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EUROPEAN ORGANIZATIONS  
ON RELIGIOUS EDUCATION: A  
CHILD'S RIGHTS PERSPECTIVE

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# Summary

UN Convention on the Rights of the Child is a progressive instrument specifically designed for children that gives a right to a child for her/his views to be heard whenever the decision that might affect her/his life is taken, including the decision on religious education. Further, when the child is mature enough she/he has a right to choose independently her/his religious education, while the parents have a role of direction and guidance.

As opposite to the CRC, the European Convention on Human Rights was drafted in a different period and henceforth has a different approach to the protection of children's rights. The EU Charter, a modern instrument, is more child sensitive as compared to the ECHR. The OSCE's documents addressing religious education seem not be in full compliance with the CRC.

Yet, inconsistency in the protection of child's right in Europe, seen through the example of religious education, is reflecting negatively on legal certainty and consequently on the protection of children's rights. Thus, there is a need as well as a possibility to make a coherent system of children's rights protection in Europe, the one that would be in compliance with the CRC. Although there could be different ways to achieve this goal, this thesis has supported change of the ECHR through the adoption of an Additional Protocol, as the most suitable solution.

# Preface

The author would like to thank all the people that have supported her throughout the course of conducting the author's first significant research assignment, in particular her supervisor, Ms. Rebecca Stern for her invaluable guidance and advice and her mum, Ms. Mira Dragić for her unconditional love and patience.

# Abbreviations

|            |   |
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| CoE        | Council of Europe   |
| CRC/UNCRC  | Convention on the Rights of the Child                                     |
| ECHR       | Convention for the Protection of Human Rights<br>and Fundamental Freedoms |
| ECECR      | European Convention on the Exercise of<br>Children's Rights               |
| ECJ        | European Court of Justice (Court of Justice of<br>the European Union)     |
| ECtHR      | European Court of Human Rights  |
| EU Charter | Charter on Fundamental Rights of the European<br>Union                    |
| EU         | European Union  |
| ICCPR      | International Covenant on Civil and Political<br>Rights                   |
| ICESCR     | International Covenant on Economic, Social and<br>Cultural Rights         |
| ODIHR      | Office for Democratic Institutions and Human<br>Rights                    |
| OSCE       | Organization for Security and Cooperation in<br>Europe                    |
| TEU        | Treaty of the European Union  |
| UDHR       | Universal Declaration of Human Rights                                     |
| UN         | United Nations  |
| VCLT       | Vienna Convention on the Law of the Treaties                              |
| WWII       | Second World War  |

## TABLE OF CONTENTS

|  |           |
|--|-----------|
| <b>SUMMARY</b>   | <b>1</b>  |
| <b>PREFACE</b>   | <b>2</b>  |
| <b>ABBREVIATIONS</b>   | <b>3</b>  |
| <b>1. INTRODUCTION</b>   | <b>6</b>  |
| 1.1. Background  | 6         |
| 1.2. Research questions  | 7         |
| 1.3. Methodology and outline   | 8         |
| 1.4. Delimitations   | 9         |
| <b>2. UNCRC ON CHILDREN’S RIGHT TO PARTICIPATION IN THEIR RELIGIONS EDUCATION</b>                  | <b>11</b> |
| 2.1. Right to participation  | 11        |
| 2.2. Freedom of religion   | 13        |
| 2.2.1 <i>Meaning and scope</i>   | 13        |
| 2.2.2 <i>Drafting procedure</i>  | 16        |
| 2.3. Right to education  | 18        |
| 2.4. Right to participation in religious education   | 19        |
| <b>3. EUROPEAN ORGANIZATIONS ON CHILDREN’S RIGHT TO PARTICIPATION IN THEIR RELIGIONS EDUCATION</b> | <b>20</b> |
| 3.1. Council of Europe   | 20        |
| 3.1.1 <i>Activities of the Council of Europe institutions</i>                                      | 22        |
| 3.1.2 <i>European Convention on Human Rights on religious education</i>                            | 26        |
| 3.1.3 <i>Interpretation of Article 2 of Protocol No. 1 by the ECtHR: a leap forward?</i>           | 29        |
| 3.1.4 <i>ECHR and the ECtHR’s approach to religious education vis-à-vis the CRC</i>                | 33        |
| 3.2. European Union  | 35        |
| 3.2.1 <i>EU Charter and the rights of the child</i>  | 37        |
| 3.2.2 <i>ECJ on the right to education and rights of the child</i>                                 | 42        |
| 3.2.3.1 <i>Post Lisbon cases on children’s rights</i>  | 45        |
| 3.3. Comparative approach between the Council of Europe and the European Union                     | 46        |
| 3.3.1 <i>ECHR and the EU Charter</i>   | 46        |

|       |   |    |
|-------|---|----|
| 3.3.2 | <i>Accession of the EU to the ECHR and future of children's rights protection</i> | 48 |
| 3.4.  | Organization for Security and Cooperation in Europe                               | 50 |
| 4.    | <b>TOWARDS A COHERENCY IN THE EUROPEAN SYSTEM OF CHILD'S RIGHTS PROTECTION</b>    | 54 |
| 4.1.  | Norms of conflict resolution of international public law                          | 54 |
| 4.2.  | Non-binding obligation of the Council of Europe to follow the UNCRC               | 57 |
| 4.2.1 | <i>Using the ECtHR's methods of interpretation</i>                                | 58 |
| 4.2.2 | <i>Making the ECHR a child-sensitive instrument</i>                               | 62 |
| 5.    | <b>CONCLUDING REMARKS</b>   | 67 |
|       | <b>BIBLIOGRAPHY</b>   | 69 |
|       | <b>TABLE OF CASES</b>   | 76 |

# 1. Introduction

## 1.1. Background

Great Bengali poet, Tagore, once said: “Don't limit a child to your own learning, for he was born in another time.” Change in society is seen as natural course of events. Consequently, as legal instruments have a task of reflecting the perception of relations in society at the time they were drafted it should be natural for them to change as well, following the new (dis)order they tend to regulate. In case of human rights instruments, this change is often connected to the changed perception of individuals whose rights the instruments tend to protect. As one of the numerous examples, one could refer to the changed perception of women and consequently protection of their rights. Nowadays, it is hard to believe that just 100 years ago women did not have right to vote and even more disturbing that this state of affair was seen as completely normal. Currently, similar movements are ongoing in regards to older people, people with disabilities, children and etc. In respect of children, today they are seen as equal members of society, and their status on basis of age is no longer justification for the limitation of their rights. Adoption of the 1989 UN Convention on the Rights of the Child (hereinafter: CRC/UNCRC) has confirmed changed perception of children, and made tremendous contribution to the full protection of their entire set of human rights.<sup>1</sup> It protects a child, not primarily as a vulnerably being in need of protection, but as an individual with her/his own opinions, views, beliefs that need to be respected each time decision concerning her/his life is taken. The child's status as a member of family does no longer serve as a basis for her/his protection, the child inside of the family has a voice that has to be heard both by the family and by the State.

Yet, as the legal instruments tend to be reflection of the time they were drafted, it seems that some of the European organizations, following their

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<sup>1</sup> Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3.

'old' legal instruments, have still not adjusted their child protection system to the changed notion of a child, mirrored in the CRC.

The child's right for her/his views to be heard in all matters concerning the child, envisaged in Article 12 of the CRC, is arguably, one of the strongest evidence of the changed perception of a child. Henceforth, we will go inside of the three European organizations, Council of Europe (hereinafter: CoE), European Union (hereinafter: EU) and Organization for Security and Cooperation in Europe (hereinafter: OSCE) in order to see, on a basis of level of adoption of Article 12, and on a specific example of freedom of religion and more narrowly religious education, whether they have followed the pace of change or are they still trapped in the past.

## **1.2. Research questions**

The main research question that this thesis will try to answer is: Why is it necessary and would it be possible to make a coherent system of child's rights protection in Europe? In order to reach this goal, the thesis will first try to answer several related questions such as: How does the CRC address children's right to participation and their role in religious education? What is the reasoning of the CoE, EU and the OSCE on children's right to participation in their religious education? How do they differ, if at all, and what will be the future of children's right protection after the accession of the EU to the European Convention on Human Rights (hereinafter: ECHR)?<sup>2</sup> Does the international public law give an answer to the lack of coherent protection of children's rights in Europe? Can the European Court of Human Rights (hereinafter the ECtHR) interpret Article 2 of Protocol No. 1 to the ECHR in compliance with children's right to participation?<sup>3</sup> Can the ECHR be made into a more child-sensitive instrument?

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<sup>2</sup> The European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221, ETS No. 5.

<sup>3</sup> Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 20 March 1952, *see supra* note 2.

### 1.3. Methodology and outline

Having this aim in mind the thesis will use the method of legal positivism, while the analysis will be done through the spectacles of the child-centered approach. Namely, thesis will examine legal instruments regulating children's rights to participation, freedom of religion and education. The core instrument for children's rights, the CRC, is the starting point for the analysis. With the help of relevant sources, the CRC's articles containing mentioned rights will be interpreted and explained.

The second part of the thesis will focus on the European perspective. In order to grasp the full picture, all three relevant European organizations will be addressed, namely the CoE, EU and the OSCE. Still, since the CoE, and in particular the ECHR adopted under its auspices as well as the ECtHR established as the ECHR monitoring body, are the most influential, more attention will be given to their reasoning. Thus, second chapter will start with explanation of Article 2 of Protocol No. 1 to the ECHR, protecting right to education. Historical perspective, helping us to better understand it, will be given by looking into the *travaux préparatoire*, while the case law of the ECtHR will be used to explain the meaning of Article 2 of Protocol No. 1 in present day conditions. Moreover, when looking at the EU reasoning of children's rights, the main focus will be on the Charter of Fundamental Rights of the European Union (hereinafter: EU Charter), i.e. on Article 14, right to education and Article 24, containing children's right to participation.<sup>4</sup> Also, stance of the European Court of Justice i.e. Court of Justice of the European Union (hereinafter: ECJ) on the right to education and children's rights will be addressed. Furthermore, since the EU Charter adopts a slightly different approach to child's rights compared to the ECHR, as it will be shown, it will be interesting to examine possible consequences of the EU's accession to the ECHR. Finally, at the end of this subchapter, the Toledo Guiding Principles on Religious Education in Public Schools (hereinafter: Toledo Guidelines) issued by the OSCE, but in close

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<sup>4</sup> Charter of Fundamental Rights of the European Union, 7 December 2000, Official Journal C 364/01.

cooperation with the CoE and the EU, will be examined from the perspective of children's rights.<sup>5</sup>

Final part of the thesis will look into the future and discussing possible solutions see what can be done in order to reconcile the differences among European organizations themselves as well as between some of them and the UNCRC. Hence, first subchapter will explore the potential of the international public law norms on conflict resolution to solve the problem. The second subchapter will argue for the existence of a non-binding obligation on part of the European organizations to follow the reasoning of the CRC. This approach will be further elaborated in two directions, one exploring the possibility for the ECtHR to use its methods of interpretation in order to bring the ECHR in compliance with the CRC and the other, preferred by the author, will focus on the ECHR itself.

## **1.4. Delimitations**

Aim of the thesis is to analyze to what extent have European organizations, in their activities, policies, documents and jurisprudence, accepted children's right to participation. Yet, as the task is too broad, the main focus will be on the children's right to participation in their religious education, envisaged in Articles 12 and 14 of the CRC, Article 2 of Protocol No. 1 of the ECHR and Articles 14 and 24 of the EU Charter. There are several reasons why the author has chosen this, and not another 'participation right', such as freedom of expression or freedom of assembly. Namely, it seems that religious education is still mainly seen through the 'rights' of parents to raise their children in accordance with their preferences and far less as a right of a child to practice her/his right to freedom of religion. Also, child's right for her/his views to be heard when making the decision on religious education shows that right to participation does not only refer to the child-State but to the child-parent relation, as well. Additionally, discussions over religious education in Europe have intensified lately; in particular after the

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<sup>5</sup> Organization for Security and Cooperation in Europe, *Toledo Guiding Principles on Religious Education in Public Schools*, 28 November 2007, <<http://www.osce.org/odihr/29154>> visited on 5 December 2010.

delivery of several prominent judgments by the ECtHR. Finally, all three European organizations have to some extent addressed matter of religious education in their activities.

## **2. UNCRC on children's right to participation in their religions education**

As the thesis will rely on the reasoning adopted by the 1989 Convention on the Rights of the Child under the auspices of the United Nations (hereinafter: UN), it is of crucial importance to thoroughly understand its stance before moving on to compare it to the instruments and practice under the European organizations, respectively, the CoE, EU and the OSCE.

In order to fully grasp the meaning of the right to participation as well as the UNCRC stance on children's role in their religious education, analysis of Articles 12, 14, 5, 28 and 29 of the CRC will be done. Also, particular attention will be given to the behavior of the European States during the drafting of the CRC and subsequently in their objections to the reservations put mainly by the Islamic countries.

### **2.1. Right to participation**

The analysis starts from the one of the general principles of the CRC, namely right of the child to be heard, or commonly known as a right to participation. “[It] establishes not only a right in itself, but should also be considered in the interpretation and implementation of all other rights.”<sup>6</sup> Apart from the principle of participation, interpretation of the rights enshrined in the CRC should be done with the help of the other three general principles, the principle of non-discrimination (Article 2 of the CRC), the best interests of the child (Article 3 of the CRC) and the child's right to life, survival and development (Article 6 of the CRC).

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<sup>6</sup> Committee on the Rights of the Child, *General Comment No. 12: The Rights of the Child to be Heard* (2009) p. 5, <[www2.ohchr.org/english/bodies/crc/comments.htm](http://www2.ohchr.org/english/bodies/crc/comments.htm)>, visited on 12 April 2011.

