

РОЗДІЛ V. АКТУАЛЬНІ ПРОБЛЕМИ КРИМІНАЛЬНОГО ПРАВА ТА КРИМІНОЛОГІЇ; КРИМІНАЛЬНО-ВИКОНАВЧЕ ПРАВО

УДК 343.54 (477)

SOME ASPECTS OF THE IMPLEMENTATION OF THE INTERNATIONAL LEGAL OBLIGATIONS OF UKRAINE ON COUNTERING SEXUAL EXPLOITATION AND PEDOPHILIA

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Mezhdunarodno-pravovye acts, directed on counteraction sexual exploitation and depravation of children, are analysed in the article, and also the problems of implementacii of their requirements are probed in the legislation of Ukraine, grounded suggestion about bringing of the proper changes in disposition 155 of the Criminal Code to reveal the contents of socially dangerous acts that indicated in the title as "sexual intercourse".

Key words: sexual exploitation, corruption of minors, the perpetrator, the objective of the offense, sexual intercourse, international legal obligations.

Чмут С.В. НЕКОТОРЫЕ АСПЕКТЫ РЕАЛИЗАЦИИ МЕЖДУНАРОДНО-ПРАВОВЫХ ОБЯЗАТЕЛЬСТВ УКРАИНЫ ОТНОСИТЕЛЬНО ПРОТИВОДЕЙСТВИЯ СЕКСУАЛЬНОЙ ЭКСПЛУАТАЦИИ И РАЗВРАЩЕНИЮ ДЕТЕЙ / Запорожский национальный университет, Украина

В статье анализируются международно-правовые акты, направленные на противодействие сексуальной эксплуатации и развращению детей, а также исследуются проблемы имплементации их требований в законодательство Украины, обосновываются предложения о внесении соответствующих изменений в диспозицию ст.155 УК Украины.

Ключевые слова: сексуальная эксплуатация, развращение несовершеннолетних, субъект преступления, объективная сторона преступления, половые сношения, международно-правовые обязательства.

Чмут С.В. ДЕЯКІ АСПЕКТИ РЕАЛІЗАЦІЇ МІЖНАРОДНО-ПРАВОВИХ ЗОБОВ'ЯЗАНЬ УКРАЇНИ ЩОДО ПРОТИДІЇ СЕКСУАЛЬНІЙ ЕКСПЛУАТАЦІЇ І РОЗБЕЩЕННЮ ДІТЕЙ / Запорізький національний університет, Україна

Міжнародно-правові зобов'язання України спрямовані на всебічний та ефективний захист усього комплексу прав і свобод неповнолітніх. Першим міжнародним документом, який проголосив загальновізнаний принцип «Людство повинно дати дітям все найкраще із того, що в нього є», була Женевська Декларація «Про права дітей» 1923 р. У 1948 р. з'явилася так звана «Карта прав дітей», яка є базовим документом в історичному процесі формування міжнародно-правових стандартів прав і свобод дитини, оскільки всі наступні документи лише розвивають і конкретизують її основні положення. Також базовими міжнародно-правовими документами, що стоять на захисті прав дитини, є Загальна декларація прав людини 1948 р. і Декларація прав дитини 1959 р.

У Конвенції ООН від 20 листопада 1989 р. «Про права дитини», ратифікованій Верховною Радою Української РСР 27 лютого 1991 р., ще раз підкреслюється право дитини на пріоритетну правову охорону порівняно із дорослими.

Міжнародна спільнота особливо занепокоєна інтенсивним зростанням останнім часом сексуальної експлуатації дітей, дитячої порнографії, комерціалізації дитячої проституції тощо. На протидію цьому ганебному явищу спрямована ціла низка міжнародних конвенцій Організації об'єднаних націй (ООН) та Ради Європи (РЄ). У числі таких документів, насамперед, слід зазначити Конвенцію про права дитини з Факультативним протоколом № 1, прийняту Генеральною Асамблеєю ООН 20 листопада 1989 р. (резолюція № 44/25).

