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CORRELATION OF THE DEFINITION OF “CHILD” IN INTERNATIONAL LEGAL ACTS AND UKRAINIAN LEGISLATION DURING THE ARMED CONFLICT

Summary. The article studies the definition of “child” at two levels: international and national. The author analyzes both international legal acts (the Convention on the Rights of the Child (1989), the Optional Protocol on the Involvement of Children in Armed Conflict (2000), the Geneva Convention relative to the Protection of Civilian Persons in Time of War (1949) and its Additional Protocol (1977), etc.) and domestic legal acts (the Constitution of Ukraine, the Law of Ukraine “On Protection of Childhood”, the Civil Code of Ukraine, Family Code of Ukraine).

The author analyzes the peculiarities of Ukrainian legislation regarding such categories as “minimally capable” and “minor”, which endows a person with different rights and obligations. The article focuses on the possibilities for a minor to obtain the rights of an adult before reaching the age of 18 and the scope of his/her rights and obligations thereafter.

The author pays attention to the “novelties” of the national legislation on the definition of a “child” during an armed conflict. In particular, in the Laws of Ukraine “On Protection of Childhood” (2001) and “On Social Protection and Support of Children Affected by the Armed Aggression of the Russian Federation against Ukraine” (2024), the Procedure for Granting the Status of a Child Affected by Military Operations (2017) and Armed Conflicts and the Amendments to Procedure for Evacuation in the Event of a Threat or Occurrence of Emergency Situations (2023), Procedure for the identification, return, support and reintegration of children deported or forcibly displaced as a result of the armed aggression of the Russian Federation against Ukraine (2024), approved by the resolutions of the Cabinet of Ministers of Ukraine, etc.

Based on a comparison of the existing definitions of the concept of “child”, the author concludes that there is no single approach to this issue. The national legal framework does not take into account the peculiarities of the existing division of “childhood” into minimally capable and minors when formulating the current legal framework. On the one hand, the state thus provides more protection to persons under 18, regardless of whether they already have full legal capacity. On the other hand, will the state thus not restrict persons who have acquired the rights of an adult before reaching the age of 18? In the future, this may lead to double interpretations in the formation and application of child protection mechanisms during armed conflict.

Key words: child, armed conflict, minimally capable, minor.

Formulation of the problem. Both in the scientific and legislative spheres, everyone unequivocally comes to the conclusion that a child is the most vulnerable and unprotected category of any society. Especially during an armed conflict. When studying the issue

of child protection during armed conflict, it is necessary, first of all, to analyze the legal framework in the context of the definition of “child”. The concept of “child” is regulated by both international and national legal acts. However, it is worth noting that there are certain peculiarities in the approaches to the definition of “child” and there is no single approach to addressing this issue.

Analysis of research problems. Ukrainian doctrine already has in its arsenal scientific developments in the field of child protection during armed conflict. Among them are the works of such scholars as:

– Nalyvaiko L.R., who states that the protection of children’s rights during armed conflict is an important part of the international community’s agenda. As of today, certain guarantees regulated by international legal documents have already become part of customary law. According to the scholar, it is important to note that although international and national legislation provides for mechanisms to protect children’s rights during martial law, if one of the parties fails to fulfill its obligations, the mechanism for their implementation in practice becomes significantly more complicated or ineffective [1];

– Ryhina O.M. in her scientific works has covered the issue of granting “additional” legal status to certain categories of children in Ukraine, which is justified by the realities of today. In particular, due to the anti-terrorist operation (ATO) in eastern Ukraine, children living in the area have found themselves in extremely life-threatening conditions. The involvement of their parents in the ATO has also had a negative impact on their lives. Such children, according to the scientist, should have special benefits [2];

– Stepanenko N.V., who conducted a comprehensive study of improving the theoretical and legal provisions, formulating proposals for legal protection and ensuring the rights of the child in the context of hostilities in Donbas [3];

– Ternavska V.M. analyzed the correlation between the categories of “child affected by hostilities and armed conflicts”, “child of war” and “person with a disability as a result of war” by studying the provisions of the constitutional legislation of Ukraine and international legal documents. The scientist drew attention to a gap in constitutional legislation regarding the proper determination of the legal status of children who were in the temporarily occupied territories in order to properly ensure the rights of such children. She also identified the shortcomings of the current legislation of Ukraine in the issues of legal regulation of the legal status of minor citizens of Ukraine who became victims of the military (armed) aggression of the Russian Federation against Ukraine, due to the inconsistency of the constitutional and legal policy of Ukraine [4].