Article 12, paragraph 1 of the CRC states that the “States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.” In essence, Article 12 gives a right to a child to express her/his views freely, meaning without any external influence, in all matters that affect her/him and puts an obligation on the State parties to take into consideration those views when making any decision that might affect the child.<sup>7</sup>

In a more detail analysis, Article 12 puts an obligation on States to *assure* to a child her/his right to be heard. This would imply positive obligation on a State to fulfill child’s right. Also, the right belongs to *every child who is capable of forming his or her own views* regardless of the age of a child. Capability of forming views can be understood very broadly to include even very young children that have still not developed language abilities, but are able to express their views in a non-verbal way. Capability of forming views is presumed, as the Committee on the Rights of the Child emphasized “...it is not up to the child to first prove her or his capacity” but it is the responsibility of State and parents to assume it.<sup>8</sup> Furthermore, child has to be heard in *all matters affecting a child*. This formulation gives a voice to a child in all decision that might affect her/him, including the ones made inside of a family.<sup>9</sup> Both State and parents have to listen to children each time decision that might affect them is taken. This stance is supported by the UN Committee on the Rights of the Child, which in its General Comment No. 12 underlines that “... it is crucial that the guidance given by parents takes account of the evolving capacities of the child.”<sup>10</sup> Moreover, the States and parents have an obligation/duty not just to listen to a child, but also to give a due weight to her/his views, in accordance with the maturity and age of the child. Still, the assessment of weight to be given to a child’s views

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<sup>7</sup> See *supra* note 6.

<sup>8</sup> *Ibid.*, p. 9.

<sup>9</sup> Stern R., *The Child’s Right to Participation – Reality or Rhetoric?* (Uppsala Universitet, Uppsala:, 2006) p. 163 note to Van Bueren G., *The international Law on the Rights of the Child* (Martinus Nijhoff Publishers, Leiden, 1998) p. 137.

<sup>10</sup> See *supra* note 6, p. 17.

should not be based on the age of the child and thus generalized, but should be done on a case by case basis, as each child has a different set of individual capacities and accordingly a different level of maturity.

Furthermore, although it was one of the most innovative provisions of the CRC, in the drafting procedure it did not invoke much controversy.<sup>11</sup> For the topic of our discussion, child's right to participation in her/his religious education, it is interesting to note that the United States representative suggested right of a child to express his/her views in matters concerning his/her own person, and in particular, *religion*... Also the original 1980 draft had special reference to education.<sup>12</sup> Thus, it seems that the participation rights of a child in connection to her/his religion and education were seen as relevant by the CRC drafters.

Henceforth, the right to participation, gives a right to a child to be heard whenever the decision taken might influence her/his life. Both the State and parents (or legal guardians) have to listen to a child and give her/his views due weight in accordance with the maturity and age of the child. Further, apart from being a right in itself, the right to participation constitutes one of the principles for the interpretation of all other rights contained in the CRC, including the right to freedom of religion.

## **2.2. Freedom of religion**

### **2.2.1 Meaning and scope**

Article 14, paragraphs 1 and 2 respectively state that “[t]he States Parties shall respect the right of the child to freedom of thought, conscience and religion and that States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide *direction* [emphasis added by the author] to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.”

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<sup>11</sup> See Mårtenson J., Detrick S., *et al* (eds.), *The United Nations Convention on the Rights of the Child: a guide to the "Travaux préparatoires"* (Martinus Nijhoff Publishers, Dordrecht, 1992).

<sup>12</sup> Mårtenson, *supra* note 11, pp. 224-225.

Essentially, Article 14 of the CRC gives a right to a child to believe and manifest her/his religion as well as a right to choose her/his religious education. On the other hand, in its second paragraph it also mentions right of parents. What is important to emphasize here is that those rights of parents are rights against the state and not against the child her/himself. The right belongs to the child and parents' role is to provide guidance to a child respecting the child's evolving capacities. Thus, parent's role is one of accessory to the right of a child to freedom of religion, and should decline as the child's capacities evolve. If the opposite view is accepted, the one of parents having a right to choose religious education for their children, this would mean that children have to follow the religion of their parents until the age of 18 which is contrary to their right to freedom of religion as well as right for their views to be heard.<sup>13</sup> The Committee on the Rights of the Child further confirms that children have a right "... against both state and parents."<sup>14</sup> In respect of the obligations of States, Eva Brems emphasizes that "[t]he State's obligation ... includes the duty to guard the limits of parental direction in matters of religion and conscience, and if necessary to offer protection to children against infringement of their freedom of thought, conscience and religion by their parents."<sup>15</sup> This further supports the view that a child has an independent right to choose her/his religion and religious education and that in case of conflict between her/his view and parents, presuming the maturity of a child, her/his views should prevail.

On the other hand there are authors who argue that children and parents have equal level of saying in the choice of religious education and that in situation of conflict between child's and parent's wishes, a balance should be sought.<sup>16</sup> Yet, if all the other rights, including the right to freedom of

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<sup>13</sup> See UNICEF, *Implementation Handbook for the Convention on the Rights of the child* fully revised edition (2002) p. 198.

<sup>14</sup> Langlaude S., *The Right of the Child to Religious Freedom in International Law* (Martinus Nijhoff Publishers, Leiden, 2007) p. 147.

<sup>15</sup> Brems E., 'Article 14: The Right to Freedom of Thought, Conscience and Religion' in: Alen A., Vande Lanotte J., Verhellen E., Ang F., Berghmans E. and Verheyde M. (eds.) *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers, Leiden, 2005) p. 29.

<sup>16</sup> See Kilkelly U., 'The Child's Right to Religious Freedom in International Law: The Search for Meaning', in Fineman M. A. and Worthington K. (eds.), *What is Rights for Children? The Competing Paradigms of Religion and Human Rights* (Ashgate Publishing

expression belong to the child, the question is why the right to freedom of religion should be an exception? If the child is mature enough, why there should be a balance between her/his rights and rights of the parents to know what is best for her/him? Parents' role should be the one of *direction* while the right itself belongs to the child and in situation of conflict, presupposing maturity of a child, the child's wishes should prevail.

In addition, Article 14(2) should be read together with Article 5 of the CRC which states that "States parties shall respect the responsibilities, rights and duties of parents... to provide, in a manner consistent with the evolving capacities of the child, appropriate *direction and guidance* [emphasis added by the author] in the exercise by the child of the rights recognized in the present Convention". During the drafting of the CRC it was emphasized that "in protecting the family from the State, the family should not be given arbitrary control over the child. Any protection from the State given to the family should be equally balanced with the protection of the child within the family."<sup>17</sup> When the child is very young parental role is more important and needed, but it should also progressively decrease as the experience and maturity of the child increases, ending up with "conversation, advice and reminders".<sup>18</sup> It is further important to emphasize the difference between the right itself and exercise of the right. Namely, the right belongs to a child and in exercising the right parents have a role of direction and guidance.

To sum up, Article 14 of the CRC gives a child an independent right to freedom of religion, and within its scope freedom to choose her/his religious education. Parents still have a significant role, the one of directing a child, not mature enough, in exercising her/his right.

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Limited, Aldershot, 2009) p. 254; Verheyde M., 'Article 28: The Right to Education', in Alen A., Vande Lanotte J., Verhellen E., Ang F., Berghmans E. and Verheyde M. (eds.) *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers, Leiden, 2005) p. 49; Langlaude, *supra* note 14, pp. 150-152.

<sup>17</sup> Detrick S., *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishing, Leiden, 1999) p. 117 note to UN Doc. E CN.4 1987 25, para. 106.

<sup>18</sup> See *supra* note 6, p. 20.

## 2.2.2 Drafting procedure

One of the major issues of the controversy [during the drafting of the CRC] was the child's right to freely choose her/his religion as this is contrary to Islam.<sup>19</sup> Representative of Bangladesh pointed out that the wording of the article "appears to infringe upon the sanctioned practice of a child being reared in the religion of his parents".<sup>20</sup> Still, according to the drafting discussion and subsequent reservations put by the Holy See, Article 14 is contrary to the Christianity as well, religion which predominates European continent. As the observer for the Holy See during the drafting procedure stated "the right of parents to give their child a religious and moral education in conformity with their personal beliefs forms part of the right to manifest one's religion and this right of religious and moral education must be respected by States".<sup>21</sup> Subsequently, the Holy See put a reservation to the CRC stating that [the Holy See] "interprets the articles of the Convention in a way which safeguards the primary and inalienable rights of parents, in particular insofar as these rights concern education [and] religion."<sup>22</sup>

In essence, during the drafting procedure "[t]he key issue [was] whether children have the right to be different from their respective community's majority belief and different from the religious beliefs of their individual families."<sup>23</sup> The end result is children seen as autonomous beings with the will of their own and right to progressively, corresponding to their evolving capacities, choose their own religion and religious education in conformity with their beliefs. Still, it is interesting to note opposition of the religious communities to the new child-parent relation.

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<sup>19</sup> Mårtenson, *supra* note 11, p. 26.

<sup>20</sup> *Ibid.*, p. 244.

<sup>21</sup> *Ibid.*, p. 248.

<sup>22</sup> United Nations Treaty Collection, <[treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en)>, visited on 24 April 2011.

<sup>23</sup> Bueren Van G., 'The Right to be the Same, the Right to be Different: Children and Religion', in Lindholm T., Durham jr. W. C. and Thazib-Lie B. G. (eds.), *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff Publishers, Leiden, 2004) p. 561.

Moreover, as a result of the lack of consensus, the right of a child to change her/his religion has been left open. Eva Brems argues that “there seems to be stronger case in favor of an interpretation that includes this aspect than in favor of its opposite”<sup>24</sup> stating, among other arguments, that “the ordinary meaning of freedom of religion [would be] hard to reconcile with situation in which one would be compelled to adhere to a religion against ones’ own conscience”.<sup>25</sup> The issue of change of religion is closely connected to the child-parent relation, as without this right, the child’s right to choose or participate in choosing of her/his religious education would be difficult to fulfill. Namely, in order to be able to choose her/his religious education that might be different from the one of her/his parents, the child has to have a right to change her/his religion.

Another consequence of the lack of consensus on Article 14 of the CRC was subsequent reservations put mainly by the Islamic countries.<sup>26</sup> Reservations are mostly concerned with the child’s right to freely choose her/his religion, which could be further interpreted as supporting the argument that the right of a child to freely choose her/his religion *is* included in Article 14.<sup>27</sup> Yet, what more interesting for the subject of our discussion are objections to reservations placed exclusively by the European States. Namely, Sweden, Denmark, Finland, Norway, Portugal, Slovakia, Germany, Austria, Netherlands, Italy, Ireland and Belgium, all members of all three European Organizations (CoE, EU and OSCE) objected to reservations, arguing that reservation is “incompatible with object and purpose of a treaty if it intends to derogate from provisions the implementation of which is essential to fulfilling its object and purpose.”<sup>28</sup> Thus, European countries explicitly argued for the child’s right to freely choose her/his religion and parent’s role of directing her/him in the exercise of *her or his right* in compliance with the child’s evolving capacities.

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<sup>24</sup> Brems, *supra* note 15, pp. 23-14.

<sup>25</sup> *Ibid.*, p. 24.

<sup>26</sup> Those countries are Brunei Darussalam, Iran, Jordan, Kuwait, Maldives, Mauritania, Qatar, Saudi Arabia, Syrian Arab Republic, United Arab Emirates, Algeria, Morocco, Singapore, Oman, Iraq and Holy See and Poland.

<sup>27</sup> Brems, *supra* note 15, p 24.

<sup>28</sup> *See supra* note 22.

*Travaux preparatoire* of the CRC and subsequent reservations put to Article 14 indicate strong opposition by the religious communities to the new child-parent relation and in general child's right to change her/his religion.<sup>29</sup> Also, one has to note strong support for the child's right to autonomous freedom of religion, including right to change ones religion, by the European countries.

### 2.3. Right to education

The right of a child to education is enshrined in Article 28 of the CRC, while the aims of education are found in Article 29 of the CRC. Children's right in connection with their education should be derived from both articles read together.

One of the core elements of the right to education is right of a child to be consulted on matters relating to his/her education.<sup>30</sup> As the Committee on the Rights of the Child emphasized education needs to be "child-centered, child-friendly and empowering".<sup>31</sup> Therefore, in order to achieve this goal children should be consulted on matters concerning their education, including the creation of school curriculum.<sup>32</sup> Apart from fully respecting children's rights, this practice would also give an invaluable input to the quality of education itself. Moreover, as has been stressed, "[c]hildren do not lose their human rights by virtue of passing through the school gates."<sup>33</sup> Hence, among other rights, their right to be heard should continue to apply in the context of their education and State should continue to have an obligation to *assure* that their voices are heard and given due weight.

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<sup>29</sup> Change of religion was one of the major obstacles to the adoption of the Article 18 of the ICCPR, guaranteeing freedom of religion. For more information please see Bossuyt M. J., *Guide to the "Travaux Preparatoires" of the International Covenant on the Civil and Political Rights* (Martinus Nijhoff Publishers, Leiden, 1987) pp. 351-372.

<sup>30</sup> Verheyde, *supra* note 16, p. 56, note to Bueren Van G., *The Minimum core obligations of States under Article 10(3) of the ICECSC* p. 149.

<sup>31</sup> Committee on the Rights of the Child, *General Comment No. 1: The Aims of Education* (2001) p. 2, <[www2.ohchr.org/english/bodies/crc/comments.htm](http://www2.ohchr.org/english/bodies/crc/comments.htm)>, visited on 12 April 2011.

<sup>32</sup> Committee on the Rights of the Child, *Day of General Discussion on the Right of the Child to be Heard* (2006), p. 4, <[www2.ohchr.org/english/bodies/crc/discussion2008.htm](http://www2.ohchr.org/english/bodies/crc/discussion2008.htm)>, visited on April 8 2011.

<sup>33</sup> See *supra* note 31, p. 3.

In connection to religious education, children should be able to participate both in the choice of education as well as in creation of the school curriculum for the religious education classes.

## **2.4. Right to participation in religious education**

To sum up, pursuant to Articles 5, 12, 14, 28 and 29 of the CRC children have a right to participate in choice of their religious education and in compliance with their evolving capacities choose religious education by themselves. Parent's role is one of guidance and direction and does not have the same standing as the child's. The right itself, right to freedom of religion, of which choice of religious education forms part of, belongs to the child.

# 3. European organizations on children's right to participation in their religions education

Now that the position of the UNCRC on children's role in their religious education has been explained the next step is to examine the standing of the European intergovernmental organizations, CoE, EU and the OSCE respectively, on the same issue. This will be done by comparing documents adopted under their auspice to the standards endorsed by the CRC.

## 3.1. Council of Europe

The Council of Europe is an international intergovernmental regional organization founded in 1949 by ten European States.<sup>34</sup> It is interesting to note that in all of the founding States Christianity was a predominant religion.<sup>35</sup> Additionally, apart from the States themselves, “on its creation various ‘transnational’ organizations and movements also played a not insignificant (indeed fundamental) role, such as the Catholic Church”.<sup>36</sup> Could this have reflected on the protection of freedom of religion within the CoE? From the protection that Article 9 of the ECHR, guaranteeing freedom of religion, gives, including the possibility to change ones religion, this seem unlikely.<sup>37</sup> Still, common traditions of the founding states, including

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<sup>34</sup> Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden and the United Kingdom.