На конференції міністрів юстиції країн – членів Ради Європи 25 жовтня 2007 р. затверджена Конвенція про захист дітей від сексуальної експлуатації та сексуального розбещення, яка була ратифікована Верховною Радою України Законом України від 20 червня 2012 року № 4988-VI. Вказана Конвенція передбачила комплекс правових та інших заходів, впровадження яких у кримінальне законодавство України гармонізує протидію сексуальній експлуатації та сексуальному розбещенню дітей на національному та міжнародному рівнях. Першим кроком у зазначеному напрямку став Закон України від 25 вересня 2008 р. № 600-VI «Про внесення змін до статей 155 та 156 Кримінального кодексу України щодо відповідальності за розбещення неповнолітніх».

Однак такі заходи є неповними. Актуальними лишаються три питання, пов'язані із відповідальністю за статеві зносини з особою, яка не досягла статевої зрілості. По-перше, слід, нарешті, визначити вік особи, до досягнення якого заборонено залучення дітей до діяльності сексуального характеру. По-друге, назріла необхідність чітко визнати, що малолітні діти не можуть давати згоду на «добровільні», «ненасильницькі» статеві зносини із собою. По-третє, було б доречним у диспозиції частини першої ст.155 КК розкрити зміст суспільно-небезпечних діянь, що позначені у назві статті як «статеві зносини».

Ключові слова: сексуальна експлуатація, розбещення неповнолітніх, суб'єкт злочину, об'єктивна сторона злочину, статеві стосунки, міжнародно-правові зобов'язання.

International legal obligations of Ukraine aimed at the full and effective protection of the whole complex of rights and freedoms of minors. They are of great importance for the development of the national system of criminal law. The first international document that declared common principle that "Humanity must give children the best of what it has", was the Geneva "Declaration of the Rights of the Child" 1923 [1, p. 6]. It draws attention that children are not able to exercise their rights independently, and that is why the special attention is needed from the side of society to this category of population. The Declaration proclaims the appeal to all humanity, public organizations, local authorities and national governments to identify and provide special rights of children by legislative and other means. Despite the declarative character of this document, for the first time in the history of humanity the right of children to assistance, education and protection, regardless of nationality, citizenship and religion was proclaimed [2, p. 155]. Before the introduction of the so-called "Map of children's rights" in 1948, this international legal instrument for 25 years guarded the rights of minors. Map of children's rights is a basic document in the historical process of the formation of international legal standards for the rights and freedoms of the child, as all subsequent documents only develop and concretize its main provisions. It is impossible not to remember as basic international legal documents, standing on the protection of the rights of the child, the Universal Declaration of Human Rights 1948 and the Declaration of the Rights of the Child, 1959. In the General Declaration of Human Rights is stated that motherhood and childhood are entitled to special care and assistance (item 2 of article 25). In the Declaration of the Rights of the Child, one of the co-authors of which was Ukraine, it is emphasized that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth" [3].

In the UN Convention of 20 November 1989 "of the Rights of the Child", ratified by Verkhovna Rada of the Ukrainian SSR on February 27, 1991, is stressed again the right of the child on priority legal protection in comparison with adults. In article 19 of the Convention stipulates: "Countries-participants shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical and psychological violence, insults or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, by parents, legal guardians or any other person caring for the child. Such protective measures should, if necessary, include effective procedures for the development of social programs to provide necessary support for the child and persons who are cared for, as well as the implementation of other forms of prevention, reveal, message, transfer for consideration, investigation, treatment and follow-up in cases of abuse against child mentioned above, as well as, if necessary, for initiation of court proceedings" [4, p. 7].

The international community is especially concerned about the intensive growth of recent sexual exploitation of children, child pornography, commercialization child prostitution, etc. A number of international conventions of the United Nations (UN) and the Council of Europe (COE) is directed in contrast to this shameful phenomenon. In the number of such documents, first of all, it should be noted Convention of Rights of the Child with Optional protocol № 1, accepted by General Assembly of the UNO on November, 20 in 1989 (resolution № 44/25). In article 34 of this Convention the duties of states-participants to protect children from all forms of sexual exploitation and sexual deprivation are determined. With this end in view they, directly, on national, bilateral and multilateral levels accept all necessary measures for prevention: a) predisposing or compulsion of the child to any illegal sexual activity; b) the use for exploitation of children in a prostitution or other illegal sexual practice; c) the use for exploitation of children in pornography and pornographic materials [5].

