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## THEORETICAL AND LEGAL BASIS FOR PRE-TRIAL INVESTIGATION OF CRIMES AGAINST CHILDREN

**Abstract. Purpose.** The article focuses on the need to create: an effective legal mechanism for ensuring the rights of the child in any contact with the justice system, as well as additional procedural guarantees for the treatment of minors involved in criminal proceedings; professional approach of persons authorized to work with children, etc. **Research methods.** The work was developed based on general scientific and special methods of scientific knowledge. In particular, comparative and legal method made it possible to equate the norms of national legislation with the content of international treaties, defining the requirements for the procedure for pre-trial investigation of crimes against children. Summarization method made it possible to consistently consolidate isolated facts and formulate reasoned conclusions aimed at improving the legislative regulation of the researched issue, overcoming its conflicts and gaps. Logical method of scientific knowledge serves as a methodological basis for the study of problematic issues of pre-trial investigation of criminal offenses, in which the victims are children. **Results.** It was determined that the effective implementation of pre-trial investigation of crimes against children depends on ensuring an individual approach to their documentation, coordination of the actions of the law enforcement officials of various departments and specialists in the relevant area, who provide and collect evidence immediately after the commission of the offence, which will allow their effective use in decision-making by both domestic judicial bodies and international institutions, in particular the International Criminal Court. International documents indicating the need to mitigate the procedure of interviews and interrogations of children who have become victims or witnesses of crimes were analyzed. **Conclusions.** To ensure the principle of equality before the law and the court regarding criminal proceedings in which the victims or witnesses are children, based on the analysis of legal instruments, it was concluded that the Criminal Procedure Code of Ukraine should be amended.

**Keywords:** child, pre-trial investigation, martial law, criminal proceedings, minor, juvenile prevention.

### 1. Introduction

Since the introduction of martial law on the territory of Ukraine in connection with the aggression of the Russian Federation, 505 children have died and 1129 children have been injured. As of October 06, 2023, 19,812 children were reported missing to the National Police. To date, 1,206 children are still actively wanted, of which: 1,182 have disappeared in the territory of hostilities (Donetsk, Luhansk, Kherson, Kharkiv, Zaporizhzhya, Mykolaiv, and Kyiv regions); 617 were forcibly

removed by the occupation authorities according to the available information, they were forcibly removed by the occupation authorities out of residence).

So far, the prosecutor's office has recorded a number of serious violations against children by military personnel of the aggressor state. According to international humanitarian law, these violations are war crimes, namely: recruitment and use of children; murder and maiming, rape and other forms of sexual violence, attacks on schools, hospitals and protected persons

associated with them, child abduction, denial of access to humanitarian aid, etc.

This indicates the need to create: an effective legal mechanism for ensuring the rights of the child in any contact with the justice system under the armed conflict; additional procedural guarantees for the treatment of minors involved in criminal proceedings; professional approach of persons authorized to work with children, etc.

The problem of crimes against children, especially under martial law, is quite acute, complex and unpredictable. When a child is subjected to criminal acts, law enforcement agencies, prosecutors, judges, social services, medical institutions, etc. are obliged to promote the rights of the child and to act in his (her) best interests. However, these actors do not always work in harmony.

It should be noted that, unfortunately, crimes against children are particularly dangerous in terms of the duration of negative effects on the child's psyche and unpredictable impacts on their future. Generally, a child victim passes through a number of institutions and has been repeatedly interrogated by different specialists and in different places, using different methods of gathering information, which can cause him to re-traumatize. Besides, repeated interrogations by specialists who have not undergone special training can distort the child's story about the events and negatively affect the course of the pre-trial investigation.

The **purpose of the article** is to study problematic issues of pre-trial investigation of crimes against children under martial law.

## **2. Problematic issues of pre-trial investigation of crimes against children under martial law**

The policy of our State in the field of protection of the child's rights and freedoms is based on the principles enshrined in the rules of domestic and international law. Certain issues of the children's rights protection are related to the proper level of pre-trial investigation of crimes against children in accordance with international legal standards. In particular, the Declaration of the Rights of the Child (United Nations General Assembly, 1959) determines that the child due to his physical and mental immaturity needs special protection and care, including proper legal protection. According to the Convention on the Rights of the Child (United Nations General Assembly, 1959) States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse. Part 1, Article 35 of the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Coun-

cil of Europe, 2007) states that each Party shall take necessary legislative and other measures to ensure that the number of interviews is as limited as possible and in so far as strictly necessary for the purpose of criminal proceedings.