<sup>35</sup> Nurser J., *For All Peoples and All Nations, Christian Churches and Human Rights* (WCC Publications, Geneva, 2005) p. 11.

<sup>36</sup> Petaux J., *Democracy and human rights for Europe, The Council of Europe's contribution* (Council of Europe Publishing, Strasbourg, 2009) p. 50.

<sup>37</sup> As has been argued above, inclusion of possibility to change a religion both in the context of drafting of Article 18 of the ICCPR and Article 14 of the CRC was a major obstacle for the approval of the drafts by the religious communities.

common religion, arguably had an influence on the CoE itself, at least at the time of its establishment.

The CoE's Statute in its Articles 1 and 3 states that the aim of the CoE is to "achieve a greater unity between its members for the purpose of... realizing... the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms."<sup>38</sup> As can be seen, from its early beginnings up to now one of its principle aims is promotion and protection of human rights. Further, the CoE has two statutory bodies, the Committee of Ministers, a decision making body that acts on behalf of the CoE, and the Parliamentary Assembly, consultative in character and primarily seen as 'forum for discussion'.<sup>39</sup> The Parliamentary Assembly has the power to adopt Recommendations addressed to the Committee of Ministers which can take further steps towards Member States. The Committee of Ministers can also adopt Recommendations which, though non-binding on Member States, reflect collective position of the European governments on the subject they cover.<sup>40</sup> Apart from statutory bodies, the CoE has numerous specialized agencies, such as the Commissioner for Human Rights, set up to develop the Council's work in specific areas.<sup>41</sup> The Commissioner for Human Rights, established in 1999, is an independent and impartial institution and the only one embodied in one person. It is assigned with a task of issuing recommendations, opinions and reports, "addressed to both the CoE institutions and authorities of the Member States".<sup>42</sup>

Importantly, both statutory bodies as well as some of the specialized agencies address the topic of our discussion, namely religious education. Henceforth, the thesis will proceed by addressing the activities of the statutory bodies and specialized agencies in relation to the religious

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<sup>38</sup> Statute of the Council of Europe, 5 May 1949, ETS 1.

<sup>39</sup> Article 13 of the Statute of the Council of Europe.

<sup>40</sup> Benoit-Rohmer F. and Klebes H., *Council of Europe Law, Towards a pan-European legal area* (Council of Europe Publishing, Strasbourg, 2005) p. 108.

<sup>41</sup> *Ibid.*, p. 74.

<sup>42</sup> Golubok S. and Puginsky E., 'The Council of Europe Commissioner for Human Rights: strengths and weaknesses' 9 *EHRAC Bulletin* (2008) p. 7, <[www.docstoc.com/docs/53912987/EUROPEAN-HUMAN-RIGHTS-ADVOCACY-CENTRE](http://www.docstoc.com/docs/53912987/EUROPEAN-HUMAN-RIGHTS-ADVOCACY-CENTRE)>, visited on 24 March 2011.

education with special regard to the child's right to participation as envisaged in Article 12 of the CRC. Subsequently, the ECHR, adopted under the auspice of the CoE, and the ECtHR as one of the CoE's most influential institutions, will be addressed as well.

### **3.1.1 Activities of the Council of Europe institutions**

As has been outlined above, the CoE has two statutory bodies and numerous specialized agencies all working to achieve the aim of promoting and protecting human rights, rule of law and democracy. In light of these aims, the CoE shapes its approach to religious education. Namely, the CoE has started relatively early (1990s) with the promotion of intercultural education in order to build tolerance seen as a means for achieving its primary goals.<sup>43</sup> After the Oslo Conference on intercultural education, held in 2004 religious education was included as a part of the intercultural education. Participants of the Conference emphasized that “[m]utual understanding, tolerance and peace are achieved through a knowledge of others, including their religious identity”.<sup>44</sup>

Subsequently, the CoE's statutory bodies adopted legal instruments materializing the work of its specialized institutions. Firstly, the Parliamentary Assembly adopted Recommendation 1720(2005) on Education and Religion (hereinafter: Recommendation 1720) with a positive aim of combating ignorance, stereotypes and misunderstanding of religions.<sup>45</sup> Recommendation 1720 promotes inclusion in school curriculum of objective and neutral teaching on religions with the aim of “making young people understand why religions are sources of faith for millions”. On a negative note, there is no special emphasis on children's rights as

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<sup>43</sup> See Keast J. (ed.), *Religious diversity and intercultural education: A reference book for schools* (Council of Europe Publishing, Strasbourg, 2007); *Dimension of religions and non-religions within intercultural education Recommendation CM/Rec(2008)12 and explanatory memorandum* (Council of Europe Publishing, Strasbourg, 2009).

<sup>44</sup> Council of Europe, *The religious dimension of intercultural education, Conference proceedings, Oslo, Norway, 6 to 8 June 2004* (Council of Europe Publishing, Strasbourg, 2004).

<sup>45</sup> Recommendation 1720(2005) on Education and Religion, Parliamentary Assembly, 4 October 2005.

envisaged in the CRC, in particular on their right to participation and freedom of religion. Paragraph 3 of the Recommendation 1720 states that “[t]he family has a paramount role in the upbringing of children, including in the choice of a religious upbringing.” Although ‘family’ should include both parents and children, from the wording of this provision it seems that these are two distinct notions, as the family has a right to decide on the upbringing of children.

Moreover, the Committee of Ministers has followed the Parliamentary Assembly’s Recommendation and adopted its own Recommendation CM/Rec(2008)12 on dimension of religions and non-religious convictions within intercultural education.<sup>46</sup> Unlike the Parliamentary Assembly’s Recommendation addressed to the Committee of Ministers, the Committee of Ministers’ recommendation is addressed to CoE Member States. In compliance with Article 1b of the Recommendation CM/Rec(2008)12, States should pursue initiatives in the field of intercultural education relating to the diversity of religions and non-religious convictions in order to promote tolerance and development of a culture of ‘living together’. It also emphasizes that “[r]eligions and non-religious convictions develop on the basis of individual learning and experience, and are not entirely predefined by one’s family or community.”<sup>47</sup>

What can be noticed from the CoE statutory body’s activities in relation to the intercultural education, religious education being part of it, is that throughout its work children are primarily seen as a future. In words of the Oslo conference “a key dimension of education is a child’s right to be fully prepared for life as a citizen within a democratic and pluralist society”.<sup>48</sup> Although this is very positive goal to be strived to, also envisaged in Article 29 of the CRC, seen through the glasses of children’s rights, it needs more

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<sup>46</sup> Recommendation CM/Rec(2008)12 on Dimension of Religions and Non-religious Convictions within Intercultural Education, Committee of Ministers, 10 December 2008.

<sup>47</sup> *Ibid.*

<sup>48</sup> Council of Europe, *Dimension of religions and non-religions within intercultural education Recommendation CM/Rec(2008)12 and explanatory memorandum* (Council of Europe Publishing, Strasbourg, 2009) p. 20.

sensitivity to the rights of children living in *present*, primarily to their right to participation, right to education and freedom of religion.

Staying in the field of intercultural education, one cannot disregard work of the The Directorate of Youth and Sport, which is part of the Directorate General of Education, Culture and Heritage. In 1995 they run a campaign ‘All Different – All Equal’ with the aim of fighting against intolerance, racism, anti-Semitism and xenophobia. From 2006 to 2007 they launched a new campaign with the same slogan and goals but significantly different in respect of inclusion of youth, entitled ‘Campaign for Diversity, Human Rights and Participation’.<sup>49</sup> In the context of freedom of religion, of particular importance is the 2007 Istanbul Youth Declaration on Inter-Religious and Intercultural Dialogue in Youth Work, promoting the intercultural education goals of the CoE, from the perspective of youth.<sup>50</sup>

Furthermore, the Commissioner for Human Rights also works with children rights. Currently, the post of the Commissioner is held by Thomas Hammarberg, former member of the UN Committee on the Rights of the Child, which might explain, compared to the CoE’s statutory bodies, more inclusive approach to children’s rights. Namely, the Commissioner gives a significant importance to the children’s right to participation. For instance, in a recent Position Paper, two core principles from the CRC, best interest of child and child’s right to participation are heavily relied on, as being of paramount importance.<sup>51</sup> In the section entitled “Child-centered approach” the Commissioner is explaining the meaning of the children’s right to participation, highlighting that “[t]he child’s ability to form and express an opinion is ... dependent on the fulfillment of several other rights, such as the right to education and the right to participate freely in cultural life. Also highly relevant are the freedoms of expression, thought, conscience [and] religion.” It is further recommended that “[c]hildren should be viewed as

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<sup>49</sup> Council of Europe, < [http://www.coe.int/t/dg4/youth/coe\\_youth/adae\\_campaign\\_EN.asp](http://www.coe.int/t/dg4/youth/coe_youth/adae_campaign_EN.asp) >, visited on 23 April 2011.

<sup>50</sup> Istanbul Youth Declaration on Inter-Religious and Intercultural Dialogue in Youth Work, DJS/EYCB/camp/IRD/2007/18, 4 April 2007.

<sup>51</sup> Council of Europe Commissioner for Human Rights, *Positions on children’s rights* CommDH/PositionPaper (2010)1.

individual subjects and their views should be taken into account, with due regard for their development and maturity” and that the “education should be inclusive.” The paper is focused on violence against children, juvenile offenders and children in need of care, as the issues deserving most attention in practice. Although the Commissioner does not take an explicit stance on religious education, from the language of the Paper it could be reasonably assumed that its standing would match the one adopted under the CRC.

Additionally, when discussing children’s right to participation, 1996 European Convention on the Exercise of Children's Rights (hereinafter: ECECR) addressing child’s rights in the family proceedings, needs to be mentioned.<sup>52</sup> Although ratified only by 16 CoE Member States, the ECECR is of significance for it is based on the CRC.<sup>53</sup> Namely, the ECECR puts significant importance on the child’s right to be heard as well as their right to be informed before the decision that concern them has been taken.<sup>54</sup> In the context of our topic, in a situation of judicial proceedings between the child and parent concerning the choice of religious education, judge would have to hear the views of the child before making the decision.

To sum up, it seems that the CoE institutions are starting to give more importance to children’s right to participation in the context of their religious education. This is in particular visible in the work of its specialized agencies, such as the Commissioner for Human Right, as well as in the campaign led by the Directorate of Youth and Sport. Still, it also seems that documents addressing religious education of the CoE statutory bodies are yet to fully accept rights of the child as conceived by the CRC.

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<sup>52</sup> European Convention on the Exercise of Children's Rights, 25 January 1996, ETS 160.

<sup>53</sup> Council of Europe, [conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=160&CM=&DF=&CL=ENG](http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=160&CM=&DF=&CL=ENG), visited on 29 May 2011.

<sup>54</sup> Explanatory Report to the European Convention on the Exercise of Children's Rights, [conventions.coe.int/Treaty/en/Reports/Html/160.htm](http://conventions.coe.int/Treaty/en/Reports/Html/160.htm), visited on 29 May 2011.

### 3.1.2 European Convention on Human Rights on religious education

The most important human rights instrument within the CoE, and the one on which all of the CoE bodies heavily rely on, is the ECHR. Religious education is included in its Article 2 of Protocol No. 1 guaranteeing right to education and stating that “[n]o 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.”

Already from the formulation of text of Article 2 we can see the first difference between the ECHR and the CRC. Namely, religious education in the CRC forms part of the article envisaging freedom of religion unlike in the ECHR where it is part of the article addressing right to education. Further, while the CRC talks about parent’s role of *direction*, the ECHR gives parents *right* to decide on the religious education of their children in conformity with their own religious beliefs. Moreover, unlike the CRC, the ECHR does not contain specific provision addressing children’s right to participation. Henceforth, from the wording of Article 2 of Protocol No. 1 it seems that parents have a right to choose religious education for their children without obligation to hear children’s views before making a decision.

On the other hand, Article 2 of Protocol No. 1 is in conformity with Article 26(3)<sup>55</sup> of the 1948 Universal Declaration of Human Rights (hereinafter: UDHR) as well as with Article 18(4)<sup>56</sup> of the 1966 International Covenant on Civil and Political Rights (hereinafter: ICCPR). Still, the difference to the 1989 CRC is obvious. In order to fully understand why there is a

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<sup>55</sup> Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948); Article 26(3) of the UDHR: “Parents have a prior right to choose the kind of education that shall be given to their children.”

<sup>56</sup> International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171; Article 18(4) of the ICCPR: “The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions”.

difference between Article 2 of Protocol No. 1 to the ECHR and Article 14(2) of the CRC we shall analyze *travaux preparatoire* of the ECHR.

For the purpose of better understanding the drafting process, it is worth noting that the CoE treaties are prepared by national experts appointed by their governments, but acting on their own responsibility. They are negotiated by steering committees answerable to the Committee of Ministers. The final text is adopted by the Committee of Ministers.<sup>57</sup> On the most important conventions, Committee of Ministers can ask the Parliamentary Assembly for an opinion.

Discussion over the inclusion and text of the right to education was the most intensive of all the rights subsequently included in the Convention. With regards to the right to education, the main point of departure among the members of the Assembly was whether to include at all right to education (and right to property) in the first place, as those rights were seen as not enforceable and as such lessening the ‘sharpness’ of the Convention.<sup>58</sup> On the other hand, reasons for including right of parents to choose education for their children, as this was the main focus within the right itself, was seen as a means to protect democracy. Namely, due to the recent experience with totalitarian regimes that used education to indoctrinate the ‘truths’, members of the Assembly felt that they had a responsibility to prevent reoccurrence of the history.<sup>59</sup> As one of the members put it: “The father of the family cannot be an independent citizen, cannot feel free within his own country, if he is menaced in his own home, and if every day the State steals from him his soul, or the conscience of his children.”<sup>60</sup> Children’s rights were not subject of discussion since the right to education was not seen as child’s rights, but as part of the group of so-called ‘family rights’ together with the right to marry and found a family. The aim of the second sentence of Article 2 was

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<sup>57</sup> Benoit-Rohmer and Klebes, *supra* note 40, p. 87.