On the conference of ministers of justice of countries – the members of the Council of Europe on October, 25 in 2007 confirmed the Convention about protecting of children from sexual exploitation and sexual deprivation, that was ratified by Verkhovna Rada of Ukraine by Law of Ukraine from June, 20, 2012 № 4988 - VI [6].

It is marked in the preamble of Convention, that every child has a right on such measures of defence, that is required in accordance with her status of minor from the side of her family, the society and the state. Countries - participants mark that sexual exploitation of children, in particular, child's pornography, and prostitution and all other forms of sexual deprivation of children, including acts, that is accomplished abroad, are destructive for child's health and psychosocial development, sexual exploitation and sexual deprivation of children gained anxious sizes on national and international levels, in particular, having regard to the growing use as by children so by the criminals of information and of communication technologies, and that warning and fight against it requires international cooperation, consider, that welfare and the best interest of children are fundamental values for all states - participants and should be supported without any discrimination.

For the first time the row of clear requirements to the national criminal legislation, that is represented in Division of IV the "Material criminal right", is entered in International legal practice of counteraction to sexual exploitation and sexual deprivation of minors in Convention. In particular, a country - participant is obligated to accept necessary legislative or other measures for criminalization of: 1) sexual deprivation: a) bringing into activity of sexual character of child that according to corresponding positions of national right did not attain entering age into sexual relations; b) bringing into activity of sexual character of a child, when the use comes true with violence, compulsion or threats; or deprivation comes true with the conscious use of trust, authority or influence on a child, and also in a family, or violence comes true in an especially vulnerable for a child situation, in particular through the use of mental or physical insolvency, or dependent position (article 18); 2) child's prostitution: a) recruiting of children for prostituting or motive of child to participating in a prostitution; b) forcing of a child to the prostitution or receipt of income from it or by another character the use of a child with that aim; c) of other actions that resulted in child's prostitution. "Child's prostitution" is the fact of the use of child understands for activity of sexual character, when money or other form of reward or indemnification is given or promised as payment, regardless of or this pay, promise or reward, is given to the child or third person (article 19); 3) child's pornography: a) production of child's pornography; b) suggestion or actions that do accessible child's pornography; c) distribution or transferrableness of child's pornography; d) acquisition of child's pornography for own necessities or for other person; e) possessing child's pornography; f) conscious access to child's pornography by means of information or of communication technologies. Any materials, that by sight represent the child brought over to the real or designed obviously sexual behavior, or any image of child's genital organs, understand under "child's

pornography", foremost with a sexual aim (article 20); 4) participating of a child in pornographic presentations: a) recruiting of children for participating in pornographic presentations or motive of a child to participating in such presentations; b) forcing of a child to participating in pornographic presentations or receipt of benefit from it or by another character the use of child with that aim; c) conscious visit of pornographic presentations of children (article 21); 5) depravation of children : intentional motive of child, that did not attain the age envisaged by a national legislation, to the supervision, even not taking participation, sexual depravation or sexual activity for the sake of sexual necessities (article 22) etc. In our view, requirements of Convention, which are contained in article 18, are reasonable and consist in determination of age, to that it is forbidden bringing in of children to activity of sexual character (item 2 of article 18) and pointing, that positions of Convention are not sent to the settlement of sexual relations by approbation between minors (item 3 of article 18). Original is pointing in relation to punishability of certain Convention offences. So, in item 1 of article 27 in relation to physical persons is envisaged providing of punishment effective, proportional and convincing approvals in accordance with the degree of weight of offence. These approvals must include punishment as imprisonment, and as a result is an extradition.