Therefore, international documents indicate the need to ensure that interviews and interrogations of children who have become victims or witnesses of crimes, are mitigated. Besides, effective implementation of pre-trial investigation of crimes against children depends on ensuring an individual approach to their documentation, coordination of the actions of the law enforcement officials of various departments (prosecutors, Security Service of Ukraine, National Police of Ukraine) and specialists in the relevant area (psychologists, Ministry of Health of Ukraine, specialized state institutions and laboratories and etc.), who provide and collect evidence immediately after the commission of the offence. It is also important to ensure the admissibility of evidence in criminal proceedings by entities authorized to collect it, which will allow their effective use in decision-making by both domestic judicial bodies and international institutions, in particular the International Criminal Court.

At the same time, the law enforcement process has demonstrated that the national legal system is not ready for the challenges, which emerged with the outbreak of full-scale war in Ukraine, primarily related to the detection, documentation and pre-trial investigation of war crimes, including the ones against children.

## **3. Theory of evidence**

One of the most important in the theory of evidence is the problem of inadmissibility of evidence (Vapnyarchuk, 2023). Thus, one of the criteria for the admissibility of evidence in criminal proceedings is that the authorized subject receives it. According to judicial practice, the evidence collected by the pre-trial investigation body in violation of the rules of investigation is inadmissible because it was collected by an unauthorized subject. It should be noted that violation of the laws and customs of war is a war crime and at the same time an international crime. According to Article 216 of the Criminal Procedure Code of Ukraine (Law of Ukraine No. 4651-VI, 2012) pre-trial investigation of the crimes provided for in Article 438 of the Criminal Code of Ukraine (Law of Ukraine No. 2341-III, 2001) is carried out by the investigators of the Security Service of Ukraine. If during the investigation it turns out that part of the related crimes are under investigation by the Security Service of Ukraine, and part – by the National Police of Ukraine or another pre-trial investigation body, the prosecutor identifies the jurisdiction

(Part 10, Article 216 of the Criminal Procedure Code of Ukraine). However, documentation of these types of crimes before the information is entered in the Unified Register of Pre-trial Investigations (hereinafter – URPI) is carried out by law enforcement officers of various departments, including the National Police of Ukraine.

For the purpose of documenting crimes before the information is entered in the URPI in accordance with the rules of the Criminal Procedure Code of Ukraine, inspection of the scene is permitted, the purpose of which is to identify and record evidence regarding the circumstances of the crime. Accordingly, during the prosecution of this category of criminal proceedings, admissibility of this evidence may be questioned in connection with their collection by inappropriate subject.

Another problematic issue during the pre-trial investigation of crimes against children is that, according to Article 226 of the Criminal Procedure Code of Ukraine, interrogation of juveniles or minor is conducted in the presence of a legal representative, a teacher, or a psychologist, and if necessary, a doctor. However, according to Part 2, Article 65 of the Criminal Procedure Code of Ukraine, the legal representative of the victim cannot be questioned as a witness. In accordance with Part 2, Article 97 of the Criminal Procedure Code of Ukraine, the court has the right to admit hearsay evidence regardless of whether the person who provided the primary explanation could be questioned in exceptional cases, if such testimony is admissible evidence under other rules of admissibility of evidence. Along with this, Part 7 of this article states that in any event, hearsay evidence may not be admissible, if they are given by an investigator, a prosecutor, an employee of an operational unit or another person to the explanations of persons given to an investigator, a prosecutor or to an employee of the operative unit in criminal proceedings.

It should be noted that the “Bernahus” model is currently being implemented in Ukraine. This project is designed to adapt the criminal process to the needs of children, to promote their reintegration and rehabilitation. In particular, the new standards of working with children are the creation of comfortable conditions at all stages of co-operating with them, the support of a qualified child psychologist, taking measures to avoid repeated traumatization, which can be achieved by limiting the number of investigative actions involving the child, engaging different specialists for procedural actions taking into account the relevant provisions of the Code of Criminal Procedure of Ukraine, in a child-friendly environment, etc.

In view of the above, and with the aim of minimizing injury to the child during her interrogation, we propose to enshrine the provision in the Criminal Procedure Code of Ukraine that if there is a need for additional evidence, then the hearsay may be heard in accordance with Article 97 of the Code of Criminal Procedure of Ukraine, which should be supplemented with Par. 8 to read as follows: “8. *Complexity of interrogation of a juvenile or minor victim or a witness who gave a primary explanation or reasons why such an interrogation is not possible*”.