<sup>58</sup> Council of Europe, *Travaux Preparatoire* to the European Convention of Human Rights and Fundamental Freedoms in Relation to Right to Education, CDH(67)2 (1967), <[www.echr.coe.int/library/colentravauxprep.html](http://www.echr.coe.int/library/colentravauxprep.html)>, visited on 15 February 2011.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*, p. 6.

to respect natural rights deriving from the marriage, paternity and those pertaining to the family.<sup>61</sup>

Surprisingly, even in 1949, when the ECHR was drafted, voices emphasizing the importance of taking children's perspective could have been heard. Namely, one of the members proposed amending the second sentence of Article 2 so as to say: "... the rights of access of every child to culture by educational methods which will allow gradual development of his individual personality".<sup>62</sup> Further, very progressively, even for the contemporary society, Belgium representative was against the text of the article pointing out that someone should exercise this right and emphasizing that the right belongs to a child and not to a parent. He also suggested changing the wording of the text so as to state 'duty' and not the 'right' of parents.<sup>63</sup> French delegate agreed emphasizing the importance of the "sacred right of a child to be brought up in accordance with methods of free enquiry".<sup>64</sup> The obligation to give due respect for children's own personalities had been emphasized as well.<sup>65</sup>

Still, majority, especially the Irish representatives, saw the right as a 'right of parents'. Importantly, the right has never been seen as a right of a parent over a child, but as a right against the State. Partial explanation could be that at the time the child was not perceived as separate individual, someone with his/her own believes that could potentially differ from the believes of his/her parents, but as a 'silent' part of family. In line with this reasoning, the drafters didn't intend to give the right to a child to decide on his/her own religious education and there is nothing indicating intention of the drafters to give a child at least a right to participate in the decision making. The aim of establishing a right under Article 2 of the Protocol No. 1 was to prevent indoctrination of children by the totalitarian regimes and in that way protect democracy, as one of the principal objectives of the CoE. Thus, through most of the discussion, the right was not referred to as a 'right to education'

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<sup>61</sup> *Ibid.*, p. 2.

<sup>62</sup> *Ibid.*, p. 7.

<sup>63</sup> *Ibid.*, p. 11-14.

<sup>64</sup> *Ibid.*, p. 16.

<sup>65</sup> *Ibid.*, p. 187.

but as a ‘right of parents to choose the kind of education to be given to their children’.

So, what lies behind Article 2 of Protocol No. 1? Firstly, testimony that at the time when the ECHR was drafted child wasn’t seen as separate individual but as a part of family. Secondly, intention of the drafters, with still fresh memories of the WWII atrocities, not to let the history reoccur, thus giving a right to family against the State.

### 3.1.3 Interpretation of Article 2 of Protocol No. 1 by the ECtHR: a leap forward?

In its subsequent case-law in relation to Article 2 of Protocol No. 1, the ECtHR embraced the expressed aim of protection of democracy through prevention of state indoctrination. Namely, in one of its first and most relevant cases on Article 2 of Protocol No. 1, dating back to 1976, *Kjeldsen, Busk Madsen and Pedersen v. Denmark*<sup>66</sup> and concerning obligatory sex education in public schools, the ECtHR underlined that “[t]he State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents’ religious and philosophical convictions”.<sup>67</sup> Additionally, as opposite to the preparatory work discussion, the focus inside the Article was shifted from the second to the first sentence. The ECtHR explicitly emphasized that “Article 2 constitutes a whole that is dominated by its first sentence, the right set out in the second sentence being an adjunct of the fundamental right to education”.<sup>68</sup> Further, the Court also found Article 2 as being closely related to Articles 8, 9 and 10 of the Convention.

Moreover, perception of the child as an individual distinct from her/his family membership started to emerge. Although the majority was still reasoning in line with the ECHR drafters, in his concurring opinion at the Commission stage, judge Kellgerg argued that “it is hardly conceivable that

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<sup>66</sup> *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, 7 December 1976, ECtHR, nos. 5095/71; 5920/72; 5926/72.

<sup>67</sup> *Ibid.*, para. 53.

<sup>68</sup> *Ibid.*, para. 52.

the drafters would have intended to give their parents something like dictatorial powers of the education of their children”.<sup>69</sup>

In the case of *Campbell and Cosans v. The United Kingdom*<sup>70</sup> from 1982, case concerning imposition of corporal punishments in schools, the ECtHR continued interpretation of Article 2 of Protocol No. 1, explaining the notion of the ‘philosophical convictions’. Further, it also underlined the fundamental difference between the first and the second sentence of the Article, namely the second sentence concerning a right of a parent and the first one a right of a child. Although, the Court is giving relevance to the children’s rights, today strict division between the first and the second sentence of Article 2 would be hard to reconcile with the children’s right to participation.

Moreover, in *Valsamis v. Greece*<sup>71</sup> from 1996, concerning the participation of applicants’ daughter and the third applicant in the military parade claimed to be contrary to the parents’ and daughter’s religious convictions, the Court found no violation of Article 2 of Protocol No. 1. Although the Court acknowledged separate right to freedom of religion of the daughter, it concluded that “the obligation to take part in the school parade was not such as to offend her parents’ religious convictions. The impugned measure therefore did not amount to an interference with her right to freedom of religion either.”<sup>72</sup> Majority decided to discuss the case on a basis of parents’ rights and not to reason separately possible violation of the daughter’s right to freedom of religion. Opposite to the majority’s approach, in their joint dissenting opinion judges Thor and Jambrek discussed separately daughter’s right to freedom of religion and found violation of Article 9 of the ECHR.

Moreover, in 2007 Grand Chamber of the ECtHR delivered a judgment in the case of *Folgerø and Others v. Norway*<sup>73</sup>, case concerning the curriculum

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<sup>69</sup> Bueren Van G., *Child Rights in Europe* (Council of Europe Publishing, Strasbourg, 2007) p. 163.

<sup>70</sup> *Campbell and Cosans v. The United Kingdom*, 25 February 1982, ECtHR, nos. 7511/76 ; 7743/76.

<sup>71</sup> *Valsamis v. Greece*, 18 December 1996, ECtHR, no. 21787/93.

<sup>72</sup> *Ibid.*, para. 37.

<sup>73</sup> *Folgerø and Others v. Norway*, 29 June 2007, ECtHR, no. 15472/02.

on religious education in public schools. The Court examined the case under Article 2 of Protocol No. 1 only, as the children's complaints under Article 9 of the Convention were declared inadmissible for the lack of exhaustion of domestic remedies.<sup>74</sup> Further, the Court emphasized that regardless of the inadmissibility decision, "Article 2 of Protocol No. 1 [is] the *lex specialis* in the area of education to Article 9".<sup>75</sup> In light of its previous decisions, in particular *Valsamis case*, this would mean that in deciding and reasoning on the case, religious education in conformity with parent's religious beliefs takes precedence over children's right to freedom of religion. Again, Article 14 of the CRC takes a different stance, emphasizing that the right in both cases, of freedom of religion and religious education, belongs to the child. As for the meritum of the case, the Court firstly found that the fact that religious education curriculum contains a predominant religion, here Christianity, does not in itself amount to violation of Article 2 of Protocol No. 1. Yet, as the parents had possibility for only partial exemption from the classes which put them "... heavy burden with a risk of undue exposure of their private life and the potential for conflict was likely to deter them from making such requests" the Court found violation of the Article 2 of Protocol No. 1.<sup>76</sup>

The shift from the protection of a child within the family to her/his protection as a separate individual, at this stage was relatively slow. On a positive note, the ECtHR insists on neutral and objective religious education. This is of particular importance in connection to children's right to freedom of religion, as without necessary information children can't have a possibility to fully exercise their right to freedom of religion. "The right to information is essential: a decision is not free if it is not an informed decision."<sup>77</sup> Yet, the reasons behind promotion of the neutral and objective religious education are more connected to the promotion of democratic

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<sup>74</sup> *Folgerø and Others v. Norway*, ECtHR, 26 October 2004, ECtHR, *Partial Decision as to the Admissibility*, no. 15472/02.

<sup>75</sup> *Folgerø and Others v. Norway*, *supra* note 73, para. 54.

<sup>76</sup> *Ibid.*, para. 100.

<sup>77</sup> Stern, *supra* note 9, p. 161.

society and building tolerance and peace than with the children's right to freedom of religion.

Furthermore, in recent two years, the slow shift has gain on speed and several important decisions are putting a bit more light to the children's rights. In the case of *Grzelak v. Poland*<sup>78</sup> from 2010 concerning consequences of the exception from religious education classes, filed by the parents and their child, the ECtHR found parent's complaint under Article 9 in conjunction with Article 14 of the ECHR, as being inadmissible *rationae personae*, underlining that the right to freedom of religion belongs to the child. Moreover, recent 2011 Grand Chamber judgment in *Lautsi and Others v. Italy*<sup>79</sup> concerning the display of crucifix in classrooms, gives the relevance to child's own believes even in the context of Article 2 of Protocol No. 1. As the Court put it, first sentence of Article 2 of Protocol No. 1, right to education, should be read in light of second sentence of Article 2 of Protocol No. 1 and Article 9 of the ECHR. This would mean that a child now has his/her own right against the State not to be indoctrinated, as this is still the leading aim behind Article 2 of Protocol No. 1. On a negative side, the Court still sees, Article 2 of Protocol No. 1 as in principle *lex specialis* to Article 9 and still, examines matters concerning religious education under Article 2 of Protocol No. 1 and not under Article 9 of the ECHR. Further, the Court made a decision on children's rights on a basis of its analysis of parent's rights, not giving a separate reasoning and not having a separate voting on child's right not to be indoctrinated. Yet, emergence of children from the family protection to having their own rights is now clearly visible.

Recent developments in the ECtHR's case law on Article 2 of Protocol No. 1 are to be welcomed, and it is to be hoped that the Court will continue to develop its case law so as to bring it in full compliance with the CRC standards.

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<sup>78</sup> *Grzelak v. Poland*, 15 June 2010, ECtHR, no. 7710/02.

<sup>79</sup> *Lautsi and Others v. Italy*, 18 March 2011, ECtHR, no. 30814/06.

### **3.1.4 ECHR and the ECtHR's approach to religious education *vis-à-vis* the CRC**

In order to understand why the ECHR's and the ECtHR's approach to religious education differs from the one adopted by the CRC we shall have a look into the past. Preparatory work for the ECHR and the CRC gives us a partial answer. The two instruments were adopted in different historical contexts and as the society keeps changing and evolving so is logical to expect legal documents aiming to regulate relations in their present to differ as well. Namely, at the time the ECHR was adopted, it was a progressive instrument reflecting the post WWII reality, the one which needed to protect the individuals against the state, and in its indoctrination. The idea was not specific to the European continent as the aim of Article 26 of the UNDHR on which Article 2 of Protocol 1 is based, as well as subsequent Article 18 of the ICCPR overlaps with the one of the ECHR.<sup>80</sup> But the society and perception of individuals inside of it has changed. The family is no longer center of protection, although it of course still has one, but the individuals inside of it. Consequently, legal instruments adopted in the 'present', most notably the CRC, have endorsed those changes. Hence, the aim of Article 14 the CRC was to give children right to freedom of religion.

Following this reasoning, difference in the texts of the two instruments, the ECHR and the CRC, is the reflection of period when they were adopted and accordingly the aims that they wanted to achieve, protection against state indoctrination as opposite to the children's right to freedom of religion.

Moreover, the ECtHR's case law, although very often quite progressive, is not in full conformity with the CRC, probably due to the fact that it has to rely on the ECHR which is its primary and binding source of law.

As stated above, the aim of the thesis, to see to what level have European organizations adopted Article 12 of the CRC in their documents, jurisprudence and policy, is done on the example of religious education. Yet, one cannot avoid asking here, what about the rest of the ECHR rights, are they in conformity with the CRC?

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<sup>80</sup> Bossuyt, *supra* note 29.

Works analyzing the ECHR from the perspective of children's rights underline that the ECHR provisions have not been drafted with children in mind and thus not as child friendly as the CRC, an instrument specifically designed for children.<sup>81</sup> For instance, Van Bueren argues that "Article 10 of the European Convention [right to freedom of expression] is principally focused on the necessity to protect against negative 'interference' from the state, and for children a negative protection may be inadequate, as children also frequently require a positive obligation placed on the state to create and protect accessibility."<sup>82</sup> She further argues that Article 12 of the CRC should be used by the ECtHR, so as to bring Article 10 of the ECHR in conformity with the CRC. Further, Langlaude concludes in relation to children's right to freedom of religion, "... the Court usually fails to take the child dimension of the cases into account, and its interpretation of Article 9 fails to do children justice in relation to their religion. The case law is tailored to an adult set of beliefs..."<sup>83</sup> Lansdown noted that the ECHR fails to properly address human rights of children, as developed by the CRC.<sup>84</sup>

Thus, from our research it could be concluded that the ECHR is not in full compliance with the CRC and consequently that its monitoring body, the ECtHR, is faced with a difficult task of interpreting the ECHR in present day conditions. Although the research had been conducted in the context of religious education, works of other authors clearly indicate that a problem of divergence between the ECHR and the CRC exceeds Article 2 of Protocol No. 1.

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<sup>81</sup> See Bueren, *supra* note 69; Langlaude S., 'On How to Build a Positive Understanding of the Child's Right to Freedom of Expression' 10:1 pp. 33-66 *Human Rights Law Review* (2010); Kilkelly U., *The Child and the European Convention on Human Rights* (Darthmought Publishing, Aldershop, 2000).

<sup>82</sup> Bueren, *supra* note 69, p. 82.

<sup>83</sup> Langlaude, *supra* note 81, p. 243.

<sup>84</sup> Draft Charter of Fundamental Rights of the European Union, Charte 4240/00, Contrib 22, note to Lansown G., *European Convention on Human Rights – Implications for Children* (1997) unpublished paper, <[http://www.europarl.europa.eu/charter/civil/pdf/con22\\_en.pdf](http://www.europarl.europa.eu/charter/civil/pdf/con22_en.pdf)> visited on 23 March 2011.

## 3.2. European Union

Compared to the CoE, a clear international organization, the EU is often referred to as a 'supranational' organization, indicating that the EU is assigned with more power over its Member States. As for the human rights jurisdiction, in its beginnings, the aims of the European Communities, were of a pure economic nature and didn't include human rights, as there was another European organization exclusively dealing with this matter, namely the CoE. Yet, in 1950s the ECJ started to refer to the fundamental rights, as they are called in the EU, as general principles of law and as such forming part of the Union law. Subsequently fundamental rights protection was included in the founding Treaties and nowadays it is a binding part of the EU law.<sup>85</sup>

But, when did the EU start to address children's rights?