The purpose of the article is to analyze international and domestic legal acts in the context of the definition of a “child” during armed conflict.

Presenting the main material. At the international level, the Convention on the Rights of the Child is one of the main legal acts in the field of defining a child during armed conflict [5]. The international community has unequivocally concluded that a child is every human being under the age of 18. However, the international community has also made a certain reservation that it is possible to apply to a given person by law the age of majority earlier than 18 years.

The same international legal act has a separate article on children during armed conflict (Article 38). This article sets out a general rule - compliance with international humanitarian law during any armed conflict. That is, part 1 of Article 38 is a blanket rule that refers to a set of international legal acts (the Geneva Conventions and their Additional Protocols, which will be discussed further).

Part 2 of Article 38 of the Convention emphasizes the so-called “child soldier” category. This provision establishes a general rule that states shall endeavor not to involve persons under the age of 15 in direct participation in hostilities. In particular, the norm on refraining from conscripting persons under 15 years of age to serve in the armed forces is fixed.

In 2000, the international community adopted an amendment to the Convention on the Rights of the Child in the form of the Optional Protocol on the Involvement of Children in Armed Conflict (hereinafter - the Protocol) [6]. Immediately, the first article of the Protocol sets out a general rule that members of their armed forces under the age of 18 should not take direct part in hostilities. It also stipulates that persons under the age of 18 are not subject to compulsory military service in their armed forces.

The Protocol is also an interesting example of how the international community makes adjustments to international legal acts. For example, the Convention on the Rights of the Child, namely Article 38, allows recruitment into the armed forces of persons who have reached the age of 15 (which already contradicts the age of the child - a person under 18).

The above-mentioned provision of the Convention on the Rights of the Child was adjusted in Article 3 of the Protocol with the following wording: “States Parties shall raise the minimum age for the voluntary recruitment of persons into their national armed forces as compared with the age specified in article 38, paragraph 3, of the Convention on the Rights of the Child, taking into account the principles contained in that article and recognizing that under the Convention, persons under 18 years of age are entitled to special protection”. Specifically, Article 3 of the Protocol reiterates that children (namely, persons under 18 years of age) enjoy special protection.

The exception to this rule is when persons under 18 years of age are studying in higher military educational institutions (Article 3(5) of the Protocol).

The Protocol is also an illustrative example of the tools that the international community can use to monitor the implementation of the legal norms it has established. At the time of ratification or accession to the Protocol, each State Party shall make a declaration stating the minimum age at which it permits voluntary recruitment into its national armed forces and setting forth the guarantees adopted by the State to ensure that such recruitment is not of a forced or coercive nature.

Of course, when analyzing the norms of international legal acts, it is impossible not to mention the Geneva Conventions and their Additional Protocols. In the context of the status of the child during armed conflict, it is necessary to refer to the Geneva Convention relative to the Protection of Civilian Persons in Time of War (hereinafter - Geneva Convention IV) [7]. The approach chosen in Geneva Convention IV is rather ambiguous in the context of determining the age-based approach to children. Several categories of children can be traced throughout Geneva Convention IV, depending on their age: children under 15, mothers with children under 7, and pregnant women and maternity cases (i.e., unborn children are also protected). At the same time, the Convention does not define a “child”.

In the Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) [8], a different approach has already been applied, namely, the concept of “children” is used. The age differentiation of children is made only in relation to their involvement in military formations.

In conclusion, it should be noted that at the time of the adoption of both Geneva Convention IV and Additional Protocol I, the concept of “child” and its age limits had not yet been fixed at the international level. Thus, the concept of “child” was reflected in the national legislation of each state separately.

For Ukraine, the norms of international legal acts are one of the most important sources for the formation of national legislation. The issue of the definition of a “child” both in general and during an armed conflict in particular is no exception.

At the level of the Main Law [9] of our country, it is stated that the family, childhood, maternity and paternity are protected by the state (Article 51).

The Constitution of Ukraine also provides for a general rule that children are equal in their rights regardless of their origin and whether they are born in or out of wedlock (Article 52).