As we have already noted earlier, in accordance with international acts, in order to mitigate the impact on the child’s psyche during criminal proceedings, it is recommended to introduce into national legislation the provisions which will ensure that child interviews are conducted without undue delay immediately after the facts have been reported to the competent authorities; limiting the number of child interrogations; interrogation of the child, if necessary, and in a room specially equipped or arranged for these purposes; conducting all interrogations of the child by the same person, if possible, and where appropriate; interrogation of the child by the person specially trained for these purposes, etc.

As we can see, considerable attention is paid to limiting the number of interrogations of the victim, who is a minor. One of the options for solving this problem is the use of audio and video recording of the minor’s interrogation for its further use in evidence in this category of criminal proceedings. As we can conclude from the content of Part 5, Article 224 of the Criminal Procedure Code of Ukraine, audio and/or video recording may be used during interrogation. That is, we are just talking about the possibility and not the obligation of using audio and/or video recording. However, in our opinion, in the case when it comes to the interrogation of a juvenile or minor witness or victim at the stage of pre-trial investigation, video recording of the questioning of the specified persons should be mandatory, because it will help to prevent re-traumatization of the child’s psyche, and in the future this video recording may be used as evidence in criminal proceedings, including during a court hearing.

Proceedings in cases involving minors are one of the types of differentiated criminal procedural form, regulated by the rules of Chapter 38 of the Criminal Procedure Code of Ukraine. It is a procedural form differentiated by the minor subject of criminal responsibility, in which general rules of pre-trial investigation and court proceedings are combined with special norms guaranteeing the protection of a minor suspect (accused) from unjustified criminal prosecu-

tion and conviction and is also of a preventive and socially restorative nature. The specified chapter of the procedural law defines additional guarantees for the protection of the rights of a minor, the existence of which is due to the characteristics of the person's age (Tsyhaniuk & Kuliebiakin, 2023, p. 353). It should also be noted that the current criminal procedural legislation of Ukraine does not fully comply with the principles of equality before the law and the court regarding proceedings in criminal cases, in which children are victims or witnesses.

Thus, Chapter 38 of the Criminal Procedure Code of Ukraine defines the procedure for criminal proceedings against minor suspects (accused), the circumstances to be established in criminal proceedings against minor suspects (accused), participation of the legal representative of a minor suspect (accused) in criminal proceedings, the procedure for summoning a minor suspect or accused, the interrogation of a minor suspect or accused, cases and procedure for engaging a legal representative, teacher, psychologist or doctor in the interrogation of a minor suspect (accused), etc. However, the norms of this chapter do not apply to victims and witnesses who are minors. In view of the above, we offer:

- title of Chapter 38 of the Criminal Procedure Code of Ukraine should be read as "*Chapter 38. Criminal proceedings against minors and involving them*";

- title of § 1. redrafted as follows "*§ 1 General rules of criminal proceedings of which a minor is a party*";

- Article 484 should be amended as follows: "*Article 484. The procedure for criminal proceedings against minors and involving them*

1. The procedure for criminal proceedings against minors and involving them is determined by the general rules of this Code, taking into account the features provided for in this Chapter.

2. Criminal proceedings against a minor, including if criminal proceedings are conducted against several persons, at least one of whom is a minor, *as well as criminal proceedings in which the victim is a minor*, are conducted by the inquirer, the investigator, who are specially authorized by the head of pre-trial investigation body to carry out pre-trial investigations on minors. In the course of criminal proceedings against a minor, including application of coercive measures of an educational nature, *and in which the minor is the victim*, the inquirer, investigator, prosecutor, investigating judge, the court and all other persons involved in it are required to carry out procedural actions in a less disruptive manner to the minor's normal way of life and corresponds to his (her) age and psycholog-

ical characteristics, clarify the essence of procedural actions, decisions and their meaning, listen to his arguments in procedural decisions and take all other measures aimed at avoiding negative impact on the minor".

*When conducting investigative (search) actions with a minor victim (witness), one should consider his (her) individual psychological and psychophysiological properties, in particular, to question the person being interrogated through the psychologist, to use special methods ("Green Room", "Barnahus", etc.).*

3. The provisions of this paragraph are applied in criminal proceedings regarding criminal offenses committed by persons under the age of 18, as well as victims and witnesses who were minors at the time of their involvement in the criminal proceedings.