As with the fundamental rights in general, the European Communities, have not addressed children's rights at its beginnings. The first reference in the Community legislation is found in the Regulation 1612(68) in its Articles 12 and 7(2) which contain the child's right to education.<sup>86</sup> Still, it was not 'given to children qua children, but [the rights] were designed to facilitate the economic ambitions of the free movement of persons provisions', namely the children's parents.<sup>87</sup> Also, few secondary legislation contained provisions relating to young people as workers. The first reference to children in primary legislation was made in 1997 Treaty of Amsterdam, in its Article 29 under the title of provisions on police and judicial cooperation in criminal matters.<sup>88</sup> Yet, before the adoption of the EU Charter, children were mainly seen as part of family and not as individual subjects, "[i]t might be said that children have been the object of EU law, not agents".<sup>89</sup>

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<sup>85</sup> Usher J. A., *General Principles of EC Law* (Longman, London and New York, 1998).

<sup>86</sup> Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, Official Journal L 257.

<sup>87</sup> McGlynn C., 'Rights for Children?: The Potential Impact of the European Union Charter of Fundamental rights' 8:3 pp. 387-400 *European Public Law* (2002) p. 388.

<sup>88</sup> European Union, *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, 13 December 2007, Official Journal C340.

<sup>89</sup> *Ibid.*, p. 390.

After the adoption of the EU Charter, in 2000, the slow shift towards inclusion of children's rights and their perspective in the EU internal and external policy started to happen. Namely, number of bodies addressed children's rights, e.g. the European Forum on the Rights of the Child and its Steering Group were organized and the Commission Coordinator for the Rights of the Child was appointed. The EU Network of Independent Experts on Fundamental Rights in 2006 issued a thematic comment called "Implementing the rights of the child in the European Union". Further, the Fundamental Rights Agency, founded in 2007, has child's rights as one of its field of activities.

As for the activities of the EU institutions, in its 2006 communication, Towards an EU strategy on the rights of the child, the EU Commission emphasized: "It is ... vital that children's rights be recognized as a self-standing set of concerns and not simply subsumed into wider efforts to mainstream human rights in general. This is appropriate since certain rights have an exclusive or particular application to children, for example the right to education."<sup>90</sup> Although at this point the child's right to participation was highly ranked, the main source of inspiration was, as argued above the instrument not specifically designed for children and as such not fully endorsing children's rights, namely the ECHR. But, already in the next, 2011 communication of the Commission, it is underlined that "[t]he "child rights perspective" must be taken into account in all EU measures affecting children" and the reference is made to the CRC and the EU Charter, with no mention of the ECHR.<sup>91</sup>

In the domain of children's rights, the EU is mainly concerned with violence against children, child-friendly justice, child refugees and asylum seekers. Reference to religious education is made in several documents addressing discrimination and xenophobia, e.g. Resolution of the Council on the

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<sup>90</sup> European Commission, *Towards an EU strategy on the rights of the child* Communication from the Commission COM(2006), I.2.

<sup>91</sup> European Commission, *An EU Agenda for the Rights of the Child* Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions Com(2011).

response of educational systems to the problems of racism and xenophobia from 1995 and its reasoning seems to be in conformity with the CRC.<sup>92</sup>

To sum up, institutions and bodies of the EU seem to have adopted the CRC's reasoning on children's rights, in particular their right to participation, probably due to the impact of the EU Charter.

### **3.2.1 EU Charter and the rights of the child**

The most important instrument for the development of children's rights in the EU and at the same time instrument that has fundamentally changed the EU's approach to children's rights is the EU Charter. Although, the Charter itself states that it only 'reaffirms the [already existing] rights' this is misleading when it comes to children's rights.

Still, the first draft of the EU Charter was not in full compliance with the CRC and consequently not as child friendly as the Charter itself is today. In order to completely understand the change from the first draft to the final outcome, and see what had influenced the shift, it is necessary to go back and see how the Charter was drafted.

The idea of drawing up an EU bill of rights dates back several decades before the 1999 initiative for drafting a Charter was given by the European Council.<sup>93</sup> Its method of drafting was deliberative in nature. It included different groups, non-governmental organizations, regional bodies as well as wider civil society, which were all invited to make their own contribution.<sup>94</sup> Also, the CoE and the ECtHR had observer status. Importantly, this novel method that opened the procedure to the external criticism and allowed civil society to participate in the EU Charter drafting made detrimental influence to the children's rights.

Additionally, another important note for our discussion is the impact of international legal instruments on the Charter draft. Namely, although the

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<sup>92</sup> Resolution of the Council on the Response of Educational Systems to the Problems of Racism and Xenophobia, 10 October 1995, published in the Official Journal C 312.

<sup>93</sup> EU Charter of Fundamental Rights, <[www.eucharter.org/home.php?page\\_id=65](http://www.eucharter.org/home.php?page_id=65)>, visited on 27 February 2011.

<sup>94</sup> Chalmers P. D., *European Union law: text and materials* (Cambridge University Press, Cambridge, 2008) updated version, p. 247.

primarily role of the Charter was to straighten the European identity, and hence the sources on which to base Charter rights were primarily national and European, it was felt that “only if the EU catalogue clearly reflects an openness to the rules and dynamics of international society, it will strengthen, rather than undermine Europe’s external identity”.<sup>95</sup>

So, in compliance with its method of drafting, before the Charter draft was presented, civil society had an opportunity to suggest what the Charter should contain. Using this chance, Euronet, the European Children’s Network, made submissions to the Convention, pointing out that the EU policies have impact on children, but that the EU does not have special regard to children’s rights and therefore argued for a need to explicitly include children’s rights in the new EU Charter.<sup>96</sup> They further suggested for a Charter to make a direct reference to the CRC, as this would be the best way to fully protect children’s rights. The Euronet was partially successful as the specific provision concerning the children’s rights was included, but the direct reference to the CRC was left out.

Henceforth, due to the method of its drafting as well as openness towards international instruments, the EU bill of rights, inspired by the CRC, came into life as an instrument drafted with children in mind. The thesis will proceed by going inside the EU Charter and making comparative approach between its provisions addressed to children and the CRC standards. Particular focus will be on the topic of our discussion, namely children’s right to participation in their religious education.

For the complete understanding of the EU Charter’s approach to children’s rights Articles 20, 21 and 23 of the EU Charter are to be analyzed. All three Articles are to be read together in the context of child’s rights protection. Subsequently, the focus will move to Article 14 of the EU Charter addressing the religious education matter.

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<sup>95</sup> Lerch M., ‘European Identity in International Society - A Constructivist Analysis of the EU Charter of Fundamental Rights’ 12:2 pp. 147-196 *East European Human Rights Review* (2006) p. 156.

<sup>96</sup> Draft Charter of Fundamental Rights of the European Union, Charte 4240/00 Contrib 113 (2000), <[www.europarl.europa.eu/charter/civil/pdf/con113\\_en.pdf](http://www.europarl.europa.eu/charter/civil/pdf/con113_en.pdf)>, visited on 27 February 2011.

Article 20 states that “everyone is equal before the law”. As notion of ‘everyone’ includes both adults and children, this would also mean that all the rights contained in the EU Charter equally protect everyone. Moreover, this would also suggest that all the rights equally refer to both parents and children and that there should be no difference between the two before the law.<sup>97</sup> Moreover, this reasoning is further supported by Article 21 of the EU Charter which prohibits discrimination on any basis, including on a basis of age. Thus, taken together, Articles 20 and 21 ensure that all Charter rights, not just those which specifically relate to children, should be interpreted as to include children.<sup>98</sup>

Still, the most relevant provision for the protection of children’s rights is found in Article 24 of the EU Charter which in its paragraph 1 states that “[c]hildren shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.” This provision corresponds to Article 12 of the CRC, namely children’s right to participation. Moreover, Explanation to Article 24 of the EU Charter states that Article 24 “... is based on the New York Convention on the Rights of the Child signed on 20 November 1989 and ratified by all the Member States, particularly Articles 3, 9, 12 and 13 thereof.”<sup>99</sup> And according to the Commentary of the Charter of Fundamental Rights of the European Union by the EU Network of Independent Experts on Fundamental Rights from 2006, interpretation of Article 24 corresponds to the reasoning employed by the CRC.<sup>100</sup>

McGlynn further argues that this provision is even broader than the one employed by the CRC. “[T]he Charter [contains] the blanket statement that children “may express their views freely”... [while] the UNCRC provides a

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<sup>97</sup> *Ibid.*

<sup>98</sup> McGlynn, *supra* note 87, p. 394.

<sup>99</sup> European Union, *Text of the explanations relating to the complete text of the Charter as set out in CHARTE 4487/00 CONVENT 50*, <[www.europarl.europa.eu/charter/pdf/04473\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/04473_en.pdf)> visited on 23 March 2011.

<sup>100</sup> EU Network of Independent Experts on Fundamental Rights *Commentary of the Charter of Fundamental Rights of the European Union* (2006), pp. 209-215 <[http://ec.europa.eu/justice/doc\\_centre/rights/charter/docs/network\\_commentary\\_final%20\\_180706.pdf](http://ec.europa.eu/justice/doc_centre/rights/charter/docs/network_commentary_final%20_180706.pdf)>, visited on 23 March 2011.

lesser level of entitlement, stating that it is only the child who is capable of ‘forming his or her own views’ who has the right to have those views taken into consideration.<sup>101</sup> Further, “[t]he Charter states that ‘protection’ is a ‘right’ of the child, whereas the UNCRC simply provides that states parties should ‘ensure’ that children receive such protection.”<sup>102</sup> Holly Cullen disagrees, arguing that the level of protection in the EU Charter falls short of the protection provided by the CRC<sup>103</sup> and stating that “[t]he EU Charter may have gone some way towards making children’s rights visible, but it cannot do much to make those rights effective”.<sup>104</sup>

Anyhow, the EU Charter does contain children’s right to participation that should serve as a basis for the interpretation of all the other rights of the EU Charter, and taken together Articles 20, 21 and 24 ensure that children have a right for their views to be heard, including their views on their religious education.

Moreover, inspired by the ECHR, religious education has been addressed in Article 14 guaranteeing right to education. Article 14 paragraph 3 of the Charter states that “... the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.” As can be noted, wording of Article 14(3) of the EU Charter corresponds to the wording of Article 2 of Protocol No. 1 of the ECHR. This is not surprising if historical perspective of EU fundamental rights protection as well as the future of the EU and the ECHR is taken into account. Namely, throughout the past the ECHR has been the main source of inspiration for the human rights protection in the EU and in the near future the EU will become one of

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<sup>101</sup> McGlynn C., Families and the European Union Charter of Fundamental Rights: Progressive Change or Entrenching the Status Quo? 26:6 pp. 582-598 *European Law Review Families* (2001) p. 597.

<sup>102</sup> *Ibid.*, p. 596.

<sup>103</sup> Cullen H., ‘Children’s Rights’, in Peers S. and Ward A. (eds.), *The European Union Charter of Fundamental Rights* (Hart Publishing, Oxford and Portland Oregon, 2004) p. 345.

<sup>104</sup> *Ibid.*, p. 346.

the contracting parties to the ECHR.<sup>105</sup> This reasoning is further supported by the Explanation to the Article 14 of the EU Charter which clearly states that “[t]his Article is based on the common constitutional traditions of Member States and on Article 2 of the Protocol to the ECHR”.<sup>106</sup> Yet, as has been argued above, Article 2 of Protocol No. 1 to the ECHR is not in full conformity with the CRC. Hence, the Euronet, in their comments on the Draft of the Charter, suggested amending Article 14, as to exclude parents’ ‘rights’ and focus more on children’s rights.<sup>107</sup> Although the wording wasn’t changed, the Explanations to the EU Charter, did make it compatible with the CRC, by emphasizing that “[r]egarding the right of parents, [Article 14] must be interpreted in conjunction with the provisions of Article 24”. Thus, although the wording of the Article corresponds to the one adopted by the ECHR, its interpretation should be in compliance with the CRC.

To conclude, during the drafting of the EU Charter, civil society, in particular Euronet, made an important impact on its drafters to include special provision addressing children’s rights, Article 24 of the EU Charter, inspired by Articles 3, 9, 12 and 13 of the CRC, which also became basis for the interpretation of all other rights contained in the Charter. This is of particular importance in connection to the right to education, Article 14 of the EU Charter. Namely, as has been argued above, text of Article 2 of Protocol No. 1 to the ECHR which served as a basis for Article 14 of the EU Charter, gives a right to parents to choose religious education for their children without a duty to hear and give a due weight to children’s views. Yet, in the context of the EU Charter, parents have to hear the child and give a due weight to her/his views before making a decision. The CRC would go further here, claiming that the right belongs to the child, while the role of parents is subsidiary and limited to the role of guidance and direction.

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<sup>105</sup> Usher, *supra* note 85.

<sup>106</sup> *See supra* note 99.

<sup>107</sup> *See supra* note 96.

### 3.2.2 ECJ on the right to education and rights of the child

In order for analysis of the EU's approach to the child's right to participation to be complete, it ought to include one of the most influential EU institutions, namely its Court of Justice.

Taking into consideration that the ECJ is a general court with a jurisdiction over entire Union law, of which fundamental rights have only recently, December 2009 with coming into force of the Lisbon Treaty, become binding part as well as the fact that children's rights entered the EU policy sometime in 2006, it is not surprising that the ECJ case-law in relation to children's rights is quite scarce.<sup>108</sup> Still, based on the existing decisions, an analysis of possible future approach to children's rights and in particular Article 14(3) of the EU Charter will be made.

Firstly it is important to emphasize that in regards to the right to education, in compliance with Article 149 of the TEU, Member States have principal jurisdiction for the content of teaching.<sup>109</sup> Still, the ECJ had addressed some aspects of education. "In rough terms educational rights consist... of the right of access to education i.e. the right to study, train and do research in another country of the European Union under the same conditions as the nationals of the host country; the right of residence in that country, at least, for the length of the study course; the right to professional recognition of diplomas and study periods, and, eventually, ancillary social rights such as social security coverage and certain social benefits like maintenance grants."<sup>110</sup> Although education has been addressed by the ECJ, Cullen notes that "[t]he tendency of the Court of Justice itself has been to refer to the importance of education, but not to the right to education, except as contained in positive Community law."<sup>111</sup> This should not come as a

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<sup>108</sup> The Court has jurisdiction over fundamental rights cases since 1960s. See Usher, *supra* note 82.