As we see, Convention of October, 25 in 2007 "About protecting of children from sexual exploitation and sexual depravation" envisaged the integral complex of legal and other measures introduction of that in the criminal legislation of Ukraine harmonizes counteraction to sexual exploitation and sexual depravation of children on national and international levels. The first step in the marked direction became Law of Ukraine of September, 25 in 2008 № 600-VI "About making alteration to the articles 155 and 156 the Criminal code of Ukraine in relation to responsibility for depravation of minors". First of all, almost twice criminal responsibility increases a law for sexual relations with a person that did not come to sexual maturity. If before for feasance of sexual relations with a person that did not come to sexual maturity, punishment as limitation of will within three years or imprisonment and the same term threatened, then now it is punished by the limit of will within five years or imprisonment on the same term. In item 2 of article 155 of Criminal code instead of imprisonment on a term from three to five years, punishment is envisaged imprisonment on a term from five to eight years with privation of right to hold certain positions or carry on certain activity within three years or without it. The circle of the special subjects of this crime is in addition, extended in item 2, if "the same actions are perfect a father, mother, stepfather, stepmother, guardian or trustee, person on that duties are fixed in relation to education suffering or caring about him" [8].

But such measures in relation to harmonization of national criminal legislation in part of counteraction to sexual exploitation and sexual depravation of children and teenagers are incomplete. In our view, Ukraine's associating to Convention of October, 25 in 2007 actualized at least three questions, related to responsibility for sexual relations with a person that did not come to sexual maturity. Firstly, it should finally define the age of person, to the achievement of that bringing in of children to activity of sexual character is forbidden. Ukraine remained the almost single state on European legal space, that until now did not give up a concept "person, that did not come to sexual maturity". It is impossible to say, that attempts to substitute this concept by a concrete age-old criterion were not done. Twice in 2006 and 2008 in VRU bills were registered where people's deputies V.N. Olyiko and V.V. Shevchuk suggested to bring changes in article 155 of Criminal code, exactly in the name and disposition of item 1 of this article and replace words "that did not come to sexual maturity", to words "that did not attain 16-years-old age" [9; 10]. The marked suggestions were thrown out, as such, that to accept beside the purpose, as they do not do a penal law more perfect. In our view, under suggestions in relation to replacement of term "person, that did not come to sexual maturity", to words "person that did not attain 16-years-old age" enough sound arguments were not given.

Secondly, coming to a head necessity clearly to admit that very young children can not give a consent to "voluntarily", "non-violent" sexual relations with a person. Such consent is actual and legal fiction, that the adult perverting, pedophiles is covered, avoiding more heavy responsibility for raping or violent satisfaction of sexual passion an unnatural method with very young persons (item 4 of article 152 and item 4 of article 153 of Criminal code). Sound are positions of CC of Denmark, Bulgaria, Georgia, Spain, Japan and other countries in that specified specially, that sexual relations with persons, that did not attain certain age, in all without an exception cases confess raping [11, p. 687]. Clear that very young child in force of features of physical и of psychical development, absence of experience and knowledge not can give consent to any legitimate, but the anymore illegal acts in relation to itself, without the corresponding consent of the parents. In accordance with the Domestic Relations code of Ukraine duties in relation to education and development of child are fully fixed on parents. According to article 150 of Domestic Relations code they are obliged to bring up a child in the spirit of respect to the rights and freedoms of other people, love to the family and family, to the people, the Motherland, to care of health of child, her physical, spiritual and moral development, to provide a receipt the child of complete universal middle education, to prepare her to independent life. Parents are obliged to respect a child. Any types of exploitation of the child by parents are forbidden. Physical punishments of child are forbidden for parents, and also application by them other types of punishments, that humiliate human dignity of child. Seems, that at modern development of child's physiology, psychology, pedagogics, sexology etc, a very young child under age 11 can not confess a victim from a crime, envisaged by article 155 CC, but a person that accomplishes with her sexual intercourses or satisfies sexual passion unnatural a method must be responsible for the feasancess of more grave crimes, that is raping of juvenile (item 4 of article 152 CC) or violent satisfaction of sexual passion in unnatural method (item 4 of article 153 CC) [12].