- add the word "*victim*" to the title of Article 487 after the words "a minor suspect or accused";

- the title of Article 488 should be read as: "*Participation of the legal representative of the minor suspect, accused, victim*";

- insert "*victim*" after the word "minor" in Part 1, Art. 488;

- insert "*victim*" after the word "minor" in Part 3, of Art. 488;

- the title of Article 489 should be worded as: "*The procedure for summoning a minor victim, witness, suspect or accused*";

- insert the words "*victim, witness*" after the word "minor" in Part 1, Art. 489.

Besides, it should be noted that international standards clearly define that the child's interrogations, if necessary, should take place in a room specially equipped and arranged for these purposes. The above characterizes the basic principles of the "Green Room" method, which involves interviewing the child who has suffered or witnessed crime, in conditions minimizing and preventing repeated traumatization of the child's psyche, considering his (her) individual psychological and psychophysiological properties. However, the problem of using this technique is the lack of a sufficient number of properly equipped "Green Rooms".

Thus, as of 2021, 34 special rooms (child-friendly rooms) were functioning in Ukraine, 25 of which are in police units, 4 – in higher education institutions of the Ministry of Internal Affairs of Ukraine, 3 – in other State agencies, and 2 – in civil institutions. Only 25 rooms were properly furnished. Currently, there is a need to increase the number of such rooms. However, today in Ukraine there are no legal principles for the "Green Rooms" functioning and legal prerequisites for their application in criminal proceedings involving a child. *This predetermines the need to develop and adopt departmental nor-*

native legal act that will determine the organizational and legal basis of the activity of inquirers, investigators, and employees of juvenile prevention units regarding the application of the "Green Room" methodology.

#### 4. Conclusions.

In today's circumstances, the improvement of the criminal procedural legislation of Ukraine in terms of ensuring the rights of the minor victim in criminal proceedings is a necessary element of its effectiveness. Besides, special methodologies such as "Green Room" and "Barnahus", the application of which during investigative (search) actions with minors will prevent their traumatization, require proper rationing for adequate application.

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## ТЕОРЕТИКО-ПРАВОВІ ЗАСАДИ ДОСУДОВОГО РОЗСЛІДУВАННЯ ЗЛОЧИНІВ ПРОТИ ДІТЕЙ

**Анотація. Мета.** У статті акцентовано увагу на необхідності створення дієвого правового механізму забезпечення прав дитини в будь-якому контакті із системою правосуддя, а також додаткових процесуальних гарантій поведінки з неповнолітніми учасниками кримінального провадження; професійного підходу осіб, уповноважених на роботу з дітьми, тощо. **Методи дослідження.** Робота виконана на підставі загальнонаукових і спеціальних методів наукового пізнання. Зокрема, порівняльно-правовий метод дав змогу порівняти норми національного законодавства зі змістом міжнародних договорів, у яких визначені вимоги щодо порядку здійснення досудового розслідування злочинів проти дітей. Завдяки методу узагальнення вдалося послідовно звести одиничні факти у єдине ціле та сформулювати обґрунтовані висновки, спрямовані на вдосконалення законодавчого регулювання досліджуваного питання, подолання його колізій і прогалин. Логічний метод наукового пізнання слугує методологічною основою для дослідження проблемних питань досудового

розслідування кримінальних правопорушень, потерпілими у яких є діти. **Результати.** Визначено, що ефективне здійснення досудового розслідування злочинів проти дітей залежить від забезпечення індивідуального підходу до їх документування, узгодженості дій залучених працівників правоохоронних органів різних відомств та фахівців у відповідній сфері, які забезпечують і здійснюють збирання доказів безпосередньо після вчинення злочину, з метою їх ефективного використання під час прийняття рішення як вітчизняними судовими органами, так і міжнародними інституціями, зокрема Міжнародним кримінальним судом. **Висновки.** Проаналізовано міжнародні документи, які вказують на необхідність забезпечення пом'якшення процедури опитувань, допитів дітей, які стали жертвами чи свідками злочинів. З метою забезпечення принципу рівності перед законом і судом щодо процедури провадження у кримінальних справах, у яких потерпілими чи свідками є діти, на підставі аналізу нормативно-правових актів зроблено висновок про доцільність внесення змін до Кримінального процесуального кодексу України.

**Ключові слова:** дитина, досудове розслідування, воєнний стан, кримінальне провадження, неповнолітній, ювенальна превенція.

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