<sup>109</sup> Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, 2007/C 306/01.

<sup>110</sup> Gori G., *Towards and EU Rights to Education* (Kluwer Law international, The Hague, London, Boston, 2001) p.210.

<sup>111</sup> Cullen, *supra* note 103, p. 342.

surprise since the fundamental rights are only binding for the ECJ from December 2009. Thus, so far the ECJ hasn't addressed the education in the context of fundamental right, and it will be interesting to see whether and how its practice shall develop in the post Lisbon Treaty period.<sup>112</sup>

Furthermore, in connection to the religious education, although this issue has not been yet dealt with, Gori claims that this could be the possibility at least in the context of the migrant's worker right to choose religious education for their children as part of the equal treatment and integration in the host country.<sup>113</sup> But, what about equal treatment of migrant's children? Can they claim right to access to religious education of their own choice? In order to answer these questions, it is of crucial importance to see the ECJ stance on children's rights, in particular children's right to participation.

It has been already noted that "the right to respect for family life... will often be a weak foundation on which to build a concept of children's rights".<sup>114</sup> Although, children are predominantly seen and protected in their capacity of family members and less perceived as individuals on their own, this is changing.<sup>115</sup> For instance, in the 2002 *Baumbast case*<sup>116</sup> the ECJ recognized that a right to education belongs to the children themselves.<sup>117</sup> Further, after 2002 *Carpenter case*<sup>118</sup>, children have equal status with their migrant parents.<sup>119</sup>

Moreover, one of the rare cases where the ECJ makes reference to the CRC and the EU Charter is 2006 case of *Parliament v. Council*<sup>120</sup> concerning family reunification. In its reasoning the ECJ makes extensive reference to the principle of the 'best interest of a child' as well as to 'discrimination on

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<sup>112</sup> European Union, *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, 13 December 2007, Official Journal C306/1.

<sup>113</sup> Gori, *supra* note 110, p. 390.

<sup>114</sup> Cullen, *supra* note 103, p. 326.

<sup>115</sup> *Ibid.*, p. 328.

<sup>116</sup> *Baumbast and R and Secretary of State for the Home Department*, 17 September 2002, ECJ, C-413/99.

<sup>117</sup> Cullen, *supra* note 103, p. 326.

<sup>118</sup> *Mary Carpenter and Secretary of State for the Home Department*, 11 July 2002, ECJ, C-60/00.

<sup>119</sup> Caracciolo di Torella E. and Masselot A., 'Under Construction: EU Family Law' 29:1 pp. 32-51 *European Law Review* (2004) p. 49.

<sup>120</sup> *European Parliament v. Council of the European Union*, 27 June 2006, ECJ, C-540/03, E.C.R. I-5769.

a basis of age' but does not refer to the children's right to participation. Still, one could claim that it is difficult to know what is in the best interest of a child, if the child her/himself is not asked. As the UN Committee on the rights of the child emphasized: "...there can be no correct application of article 3 [best interest of a child] if the components of article 12 [right to be heard] are not respected."<sup>121</sup> Furthermore, commenting on the case, Drywood notes that "[t]here appears to be an over emphasis upon the restrictive provisions of the ECHR at the expense of a bold approach to children's rights. It has deprived the decision of a child-focused nature that is both appropriate and desirable."<sup>122</sup>

Although this is not welcomed stance of the ECJ, from the historical perspective of protection of fundamental rights before the ECJ, it is understandable.<sup>123</sup> In connection to other fundamental rights, it has been already noted that the ECJ relies quite heavily on the ECHR.<sup>124</sup>

On the other hand, the ECHR and its case law are not binding source of law for the ECJ and after the entry into force of the Lisbon Treaty, the EU Charter is.<sup>125</sup> In compliance with Article 6 of the TEU "...the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union ... shall have the same legal value as the Treaties". EU Charter's binding character should further reflect on the ECJ case law, inciting it to refer more to the EU 'Bill of Rights' and follow the Charter's reasoning on fundamental rights.<sup>126</sup> Indeed, in the 2010 *Küçükdeveci case*, the ECJ confirmed that the Charter is (now) to have "the same legal value"

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<sup>121</sup> See *supra* note 6, p. 18.

<sup>122</sup> Drywood E., 'Giving with One Hand, Taking with the Other: Fundamental Rights, Children and the Family Reunification Decision' 32:3 pp. 396-407 *European Law Review* (2007) p. 404.

<sup>123</sup> See Guild E. and Lesieur G., *The European Court of Justice on the European Convention on Human Rights, Who said what, when?* (Kluwer Law International, London, 1998).

<sup>124</sup> Williams A., *EU Human Rights Policies A Study in Irony* (Oxford University Press, Oxford, 2004) p. 111.

<sup>125</sup> Although pursuant to Article 6(3) of the TEU, the ECHR and the ECtHR have a status of general principles of the EU law.

<sup>126</sup> Groussot X. and Pech L., 'Fundamental Rights Protection in the European Union post Lisbon Treaty' European Issue n°173 *Robert Schuman Policy Paper* (2010) p. 5, <[www.robert-schuman.eu/doc/questions\\_europe/qe-173-en.pdf](http://www.robert-schuman.eu/doc/questions_europe/qe-173-en.pdf)>, visited on 13 April 2011.

as the Treaties.<sup>127</sup> Also, from December 2009 to January 2011, the Court has cited Charter thirty times in its case law.<sup>128</sup>

Consequently, it seems that the ECJ is leaving aside the instrument that has been its main source of inspiration from the beginning of its fundamental rights protection, the ECHR, and relying on its own bill of rights, the EU Charter. In the context of children's rights, in particular their right to participation, right not envisaged in the ECHR, this new approach is to be encouraged.

### 3.2.3.1 Post Lisbon cases on children's rights

So the question is whether the binding character of the EU Charter has influenced the ECJ to become a more child sensitive court? The analysis will be done on three major child related cases, *Teixeira*<sup>129</sup> and *Ibrahim*<sup>130</sup> from 2010 and *Zambrano*<sup>131</sup> case from 2011. In the first two cases the Court was asked to decide whether primary carers which are not able to support themselves, in the present case parents, have a right to remain in the host country where their children are gaining education. The ECJ gave an affirmative answer, in this way recognizing rights of the child in her/his own capacity and independent from family membership. The Court even extracted rights of parents on a basis of their children's status. The child's individual capacity has been further confirmed in the *Zambrano*<sup>132</sup> case, where the ECJ confirmed that children have individual status of 'citizens' that are equal to all other citizens. Although there is still no explicit reference to children's rights or the EU Charter all of these cases see

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<sup>127</sup> *Seda Küçükdeveci v. Swedex GmbH & Co. KG*, 19 January 2010, ECJ, C-555/07, para. 21.

<sup>128</sup> Council of Europe and European Union, *Joint communication from Presidents Costa and Skouris* (2011) para. 1, <[http://www.echr.coe.int/NR/rdonlyres/02164A4C-0B63-44C3-80C7-FC594EE16297/0/2011Communication\\_CEDHCJUE\\_EN.pdf](http://www.echr.coe.int/NR/rdonlyres/02164A4C-0B63-44C3-80C7-FC594EE16297/0/2011Communication_CEDHCJUE_EN.pdf)> visited on 10 May 2011.

<sup>129</sup> *Maria Teixeira v. London Borough of Lambeth, Secretary of State for the Home Department*, 23 February 2010, ECJ, C-480/08.

<sup>130</sup> *London Borough of Harrow v. Nimco Hassan Ibrahim, Secretary of State for the Home Department*, 23 February 2010, ECJ, C-310/08.

<sup>131</sup> *Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm)*, 8 March 2011, ECJ, C-34/09.

<sup>132</sup> *Ibid.*

children as individual subjects, having rights in their own capacity and not just as family members.

Thus, though not explicit and quite slow, change of the ECJ from seeing children in their role of ‘family members’ to individuals on their own together with the binding character of the EU Charter could potentially lead to the more sensitivity of the ECJ to children’s rights. It is difficult to assume the ECJ stance towards children’s right to participation in their religious education, but one has a reason to be optimistic, as not ruling in compliance with the EU Charter, and consequently the CRC, would lead to the larger issue of ruling at the same time against the primary source of the EU law.

### **3.3. Comparative approach between the Council of Europe and the European Union**

#### **3.3.1 ECHR and the EU Charter**

As both the ECHR and the EU Charter are international instruments aimed at human rights protection, and addressed to the overlapping Member State audience, it is interesting to see their comparative analysis in connection to the protection of children’s rights.

Firstly the most obvious is difference in regards to the international organizations under which auspice they were adopted. In this connection the procedure of drafting, as has been shown was different as well. Partially due to the drafting procedure and time they were adopted, the EU Charter protects much broader scope of human rights, as it contains, apart from civil and political rights, some economic, social and cultural rights. More importantly, again mainly due to the method of drafting and the period when it was adopted, the EU Charter was drafted with children in mind, and thus could be regarded as a more child friendly instrument. Unlike the ECHR, that puts children under the notion of ‘everyone’ that enjoy protection when in the jurisdiction of Member States, the EU Charter has a specific provision referring to the child’s right to participation as well as the best interest

principle, making those principles basis for the interpretation of the rest of the rights envisaged in the Charter. In connection to the children's right to participation in their religious education, Article 2 of Protocol 1 to the ECHR has been interpreted to give, in principle, a right to parents, while Article 14 of the EU Charter, when interpreted in compliance with Article 24 of the EU Charter, gives a right to the child and role of guidance and direction to parents.

Furthermore, as the ECHR and the EU Charter, are the most important human rights instruments within the CoE and the EU respectively, the child sensitivity they endorse has reflected to other institutions and bodies inside of these organizations, with some exceptions. Namely, while the ECtHR has made important steps to interpret the ECHR in a present day conditions, its case law is still not in full compliance with the CRC principles, in particular principal of 'respect for child's views'. Also, the CoE statutory bodies' documents addressing religious education seem not to be in full conformity with the CRC. As opposite to this, Commissioner for human rights takes the CRC as the main source of inspiration for its activities. In the EU, the ECJ is currently not entirely a child sensitive body but has a potential to become one, while the other EU institutions seem to follow the EU Charter, drafted on a basis of the CRC.

Thus, in the European context there is a clear disparity between child's right protection within the CoE and the EU, arguably due to the impact of their separate 'bills of rights'. As will be argued bellow, this is reflecting negatively on the principle of legal certainty, coherency of human rights system and more importantly on the protection of rights of children living in Europe. Apart from these concerns, another one is the future accession of the EU to the ECHR. The question to be asked is what will be the future of children's rights protection in Europe after the EU accedes to the ECHR?

### 3.3.2 Accession of the EU to the ECHR and future of children's rights protection

Accession of the EU to the ECHR is a thirty year old idea, but only recently with coming into force of the Lisbon Treaty stating that the EU *shall* accede to the ECHR and of Protocol No. 14 to the ECHR, opening possibility for the EU to accede as a Contracting Party, the idea has been transferred into reality.<sup>133</sup> At the moment negotiations are underway at both Strasbourg and Luxembourg, making the accession a reality to come. Recently, January 2011, presidents of the two European courts have issued their first joint communication, addressing the issues of relationship between the ECHR and the EU Charter as well as between the ECtHR and the ECJ.<sup>134</sup> The main idea, underling the entire process is to ensure that the EU institutions are respecting human rights and in this way give legitimacy to the entire organization. On the other hand, there are many obstacles to overcome, e.g. balancing of rights in the context of EU's four freedoms.<sup>135</sup>

After the accession, the ECtHR will have a power to scrutinize actions of the EU institutions, including the ECJ, making sure they are respecting human rights as envisaged in the ECHR. Putting the idea in the context of our discussion, children's right to participation, this would mean than the ECtHR, shell make sure that actions of the EU institutions that are bound by a more child sensitive EU Charter, are in compliance with the ECHR, an instrument giving a less protection to children when compared to the EU Charter. In order to resolve the possible conflict, it could be argued that the ECHR provides less extensive protection for children, and that the EU Charter should simply prevail. Namely, Article 52(3) of the EU Charter states that "in so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the

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<sup>133</sup> See Lock T., 'EU Accession to the ECHR: Implications for the Judicial Review in Strasbourg' 35:6 pp. 777 - 798 *European Law Review* (2010).

<sup>134</sup> See *supra* note 21.

<sup>135</sup> See e.g. *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, 18 December 2007, ECJ, C-341/05.

same as those laid down by the said Convention. This provision shall not prevent the Union law providing more extensive protection.” Yet, how does one determine what is the higher level of protection, especially when it comes to children’s right to participation in connection to their religious education, where it could be claimed that the stance of the UN and the ECHR are simply two different approaches.

Further, after the accession, the ECHR will become binding instrument for the EU institutions, including the ECJ which will be subject to the ECtHR’s supervision. Namely, the ECJ is bound by the EU Charter, which now falls under the notion of the Union law, but at the same time and after the accession it will be bound by the ECHR as well. Some authors argue that [t]he likely outcome of this “dilemma” for the ECJ is that, in the majority of cases, the ECJ will interpret the provisions of the Charter as being identical to the corresponding provisions of the ECHR.”<sup>136</sup> Yet, in connection to children’s rights, this might not be applicable. Which reasoning in the domain of children’s rights should it fallow? If it opts for the EU Charter it risks being subject to the appeal to the ECtHR, and if it chooses the ECHR, it goes contrary to the Union law. Additionally, in compliance with Article 6(3) of TEU fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms constitute general principles of the Union's law. Thus the ECJ could rely on the ECHR, but its primary source of law in the domain of fundamental rights is binding EU Charter.

So what would be the solution? The only possible solution, as this thesis will argue, is to make coherency between the two systems. This reasoning is supported by the cooperation of the two organizations in other areas, since as has been argued “[r]ather than looking dangers at each other, the two major pan-European organizations are co-operating, pooling their skills and officially endeavoring to promote their common goals jointly, thus exploiting a new type of synergy that definitely ought to be better

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<sup>136</sup> Mathisen K. L., ‘The Impact of the Lisbon Treaty, in particular Article 6 TEU, on Member States’ obligations with respect to the protection of fundamental rights’, *Law Working Paper Series* Paper number 2010-01, University of Luxembourg (2010) p. 34.

publicized. There is nothing shocking about each institution seeking to defend its own flag... especially as they are the same!”<sup>137</sup>

Yet, before going into details of possible solution for the coherent protection of children’s rights in Europe, let us not disregard the third major European organizations, which membership overlaps with the one of the CoE and the EU, namely the OSCE. Hence, the thesis will proceed by examining the OSCE’s approach to children’s right to participation, right to freedom of religion and right to education and compare it to the standards adopted by the CRC.