Thirdly, would be appropriate in disposition of item 1 of article 155 CC to expose maintenance of publicly-dangerous acts, that mark in the name articles as "sexual relations". Because, word-combination "sexual relations" is used in disposition of item 1 of article 152 CC of "Raping". However, at raping sexual relations become possible with application of physical violence, threat of his application or with the use of the helpless state of suffering person. Native CC does not use these terms in disposition of item 1 of article 155 CC. But does it mean, that any sexual relations with a person that did not come to sexual maturity, without application of physical violence, threat of his application, without the use of the helpless state of suffering person and exceptionally after the voluntarily consent of person form the objective side of the investigated crime? [13, p. 285]. That these states are unequivocal testifies the use of deception for entering into sexual connection. As specified already, some CCs actually had joined the first position and marked that this crime took place in default of signs of raping or satisfaction of sexual passion an unnatural method. Other CCs, not using the marked negative sign, go on the way of list of publicly-dangerous voluntarily sexual relations with a very young person: carnal knowledge, buggery, lesbianism or other sexual contacts in an unnatural form. It seems to us that descriptive disposition is more successful. It is clear and adequately perceived both at the level of professional and at the level of domestic sense of justice. In relation to the concrete "typical model" of disposition, then will mark now, that she must unite identical after a public danger and distribution criminal acts that trench upon sexual inviolability of very young person, namely: that satisfy sexual passion in a natural or unnatural method.

Summarizing, it should be noted that, unfortunately, now native criminal legislation is not yet in a complete measure harmonized in accordance with the international legal obligations of Ukraine on questions counteraction to sexual exploitation of children and teenagers. Harmonization of national criminal legislation to the international standards of guard of rights

and freedoms of children is basic direction of perfection of norms of law of responsibility for sexual relations with a person that did not come to sexual maturity.

REFERENCES

1. Volinets, L.S. (2005), "Zahust prav ditiny cherez prizmu realizatsyy Konvensii OON", *A protection of rights of a child through the prism of realization of Convention of the UNO Restoration justice in Ukraine*, vol.3, pp. 6 - 9.
2. Chmut S.V. (2009) "Evropeyska konvensiya z protidii seksualnoyi ekspluatatsii ditey ta vidpovidalnist' za statevi znisini z osoboyu yaka ne dsiagla statevoyi zrilosti", *European convention of counteraction of sexual exploitation of children and responsibility for carnal knowledge with a person that did not come to sexual maturity*, the Legal state: History, contemporaneity and forming prospects in Ukraine: Proceedings of All-Ukrainian scientific-practical conference (Zaporizhzhya, April, 24, 2009), Zaporizhzhya, Legal inst. of DSUIA (Dnipropetrovsk State University of Internal Affairs), part 2, pp. 155 - 159.
3. Declaration of the Rights of the Child 1959, Informative web site of Verkhovna Rada of Ukraine, available at: <http://www.zakon.rada.gov.ua/>.
4. Volinets L.S. (2005) "Zahist prav ditini cherez prizmu realizatsii Konvensii OON" *A protection of rights of a child through the prism of realization of Convention of the UNO*, A restoration justice in Ukraine, vol.3, pp. 6-9.
5. Convention of the UNO About rights of a child dated November, 20, 1989: accepted by resolution of General Assembly № 44/25 with Optional protocols № 1 and № 2, available at: <http://zakon1.rada.gov.ua/>.
6. About ratification of Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse: Law of Ukraine dated June, 20, 2012 № 4988-VI, Lists of Verkhovna Rada of Ukraine (2013), vol. 19-20, art.131.
7. Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse dated October, 25, 2007, [Electronic resource], Official internet-portal of Verkhovna Rada of Ukraine, available at: <http://www.zakon.rada.gov.ua/>.
8. About making alteration to the articles 155 and 156 the Criminal code of Ukraine in relation to responsibility for depravation of minors: Law of Ukraine dated Septembre, 25, 2008 № 600 – VI, of List of Verkhovna Rada of Ukraine (2001), № 25 – 26, article 131.
9. About making alteration in the Criminal code of Ukraine (in relation to responsibility for carnal knowledge with a person that did not attain 16-years-old age)", (register. №8750 dated July, 20, 2006), [Electronic resource], Informative web site of Verkhovna Rada of Ukraine, available at: <http://gska2.rada.gov.ua/pls/zwebprjc342id=&pf3511/>.
10. About making alteration in the Criminal code of Ukraine (in relation to responsibility for carnal knowledge with a person that did not attain 16-years-old age)", (register. №2153 dated March, 3, 2008), [Electronic resource], Informative web site of Verkhovna Rada of Ukraine, available at: <http://www.zakon.rada.gov.ua/clients/vs.nst/81b/cia599140111fc/>.
11. Havronuk M.I. (2006), *Kriminalne zakonodavstvo Ukraini ta inshih derzhav kontinentalnoyi Yevropi: porivnyalniy analiz, problem harmonizatsii* [Criminal legislation of Ukraine and other states of continental Europe : comparative analysis, problems of harmonization], monograph, legal Adviser, Kyiv, Ukraine.