The definition of a “child” is set out in the Law of Ukraine “On Protection of Childhood” [10] – a child is a person under the age of 18 (majority), unless, according to the law applicable to him or her, he or she acquires the rights of an adult earlier. This definition completely duplicates the definition of a child in the Convention on the Rights of the Child.

However, this is not the only definition of a “child” in Ukrainian law. In the Family Code of Ukraine [11], the legislator also enshrined it, but in a different wording, namely, a “child” is a person before reaching the age of majority.

The second definition focuses exclusively on age and does not contain any exceptions.

At the same time, the Family Code of Ukraine divides childhood into two categories: 1) a minimally capable child – a child under the age of fourteen; 2) a minor child – a child between the ages of fourteen and eighteen.

This provision correlates with the provisions of the Civil Code of Ukraine [12], which also uses the concepts of a minimally capable and a minor. According to the current Ukrainian legislation, a minimally capable person has partial civil capacity of a natural person and already has the right to independently perform small domestic transactions, exercise personal non-property rights to the results of intellectual and creative activity protected by law. At the same time, a minor is not liable for any damage caused by him or her (Article 31 of the Civil Code of Ukraine).

A minor acquires incomplete civil capacity, which allows him/her to independently dispose of his/her earnings, scholarship or other income; independently exercise the rights to the results of intellectual and creative activity protected by law; be a participant (founder) of legal entities, unless prohibited by law or the constituent documents of the legal entity; independently conclude a bank deposit (account) agreement and dispose of the deposit made in his/her name (funds on the account); independently conclude an agreement on obtaining a loan or other credit.

All other transactions are performed by a minor with the consent of his or her parents (adoptive parents) or guardians.

The Civil Code of Ukraine stipulates that full civil capacity is acquired from the moment a person reaches the age of majority (18 years).

At the same time, the Ukrainian legislator allows for the acquisition of full civil capacity before reaching the age of majority:

- in case of registration of marriage of an individual who has not reached the age of majority (in case of termination of marriage before the person reaches the age of majority, the full civil capacity acquired by him/her is preserved) (Article 34 of the Civil Code of Ukraine);
- an individual who has reached the age of sixteen and works under an employment contract (Article 35 of the Civil Code of Ukraine);
- a minor who is registered as the child's mother or father (Article 35 of the Civil Code of Ukraine). Minor parents have the same rights and obligations towards the child as adult parents and can exercise them independently (Article 156 of the Family Code of Ukraine);
- an individual who has reached the age of sixteen and wishes to engage in entrepreneurial activity (Article 35 of the Civil Code of Ukraine).

It is also stipulated that an individual who has reached the age of fourteen freely chooses his/her place of residence (Article 29 of the Civil Code of Ukraine).

The full civil capacity granted to an individual extends to all civil rights and obligations and is retained by the individual in the event that the grounds for obtaining it cease to be valid.

The recent development of the national legal framework on the protection of children during armed conflict can be noted. In particular:

Amendments to the Law of Ukraine “On Protection of Childhood” in terms of adding the concept of “child affected by military operations and armed conflicts”;

Procedure for granting the status of a child affected by hostilities and armed conflicts [13];

Amendments to the Procedure for Evacuation in Case of Threat or Occurrence of Emergency Situations, which introduced a mechanism for forced evacuation of children in the area of military operations and armed conflicts [14];

The Law of Ukraine “On Social Protection and Support of Children Affected by the Armed Aggression of the Russian Federation against Ukraine and Amendments to Certain Legislative Acts of Ukraine on the Regulation of Social Services and Benefits” [15];

Some issues of identification and return of children deported or forcibly displaced as a result of the armed aggression of the Russian Federation against Ukraine [16], etc.

The above legal acts do not contain a unified approach to the definition of “child”. For example, the Procedure for granting the status of a child affected by hostilities and armed conflicts uses the following wording – “a child, as well as a person who at the time of hostilities, armed conflicts, armed aggression of the Russian Federation has not reached the age of 18 (majority)”.

The Law of Ukraine “On Social Protection and Support of Children Affected by the Armed Aggression of the Russian Federation against Ukraine and Amendments to Certain Legislative Acts of Ukraine on the Regulation of Social Services and Benefits” simply uses the term “child” with a reference to the Law of Ukraine “On Protection of Childhood”.