### **3.4. Organization for Security and Cooperation in Europe**

Established in 1948 (first called Organization for European Economic Cooperation – OEEC) with the aim of managing the funds provided for the 16 European states by the United States of America in order to stop the economic stagnation “[t]he OSCE works for early warning, conflict prevention, crisis management and post-conflict rehabilitation.”<sup>138</sup> Thus, as the OSCE is primarily security organization, its approach to human rights is different to the one of the CoE, primarily a human rights organization. The OSCE gives more importance to political and security aspect to its activities and documents as compared to the CoE.<sup>139</sup> One of its main areas of activity is the so called ‘Human Dimension’ which includes, but is not limited to human rights. One of the principal institutions of the Human Dimension is the Office for Democratic Institutions and Human Rights (hereinafter: ODIHR). Among other, it addresses the issue of tolerance and non-discrimination, in particular in connection to the freedom of religion or belief which constitutes important part of the OSCE’s activities. Already in the 1975 Helsinki Final Act, Chapter 1(a) VII, concerning the ‘Question of

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<sup>137</sup> Petaux, *supra* note 36, p. 312.

<sup>138</sup> Organization for Security and Cooperation in Europe, *What is OSCE?* p. 1, <[www.osce.org/secretariat/35775](http://www.osce.org/secretariat/35775)>, visited on 22 April 2011.

<sup>139</sup> Bloed A., ‘Monitoring the Human Dimension of the OSCE’, in Alfredsson G. et al. (eds.), *International Monitoring Mechanisms: Essays in Honour of Jacob Th. Moller* (Marinus Nijhoff Publishers, Leiden, 2009) p. 550.

security in Europe’, it has been stated that “the participating States will recognize and respect the freedom of the individual to profess and practice, alone or in community with others, religion or belief acting in accordance with the dictates of his own conscience”.<sup>140</sup> It is important to emphasize that neither of the OSCE documents has a legally binding character.<sup>141</sup>

Among documents addressed at building tolerance as a means of conflict prevention, prepared by the ODIHR, are the 2007 Toledo Guiding Principles on Teaching about Religions and Beliefs in Public Schools.<sup>142</sup>

The first critique to be given to the Toledo Guidelines is connected to its drafting team. Namely, in its drafting procedure number of advisors coming from different backgrounds and institutions, e.g. CoE, EU, UN Commissioner on Freedom of Religion, members of different religious communities etc. have been included, but there was not a single expert on children’s rights. This comes as a surprise, considering that the Guidelines have children as its primary stakeholders.

In regards to its content and stance on religious education, the Toledo Guidelines state that “the OSCE commitments and international law are clear that parents and legal guardians have a right to have their children educated in accordance with their religious or philosophical convictions” and “[f]amilies, together with religious or belief communities, are responsible for the moral education of future generations”.<sup>143</sup> Also, one of the key guiding principles states that “[t]eaching about religions and beliefs is a major responsibility of schools, but the manner in which this teaching takes place should not undermine or ignore the role of families and religious or belief organizations in transmitting values to successive generations.”<sup>144</sup> Thus, rights in connection to the choice and creation of religious education have been primarily given to the family, state and religious communities. It is further interesting to note, that, compared to other international

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<sup>140</sup> Conference on Security and Co-Operation in Europe, Final Act Helsinki, 1 August 1975.

<sup>141</sup> Berger C., ‘Current Trends in International Law a Challenge for Law Librarians Paper and Presentation: OSCE and International Law’ 24:1 pp. 36-47 *International Journal of Legal Information* (1996) p. 38.

<sup>142</sup> See *supra* note 5.

<sup>143</sup> *Ibid.*, p. 19.

<sup>144</sup> *Ibid.*, p. 16.

instruments, CRC, ECHR and EU Charter most notably, there is a special emphasis on the role of religious organizations in the education of children, probably coming as a consequence of the composition of the drafting team. It is also worth recalling the reservation put by the Holy See to Article 14 of the CRC, explicitly opting out of the possibility for a child to change her/his religion and for the parents to have a right to choose religious education for their children in conformity with their own religious beliefs.

On a positive note, children's right to freedom of religion, as stipulated in the CRC, is mentioned in part addressing human rights framework, but it has been also noted that "... given the special status of the rights of parents and legal guardians regarding the religious and philosophical upbringing of their children, the rights of the child in the sphere of education are often exercised by parents in their own right rather than in the name of the child."<sup>145</sup> In essence, the document endorses presumption that in practice parents' rights and child's evolving capacities match, and henceforth that there is no need for special attention to the child's right to freedom of religion as an autonomous right.

Moreover, in connection to children's right to education, in a part discussing curriculum creation, the Toledo Guidelines argue for the inclusion of parents, teachers, NGOs, different range of religious communities, from small to the big ones, but do not mention children. This is contrary to Article 28 of the CRC which emphasizes the importance of creating curriculum in cooperation with children.

To sum up, the OSCE Toledo Guidelines are not in full compliance with the CRC, in particular with its Articles 12, 14 and 28. It has to be noted that in a document that has children as its principal stakeholders, child's right to freedom of religion and right to education need to be a central point, and not a sideway mention. As Schweitzer argues "[n]o education or religious

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<sup>145</sup> *Ibid.*, p. 35.

education can claim to be well founded if it is not clearly based on children's rights."<sup>146</sup>

Therefore, the outcome of the research under Chapter II, comparing European organizations' approach to children's right to participation to the CRC, with special emphasis on religious education, would be that at the moment, there is inconsistency between different organizations as well as between different institutions inside of them. Therefore, in order to fully protect children's right and build a coherent system, urgent solution needs to be found.

The thesis shall continue by discussing some of the possible solutions and at the end suggest the most desirable.

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<sup>146</sup> F. Schweitzer, 'Children's Right to Religion: A Challenge to Educational Neutrality' *F.B.I. Conference* (2005), p. 1, <[www.ortoweb.fi/fbi/SchweitzerTartu.pdf](http://www.ortoweb.fi/fbi/SchweitzerTartu.pdf)>, last visited on 20 April 2011.

## **4. Towards a coherency in the European system of child's rights protection**

### **4.1. Norms of conflict resolution of international public law**

To start with, all four most important documents discussed, namely the CRC, the ECHR, the EU Charter and the Toledo Guidelines are all international instruments and have overlapping membership. 47 European states are all members to the CRC, ECHR and the Toledo Guidelines while 27 of them are in addition members to the EU Charter. Henceforth, the logical and first possible solution would be to look at the norms for conflict resolution of international public law. In essence the issue of conflict exists between the CRC and the ECHR, as the EU Charter is in compliance with the CRC and the Toledo Guidelines drafted under the auspices of the OSCE are a non-binding legal instrument.

Firstly, we need to see whether there is a conflict falling under the definition of international public law. Conflict exists when “as a result of interpretation, the relevant treaties seem to point to different directions in their application by a party”.<sup>147</sup> On our example of religious education, the CRC gives children right to decide on their religious education while the ECHR gives right to parents to decide on the religious education of their children and subsequent interpretation of the ECtHR would suggest that both child and parents have this right, not being explicit whose opinion should prevail in case of disagreement. From the perspective of a child, both treaties give her/him right, but it seems that the rights might be shared with

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<sup>147</sup> International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, (2006) para. 23, <[http://untreaty.un.org/ilc/documentation/english/a\\_cn4\\_l682.pdf](http://untreaty.un.org/ilc/documentation/english/a_cn4_l682.pdf)>, visited on 26 April 2011.

parents under the ECHR. Also, in the context of the right to freedom of expression, the ECHR defines this right as a ‘negative’ while the CRC puts an additional positive obligation on its Member States to fulfill child’s right to freedom of expression. From the perspective of a State’s obligation, under the ECHR it has the obligation to refrain, while under the CRC it also has an obligation to act. Thus, it seems that from the perspective of a child, and states obligation to protect her/his right, there seems to be pointing of a treaties to different directions, and sometimes to an additional direction as well, as has been shown on the example of the right to freedom of expression.

Put into the language of general international law, there is a conflict between the norms of equal legal value, i.e. the ‘more special’, later in time, but universal UN Convention and more general, prior regional instrument, the ECHR. If rules for the conflict resolution of international public law are used, the answer would be that the CRC, as a more special and later in time instrument should prevail over the ECHR. As there is no *lex superior* in the present case, i.e. no rules adopted under Article 103 of the UN Charter nor *jus cogens* norms, general rules should be applied. Namely, in compliance with the maxim of *lex specialis derogat legi generali*, regarded as a general principle of international law, CRC is a ‘more special’ instrument than the ECHR, as it has been specifically designed for the special group of right holders, namely the children, unlike the ECHR which refers to ‘everyone’.<sup>148</sup> Further, in accordance with the principle of *lex posterior derogat lege priori*, embodied in Article 30(3) of the Vienna Convention on the Law of the Treaties (hereinafter: VCLT)<sup>149</sup>, the CRC, adopted in 1989 should prevail over the ECHR adopted in 1949.<sup>150</sup>

In line with this argument of conflict resolution, Article 53 of the ECHR, entitled ‘Safeguard for existing human rights’ provides that [n]othing in this

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<sup>148</sup> *Ibid.*

<sup>149</sup> Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331.

<sup>150</sup> Article 30(3) of the Vienna Convention on the Law of Treaties states: “When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty”.

Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party. “Article 53 embodies what has become a general rule of international human rights, viz. that a legal obligation implying a more far-reaching protection takes priority over any less far-reaching obligation.”<sup>151</sup> When the ECHR was adopted, its drafters did not have children in mind, but were referring to the protection of ‘everyone’ and the child was protected in his/her capacity of family member. Yet, as the protection of children’s rights under the notion of ‘everyone’ and through their family membership does not fully respects, protects and fulfills their rights in their individual capacity, there was a need to adopt an instrument that would be specifically designed for children. Henceforth, the protection under the CRC should be more child-friendly and henceforth more far-reaching than the one afforded under the ECHR.

To sum up, based on the rules of conflict resolution of public international law as well as on Article 53 of the ECHR, in case of conflict between the CRC and the ECHR, former should prevail.

The downside of the conflict resolution solution is that these rules only refer to the Contracting Parties of the CRC and the ECHR, at the moment only States. This would mean that in their domestic child related affairs Member States should follow the CRC’s reasoning. Yet, the CRC does not have a judicial nor at the moment quasi-judicial monitoring body which would scrutinize violations of its provisions, unlike the ECHR which is supplied with a very influential ECtHR. Further, this solution does not resolve the lack of coherency in the European child protection system. Namely, there is no obligation on the CoE, or the OSCE, to follow the CRC reasoning in their child-related matters.

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<sup>151</sup> Dijk van P., Hoof van F., Rijn van A. and Zwaak L. (eds.), *Theory and Practice of the European Convention of Human Rights* (Intersentia, Antwerpen – Oxford, 2006) p. 10.

## 4.2. Non-binding obligation of the Council of Europe to follow the UNCRC

One could rely on a non-binding obligation of international human rights organizations to attain highest possible standard in human rights protection as well as to follow human rights development in their Member States. All with the aim of enhancing the protection of human rights and contributing to the coherency in the international human rights law system. In our case of conflict between the UN and the CoE in the domain of children's rights, it could be claimed that the CoE, as a human rights organization, has a non-binding obligation to adjust its system to a more far-reaching system created under the auspice of the UN.

On our example of religious education, several arguments could be used in order to support this reasoning. To start with, from the behavior of the European States during the drafting procedure as well as based on their objections to reservations put mainly by the Islamic states, implicit intend to give an independent right to freedom of religion to children as well as right to participate in their religious education can be derived. Additionally, as has been shown, in regards to the Member States obligations the CRC prevails over the ECHR and henceforth it could be argued that the European organizations should adjust their reasoning of children's rights in order to bring it in compliance with the laws of their Member States. Furthermore, some of the Member States are already following the CRC's reasoning on children's right to participation. For instance in Norway child of seven years of age must be given the opportunity to express his/her views, including the religious education matter and at 15 years of age they can make independent decisions about their education and religion.<sup>152</sup> Also, in the context of the EU member states there is a serious issue of inconsistency, as the EU Member States are bound by the EU Charter in the domain of Union law, and at the domestic level by both the ECHR and the

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<sup>152</sup> Skivenes M. and Strandbu A., 'A Child Perspective and Children's Participation' *Children, Youth and Environments* 16:2 pp. 10-27 (2006) p. 15.

CRC, which again differ. Yet, interest of legal certainty requires the same standard of protection as well as the same approach to children's rights by the international law.

On the other hand, this solution needs to be elaborated more, as claiming that something should change, without giving concrete and feasible details on how to change it does not solve the problem. Henceforth, let us proceed by looking at possible ways for the CoE to adjust its child protection system to the one of the CRC. Here, there could be two approaches, one focusing on the ECtHR and other on the ECHR.

#### **4.2.1 Using the ECtHR's methods of interpretation**

So, the approach focusing on the ECtHR would claim that the ECtHR can use its methods of interpretation in order to bring the ECHR in compliance with the CRC. Further, since the ECtHR has significant influence on both other CoE institutions and other European organizations, it could incite other institutions to follow its reasoning. Moreover, positive aspect of this argument is that this is not an unusual approach, as the ECtHR is constantly using its powers to interpret the ECHR in a present day conditions. Hence, let us use the ECtHR methods of interpretation on our example of Article 2 of Protocol No.1 to see whether this solution would be feasible in practice.

The starting point, as usual in the interpretation of international treaties, will be the VCLT which in its Article 31 and 32 gives general guidelines for the interpretation. Also, the ECtHR has developed its own methods of interpretation, the 'living instrument' method and the margin of appreciation, which will be also used in order to check the feasibility of our solution.

