribunal, Beograd, 2007. pp.119-121.

[33] The institution of joint criminal enterprise has been used several times in: 1) the practice of The Hague Tribunal: judgment 00-39-T (The Krajišnik case), judgment 98-32 (The Vasiljević case), judgment: 95-14 (The Blaškić case) and judgment 98-33 (The Krstić case), 2) the practice of The Rwanda Tribunal: judgment 96-17 (The Nakirutimana case) and 3) the practice of Special Panels for Serious Crimes in East Timor through the judgments in the following cases: Pereira, Domingos de Deus and Cardoso.

[34] M.Damaška, Boljke zajedničkog zločinačkog poduhvata, Hrvatski ljetopis za kazneno pravo i praksu, Zagreb, No. 1/2005.pp.3-11.

[35] A participation of a smaller number of persons in the commission of particular crimes on a limited territory is considered as enough to form "the presence of several persons" in the sense of joint criminal enterprise. These persons need to know (be familiar with) each other because they act together and there is a consent among them on the commission of criminal offences.

[36] The institution of joint criminal enterprise significantly differs from the traditional continental system of criminal law. It is said to have the following missing: 1) it allows a person to be considered as guilty although that person did not have the intent (consciousness and will) that would give reason for the constitution of guilt, 2) guilt is imposed on one person for the predictable actions of another (without clear arguments), 3) significantly different acts of persons who participate in the commission of a criminal offence are wrongfully treated as equal, 4) it is nit in accordance with the principle of legality and 5) the existence of this institution is especially disputable when it comes to proving, since it allows the innocent persons to be punished as well.

[37] K.Ambros, Joint criminal enterprise and Command responsibility, Journal of International Criminal Justice, No. /2007.

a) be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court or

b) be made in the knowledge of the intention of the group to commit the crime. Joint criminal enterprise can emerge in three forms. Those are[38]:

1. The responsibility of all the members of the group acting with a common purpose and with a common intent to commit a particular crime against international law. In such case, not all the members of the group have to conduct direct perpetration of such criminal offence. But, if one of them voluntarily participated in an aspect of the common plan with the intent to commit such crime against international law as a result of joint enterprise, all of them will be considered as responsible,

2. The responsibility for "concentration camps" [39], where all the persons on high positions within the camps in which these criminal offences were committed are also considered as perpetrators in spite of the fact that they did not participate in the direct perpetration. The use of this form of responsibility requires that the following conditions are me[40]t:

a) an organized system of maltreatment of the imprisoned persons that includes the commission of some of the crimes against international law,

b) perpetrator's awareness of the nature of this system of maltreatment and

c) the fact that the perpetrator encouraged, helped, supported or otherwise participated in the conduction of the common criminal purpose due to the fact that he had the permission and the possibility to supervise the imprisoned persons and to make their life supportable and acceptable (satisfactory), but failed to do so and

3. The responsibility for the crime against international law that stands beyond the frames of the joint criminal purpose but still represents its natural and predictable consequence. This is the so called "extended" joint criminal enterprise.

CONCLUSION

Established within the frames of international law of war and international humanitarian law, international criminal law obtained its "citizenship" at the beginning of the third millennium as the newest criminal legal discipline. When The Rome Statute of the International Criminal Court came into force, this branch of law was finally inaugurated in substantial, procedural and executive sense. Even earlier than that, this branch of law had been evolving through the development of basic criminal legal terms and institutions within a series of international legal documents (of universal and regional character) or contracts between individual states as well as through the practice of the courts (first of all, the practice of the Nürnberg and Tokyo Tribunals).

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pp.159-168.

[38] V.Đurđić, D.Jovašević, Krivično pravo, Posebni deo, Beograd, 2006. pp.337.

[39] According to the practice of The Hague Tribunal, a common plan is considered to exist in the following cases: a) long term and routine imprisonment and captivation of another nation's members, b) repeated torture and beating of the imprisoned persons, c) murder if the imprisoned persons, d) frequent and long lasting forced labor of the imprisoned persons and e) maintenance of inhumane conditions in the prison building.

[40] D.Jovašević, Međunarodna krivična dela – odgovornost i kažnjivost, Niš, 2010.pp.193-194.

The latter include the following:

1) crime against international law (which differs from a criminal offence with an international element) that can emerge in two forms: as a crime against international law in the narrow sense (genuine) or as a crime against international law in the broader sense (counterfeit or mixed),

2) criminal responsibility of the perpetrator (the precondition for criminal responsibility is the fact that the perpetrator is more than 18 years old), who can appear either as one person or include several persons or even a legal person such as a state or an organization and

3) the system of criminal sentences i.e. punishments that are being imposed by the supranational judiciary authorities.

These fundamental terms and institutions of international criminal law are discussed in this paper.

Because of the nature, the character and the hazard of crimes against international law, this branch of law is familiar with a special form of objectified responsibility besides individual criminal responsibility. It is the responsibility of political and military superiors for the crimes against international law committed by their subordinates, known as the responsibility of a superior, which is entering national criminal legislations through relevant international standards. Accordingly, the latest Criminal Code of The Republic of Serbia from 2005. also includes this institution.