12. Domestic code of Ukraine : Law of Ukraine dated January,10,2002 № 2947 – III, List of Verkhovna Rada (2002), № 21 – 22, article 135.
13. Chmut S.V. (2006) “Zlochinni dii pri stateviih znisinah z osoboyu yaka ne dosyagla statevoyi zrilisti”, *Criminal acts at carnal knowledge with a person that did not come to sexual maturity*, Criminal-legal politics of the state : theoretical and practical aspects of problem : Proceedings of International scientific conference, Donetsk, dated November, 17–18, 2006, Donetsk Law Institute of Internal Affairs of Ukraine, pp. 282-287.

УДК 351.749: 343.451 (100)

TOPICAL ISSUES OF THE ESTABLISHMENT AND FUNCTIONING OF SPECIAL STATE ORGANIZATIONS TO FIGHT AGAINST THE INTERNET FRAUD IN DIFFERENT COUNTRIES OF THE WORLD

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The article deals with topical issues of combating online fraud by analyzing the activity of the state special organizations of such leading countries of the world as the USA, Great Britain, Russia, France, Germany and some other countries, that have gained an extensive experience in the establishment and functioning of such departments and organizations which can be used for creating similar services in other countries.

Key words: Internet fraud, fight, prevention, special department, special organization, investigation, crime, cybercrime, information technology.

Сабадаш В.П. АКТУАЛЬНЫЕ ВОПРОСЫ СОЗДАНИЯ И ФУНКЦИОНИРОВАНИЯ ГОСУДАРСТВЕННЫХ СПЕЦИАЛЬНЫХ ОРГАНИЗАЦИЙ ПО БОРЬБЕ С ИНТЕРНЕТ-МОШЕННИЧЕСТВОМ В РАЗЛИЧНЫХ ГОСУДАРСТВАХ МИРА / Запорожский национальный университет, Украина

В статье рассматриваются актуальные вопросы противодействия интернет-мошенничеству путем анализа деятельности государственных специальных организаций таких ведущих стран мира, как США, Великобритания, Российская Федерация, Франция, Германия и некоторых других стран, в которых накоплен огромный опыт по созданию и функционированию таких подразделений и организаций, который можно использовать при создании аналогичных служб в других странах мира.

Ключевые слова: интернет-мошенничество, борьба, противодействие, специальные подразделения, специальные организации, расследование, преступление, киберпреступность, информационные технологии.

Сабадаш В.П. АКТУАЛЬНІ ПИТАННЯ СТВОРЕННЯ ТА ФУНКЦІОНУВАННЯ ДЕРЖАВНИХ СПЕЦІАЛЬНИХ ОРГАНІЗАЦІЙ ПО БОРОТБІ З ІНТЕРНЕТ-ШАХРАЙСТВОМ У РІЗНИХ ДЕРЖАВАХ СВІТУ / Запорізький національний університет, Україна

У статті розглядаються актуальні питання протидії інтернет-шахрайству шляхом аналізу діяльності державних спеціальних організацій таких провідних держав світу, як США, Великобританія, Російська Федерація, Франція, Німеччина та деяких інших держав, у яких накопичено великий досвід щодо створення та функціонування таких підрозділів та організацій.

Однією з особливостей створення таких державних спеціальних організацій є те, що вони створюються державами у складі центральних органів влади: Міністерств, відомств, Служб безпеки тощо. Так, у Російській Федерації – це Бюро спеціальних технічних заходів МВС Росії, до структури якого увійшло Управління «К».

У Великобританії питаннями боротьби зі злочинами у сфері високих технологій до останнього часу займалося Національне Агентство по боротьбі з організованою