Using textual interpretation of the Article 1 of Protocol No. 1 which states that parents have *right* to choose religious education for their children would result in right of a parent over a child and towards the State. Children's right to participation would be nowhere to found. Further, this interpretation would be hard to reconcile with the underling idea of human rights that *all*

humans should be equal, no distinction being made on any basis, in particular on a basis of age. Thus, pure textual interpretation would probably not be the most suitable. Moreover, arguably this is not the method that the ECtHR would engage itself in, as some authors argue “[t]he Court’s interpretive ethic became one of looking at the substance of the human right at issue and the moral value it serves in a democratic society, rather than engaging in linguistic exercises about the meaning of words or in empirical searches about the intentions of drafters.”<sup>153</sup>

Teleological interpretation requires the interpretation to be done in the context and in the light of the object and purpose of a treaty. The ECtHR has on numerous occasions emphasized that interpretation of rights envisaged in the ECHR should be done bearing in mind other provisions of the ECHR. In *Stec v. The United Kingdom*<sup>154</sup> the ECtHR noted that the “Convention must be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions”.<sup>155</sup> Thus, the context of giving parents *right* to choose the religious education for their children should be the one which takes into consideration Articles 1, 9 and 14 of the ECHR, first one giving the rights to *everyone*, including children, second giving everyone right to freedom of religion and third forbidding discrimination on a basis of age. If the parents have right to choose a religious education for their children under Article 2 of Protocol No. 1 than children do not have a right under Article 9 to freedom of religion. Additionally, special emphasis should be given to the object and purpose of the ECHR, expressed in its preamble, among other, as a maintenance and further realization of human rights and fundamental freedoms. Object and purpose have been indentified in general terms as ‘the protection of individual human rights’ and the maintenance and promotion of ‘the ideals and values of a democratic society’.<sup>156</sup> This interpretation

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<sup>153</sup> Letsas G. ‘Strasbourg’s Interpretive Ethic: Lessons for the International Lawyer’ 21:3 pp. 509-541 *European Journal of International Law* (2010) p. 520.

<sup>154</sup> *Stec and Others v. The United Kingdom*, 12 April 2006, EctHR, nos. 65731/01 and 65900/01.

<sup>155</sup> *Ibid.*, para 48.

<sup>156</sup> Harris, O’Boyle and Warbrick, *Law of the European Convention on Human Rights* (Oxford University Press, Oxford, 2009) p. 6.

would lead to the conclusion that Article 2 of Protocol No. 1 can be read as giving children voices when the decision on their religious education is made.

Moreover, Article 31(3) c of the VCLT states that “[t]here shall be taken into account, together with the context: any relevant rules of international law applicable in the relations between the parties”. “It may be valuable to refer to [the international instruments] ... [in order to] avoid inconsistent interpretations of similar guarantees by different international institutions.”<sup>157</sup> Clearly, Articles 5, 12, 14, 28 and 29 of the CRC support the interpretation in which right of children to be educated in accordance with their religious conviction is respected.

Thus, using teleological method of interpretation as well as seeing the ECHR in the arena of other international treaties, the ECtHR could interpret the ECHR in a child sensitive manner.

Yet, the ECtHR does not stop at VCLT rules of interpretation, but has developed its own methods of interpretation, most notably the ‘living instrument’ or dynamic interpretation and the ‘margin of appreciation’.

“[T]he principle of “dynamic” is much more deeply embedded in human rights law than in general international law”<sup>158</sup> and the ECtHR makes extensive use of it. It basically requires the interpreting body to take into consideration developments in the society when interpreting a treaty and adjust its provisions to the changed perception of certain notions. In the language of the ECtHR, the Convention is a "living instrument which must be interpreted in the light of present-day conditions."<sup>159</sup> And how does the ECtHR establish what are the ‘present-day conditions’? The only way possible, by looking at developments in Member States domestic law as well as at achieved level of protection of other international instruments. “The Court's position here is that the interpretation of the ECHR does not take place ‘in a vacuum’ and that the ECHR must be interpreted ‘according

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<sup>157</sup> Ovey C. and White R. C.A., *Jacobs and White, The European Convention on Human Rights* (Oxford University Press, Oxford, 2006) p. 41.

<sup>158</sup> See *supra* note 147, para. 130.

<sup>159</sup> See *e.g. Loizidou v. Turkey*, 18 December 1996, ECtHR, no. 15318/89.

to other parts of international law of which it forms part'.”<sup>160</sup> In the case of *Demir and Baykara v. Turkey*<sup>161</sup> the ECtHR confirmed its position on this matter emphasizing that in interpretation of the ECHR it “must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values”.<sup>162</sup>

In the case of children’s right to participation, the ECtHR could continue to apply its ‘living instrument’ method, and acknowledging that the society has changed, interpret the ECHR’s provisions in compliance with the CRC standards.

As for the margin of appreciation method, in the meaning relevant for our discussion, it basically requires the ECtHR to have regard to the developments in the Member States before interpreting the convention in compliance with the ‘living instrument’ method. Still, in the case of children’s right to participation this should have no bearing, as all of the CoE Member States are at the same time members of the CRC while the EU, a future member, is bound by the EU Charter inspired by the CRC.

Thus, as has been shown, it is feasible for the ECtHR to continue interpreting the ECHR in compliance with the CRC and fully endorse principle of children’s right to participation in its case law.

Yet, there are several flaws to this solution. Firstly, it is a quite long process. As can be seen on the example of the Article 2 of Protocol No. 1, even if the time is to be counted from the adoption of the CRC, it took the Court 21 years to give a child a right against State indoctrination. Yet, child’s rights need to be coherently protected and the process should be urgent. Also, accession of the EU to the ECHR is about to happen, and as has been argued above, this might potentially lead to numerous other problems. Also, the problem is not just about interpreting one institute or one right envisaged in the ECHR, it is about interpretation of all rights contained in the ECHR in a

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<sup>160</sup> Letsas, *supra* note 153, p. 521.

<sup>161</sup> *Demir and Baykara v. Turkey*, 12 November 2008, ECtHR, no. 34503/97.

<sup>162</sup> *Ibid.*, para. 85.

child sensitive manner. Henceforth, the solution that this thesis will argue for is the one focusing on the ECHR itself, as this is the core source of potential problems.

#### **4.2.2 Making the ECHR a child-sensitive instrument**

As has been shown above, the ECHR was adopted in different historical context from the one of the CRC as well as from the one of the EU Charter and consequently has a different approach to children's rights. In particular it does not envisage child's right to participation, one of the basic principles for the interpretation of any right claimed by a child. The ECtHR has partially interpreted the ECHR so as to respond to a changed perception of a child, but the process is long and requires modification of entire set of ECHR rights.

Thus, what this thesis suggests is adoption of an Additional Protocol to the ECHR, called here The Child's Protocol that would contain basic principles for the interpretation of the rights in the ECHR in a child related cases. Also, apart from substantive provisions, the Protocol could contain procedural guarantees which would make the proceedings before the ECtHR more child-sensitive.

In regards to the substantive norms, based on the experience of the EU Charter, i.e. Article 24 discussed above, the Child's Protocol could include the CRC principles which would further serve as a basis for the interpretation of other rights enshrined in the ECHR. Apart from the principle of the best interest of the child, prominent position should be given to the principle of child's right to participation which should further be a separate right for the child. Right not to be discriminated is included in the ECHR, so, arguable there would be no need to include it again. Still, it might be useful to mention that it is of particular importance in a child related matters. Further, principle of right to life, survival and development should be included, as it differs from Article 2 of the ECHR, protecting right to life. Moreover, one of the bases for drafting the text of Article 24 of the

EU Charter was Article 13 of the CRC which gives a child right to information, and should be included in the Child's Protocol as well. This seems very relevant, as in order for the child to make a decision or/and to participate in decision making it has to have relevant information. Further, Article 5 of the CRC, addressing child-parent relation, should be also included. This would be of particular significance in the context of Article 2 of Protocol No. 1 to the ECHR, where it seems unclear whose rights, child's or parent's, should prevail in case of disagreement on choice of religious education.

In regards to the procedural provisions of the Protocol, as has been noted during the drafting of the Optional Protocol to the CRC to provide a communications procedure (hereinafter: Optional Protocol), the procedure itself needs to be child sensitive.<sup>163</sup> The Working group on the Optional Protocol came up with several suggestions on how to make the procedure before the international bodies more child sensitive. Suggested solutions could be applicable in the proceedings before the ECtHR as well. Firstly, there ought to be a special emphasis on the child's right to participation. Also, the proceedings in child-related matters need to be urgent. Although the ECtHR already partially applies this policy in its practice, the Protocol should require the procedure to be urgent in *all* child-related matters, and not only some of them, such are custody cases. Further, it seems that adjustments to the admissibility criteria should be made as well. Namely, due to the position of a child, notably lack of knowledge on her/his rights and available international procedures, it might be good to prolong the period of bringing application before the ECtHR, from current 6 months to one year.<sup>164</sup> The last suggestion might be arguable in light of the ECtHR's case overload and current work on enhancing its effectiveness. Still, due to the special status of children i.e. their knowledge on their rights and possibility to use the ECtHR's procedure to protect their rights, this change

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<sup>163</sup> Report of the Open-ended Working Group on an optional protocol to the Convention on the Rights of the Child to provide a communications procedure, 16 May 2011, <<http://www2.ohchr.org/english/bodies/hrcouncil/OEWG/2ndsession.htm>> visited on 31 May 2011.

<sup>164</sup> *Ibid.*, para. 55.

shouldn't bring substantial amount of new cases. On the other hand, it could have important impact on the protection of child's rights before the ECtHR.

Additionally, based on the provisions for entry into force of other Protocols to the ECHR, it seems that the Child's Protocol would need to be ratified by all of the Member States to the ECHR in order for it to enter into force. Namely, Protocols to the ECHR addressing substantive provisions usually need to be ratified by 10 Member States, unlike the one that concern procedural changes which require ratification of all Member States. In our case, the Child's Protocol would contain both substantive and procedural provisions, as well as principles for interpretation of all other rights contained in the ECHR. Further, it would be awkward if the ECtHR would interpret rights differently depending on whether a State has ratified the Child's Protocol or not.

Still, one would wonder whether this is a feasible solution. Would it be possible to achieve agreement of all of the CoE Member States? Although the question cannot be answered with certainty, one has a basis to be optimistic. Namely, as has been noted above the ECtHR is to some extent already interpreting the ECHR in a child-sensitive manner. Also, all of the CoE Member States that would need to ratify the Child's Protocol are at the same time members to the CRC, and already have as part of their legislation child's right to participation, some of them even putting it in their domestic acts.

On the other hand, one could claim that the main difference from the States perspective is that the CRC unlike the ECHR at the moment does not have complaints mechanism. Still, the reason why the CRC still lacks complaints mechanism seem to be mostly connected to the scope of the rights protected under the CRC. Namely, apart from civil and political rights it also protects economic, social and cultural rights, use to be considered non-judiciable. This reasoning is further supported by the current discussions on why the optional protocol to the CRC on the complaints mechanism shouldn't be adopted, as they match the ones invoked against the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights introducing

individual complaints mechanism.<sup>165</sup> On the other hand the ECHR protects mainly civil and political rights and henceforth arguments against the complaints mechanism invoked for the CRC could not be used for the ECHR.

The outcome of adoption of a new protocol to the ECHR would be firstly, to make the ECHR a child sensitive instrument in this way further reflecting on the child sensitivity of the ECtHR case law. Secondly, other CoE institutions that heavily rely on the ECHR would make their actions correspond to the standards endorsed by the CRC. Moreover, as the OSCE often refers to the ECHR and the ECtHR case law in its documents, for instance it did this in the Toledo Guidelines, presumably the OSCE documents would be more child sensitive as well. Additionally, there would be no issue of divergence between the ECHR and the EU Charter, and after the accession no issue of possible confusion by the ECJ over which instruments should it follow, the ECHR or the EU Charter, as they would give the same level of protection to children.

And finally, the European system of protection of children's rights would be a coherent whole, not just inside but would make a coherent whole with the one of the UNCRC. This would reflect positively on legal certainty and protection of children's rights in general. "Coherence is valued positively owing to the connection it has with predictability and legal security. Moreover, only a coherent legal system treats legal subjects equally."<sup>166</sup>

At the end, it is not unusual to see development in human rights protection, as Harris argues: [i]f human rights are legal rights grounded in moral insights, then it is to be expected that those moral insights would continue to unfold in an enlarging understanding and conception of what is involved in truly respecting the worth and dignity of human beings.<sup>167</sup> And, if the aim of

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<sup>165</sup> Vandenbogaerde A. and Vandenhoe W., 'The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: An Ex Ante Assessment of its Effectiveness in Light of the Drafting Process' 10:2 pp. 207-237 *Human Rights Law Review* (2010) note 7.

<sup>166</sup> See *supra* note 147, para. 491.

<sup>167</sup> Harries R., 'The complementarity between Secular and Religious Perspectives of Human Rights', in Ghanea N., Stephens A. and Walden R. (eds.), *Does God Believe in Human*

all human rights instrument is the same, namely to make States respect, protect and fulfill human rights of 'everyone', than it is logical to expect the older instruments to make necessary adjustments in order to respond to changed notions of the international human rights law.

## 5. Concluding Remarks

At the end, what do European organizations say on children's right to participation in their religious education? Firstly, the CoE statutory bodies and the ECtHR as the most influential institutions in the human rights sphere at the European continent, have only partially endorsed child's right to participation in the field of religious education. Further, the EU, although not explicitly addressing religious education in its policy or the ECJ in its case law, seem to be on a good way to fully endorse the CRC's reasoning on children's rights, probably due to the impact of the EU Charter. Finally, the OSCE in its documents addressing religious education seem not to give enough importance to children's right to freedom of religion, right to education and right to participation. Therefore, it seems that most of the European organizations are changing their position towards protection of children's rights, but it also seems that some of them have not yet fully adjusted their position on children's right to participation in their religious education to the one adopted by the CRC.

Still, as this thesis has argued, in order to fully protect children's rights, a coherent system of child's rights protection in Europe should exist. Namely, out of several suggested solutions, the thesis has argued for the adoption of an Additional Protocol to the ECHR, the Child's Protocol, which would contain basic principles for the interpretation of rights contained in the ECHR in a child sensitive manner. Also the Protocol could contain procedural rights that would make the ECtHR's procedure more child sensitive. This should further reflect on the other CoE institutions, in particular its statutory bodies, the EU, especially in light of its future accession to the ECHR, as well as to the activities of the OSCE and make their activities more child sensitive as well.

At the end, coherent system of child's rights protection in Europe by the international organizations would make a significant contribution towards

making their Member States truly protect, respect and fulfill children's rights.

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