The Procedure for Identification, Return, Accompaniment and Reintegration of Children Deported or Forcibly Displaced as a Result of the Armed Aggression of the Russian Federation against Ukraine uses the term “deported child” to mean any person under the age of 18.

The Procedure for Evacuation in the Event of a Threat or Emergency, which introduced compulsory evacuation by force, uses the term “child” without any conceptual definition.

Conclusions. Summarizing the above, the following conclusions can be drawn. First, regarding the international regulation of the definition of a child. Since 1989, the international community has established that a child is a person under the age of 18, unless under the law applicable to the person concerned, he or she reaches the age of majority earlier. The international community has not established a separate definition of a child during armed conflict. The Geneva Convention IV also does not define a child, but only differentiates between the ages of children and, depending on this, certain additional elements of their protection.

Secondly, regarding the Ukrainian regulation of the definition of a “child” in general and during armed conflict in particular. Thus, in the Law of Ukraine “On Protection of Childhood”, the definition of “child” completely duplicates the Convention on the Rights of the Child. Thus, this law took into account the peculiarities of domestic legislation when a person under the age of 18 can acquire the rights of an adult (marriage, birth of a child, entrepreneurship, etc.). According to the current legislation, such a person begins to have all rights and obligations from that moment on.

At the same time, a number of legal acts are being adopted in the domestic legal framework to protect children during armed conflict. These legal acts use the term “child” exclusively as a person under the age of 18. This approach is not consistent with the existing legal acts on the issue under study.

On the one hand, the state thus provides more protection to persons under 18, regardless of whether they already have full legal capacity. On the other hand, the state thus restricts persons who have acquired the rights of an adult before the age of 18.

From the point of view of both legal technique and regulation of the rights and obligations of citizens, we believe that it is more appropriate to use the term “child” as already established in both the Convention on the Rights of the Child and the Law of Ukraine “On Protection of Childhood”.

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Чепкова К. Співвідношення поняття «дитина» в міжнародно-правових актах та українських нормативно-правових актах під час збройного конфлікту

Анотація. У статті досліджується визначення поняття «дитина» на двох рівнях: міжнародному та національному. Автор аналізує як міжнародно-правові акти (Конвенція про права дитини (1989), Факультативний протокол щодо участі дітей у збройних конфліктах (2000), Женевська конвенція про захист цивільного населення під час війни (1949) та Додатковий протокол до неї (1977) тощо), так і національні, Цивільний кодекс України, Сімейний кодекс України).

Автор аналізує особливості українського законодавства щодо таких категорій, як «малолітня особа» та «неповнолітня особа», які наділяють особу різним обсягом прав та обов'язків. У статті проаналізовано можливості отримання неповнолітньою особою прав повнолітньої раніше досягнення 18 років та обсяг її прав та обов'язків після цього.

Автор звертає увагу на «новинки» національного законодавства щодо визначення поняття «дитина» під час збройного конфлікту. Зокрема, у Законах України «Про охорону дитинства» та «Про соціальний захист і підтримку дітей, які постраждали внаслідок збройної агресії Російської Федерації проти України», Порядку надання статусу дитини, яка постраждала внаслідок воєнних дій та збройних конфліктів (2017), Змінах до Порядку проведення евакуації у разі загрози виникнення або виникнення надзвичайних ситуацій (2023), Порядку виявлення, повернення, забезпечення супроводу та реінтеграції дітей, депортованих або примусово переміщених внаслідок збройної агресії Російської Федерації проти України (2024), затверджених постановами Кабінету Міністрів України, тощо.

На основі порівняння існуючих визначень поняття «дитина» автор робить висновок про відсутність єдиного підходу до цього питання. Вітчизняний нормотворець не враховує особливості вже існуючого поділу «дитячого віку» на малолітніх осіб та неповнолітніх осіб під час формування чинної нормативно-правової бази. З одного боку, держава таким чином надає більший захист особам, які не досягли 18 років, незалежно від того, чи мають вони вже повну дієздатність. З іншої сторони, чи держава таким чином не буде обмежувати осіб, які набули прав повнолітньої особи до досягнення 18 років? В подальшому це може призвести для формування подвійних тлумачень при формуванні та застосуванні механізмів захисту дітей під час збройного конфлікту.

Ключові слова: дитина, збройний конфлікт, малолітня особа, неповнолітня особа.