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## ISSUE OF MATERIAL OF SEXUAL EXPLOITATION OF A MINOR

### Abstract:

*In our environment, the legal system, and the awareness of citizens, the problem of exploitation of minors and children has not been adequately addressed, despite the fact that a decade ago there was an operative action “Armageddon” by the Ministry of Interior of Republic of Serbia. One would say that childhood diseases were overcome in the first moments of implementation in the legislation with the omissions made by the professional public and the expert services of the parliament, as well as the working groups on the drafting of the Criminal Code and accompanying systematic acts. Of course, that was not the case. Even today, it can be said that there are shortcomings, ambiguities, inadequate implementation and implementation of Council of Europe conventions in our legislation. The authors discuss the status and situations in legal discourse, the positive and negative elements in the existing system, point to comparative - legal and comparatively terminological issues, trying, without success, to arrive at an ideal solution. Nevertheless they rise the right question.*

**Key words:** *exploitation of minors and children for pornographic purposes, “child pornography”, terminological determinants, inadequate implementation of standards.*

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## INTRODUCTION

A person's need to understand the processes and events<sup>4</sup> around him (or her) is as old as the mankind itself. The ways in which mankind has succeeded to do that, have changed and adapted to the advancement of technology and society. Of course, all complexity was created from progress and then vice versa, and so this has remained a cyclical process to this day, which never stops. In such a defined narrative about humanity globally, crime is also indispensable, which is also a phenomenon that has taken on new forms, changed and progressed since its inception. Through its cyclical movement, crime has never disappeared, only emerging in new forms, depending on the place and era of progress in which people were. It was the people who were changing and re-adapting the crime not only to technology, but to themselves and their minds and that is why they was so separate, each one for him (her)self. But the specimens of human species on the other, "right" side of the law did not want to lose this race, and were constantly trying to be one step ahead of the crimes and their perpetrators. For this to be possible, it had to go to the core of the "complexity" that creates and commits crime. This complexity, the human mind, is infinite in its capabilities, and technology is merely a tool to execute human orders.

Criminalistics, in its complexity, penetrates every detail of the crime and obtains answers from all sides, in order to examine the crime in detail, study it in detail, study it and learn lessons for the future. It is in this process, which is immensely more complex than the one stated in the preceding sentence, that we have come up with two questions among those nine golden questions (of criminalistics) that lead us into the maze of the human mind and allow us to grasp, or at least try, this vast machinery behind the question of how the criminal act was done. These are questions of How? and Why?. The manner (*modus operandi* – MOs) and the motive go hand in hand, because the fighters of crime have realized that in every way they will find something of the motive and that in the future perceived ways – manners (MOs), if perceived well and meaningfully, they will find a motive, and this can be the first step to finding one the offender – solving the crime. As we said before, there can be as many perpetrators as MOs, but motives can usually be grouped into a couple of larger categories of recurring motives, and this can be the key to classifying MOs, thus preventing the initial adverse hypothesis that there are just as many perpetrators and that it is therefore impossible to be

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<sup>4</sup> Gordana Gasmi, "European Legal Standards of Combating Violence Against Women and Domestic Violence", *Nauka i društvo (Science and society)*, No 1, 2019, p. 29.

one step ahead of them. Given that police officers come first in touch with the consequences of the act, whether in the form of testimonials from participants or material traces, these consequences directly indicate how the act was committed. From these consequences, we can conclude or infer and start tracing backwards, ie. from the end to the beginning, and in the beginning we will find the “idea creator” and the one we are just looking for. This is why MOs is so important and knowing how to properly use it to our advantage gives a huge advantage in the combat against crime.

The role of children and their importance to society as its most vulnerable members, but the future bearers of every segment of life, need not be discussed separately. The participation of all adults, irrespective of their positions, is unquestionable in protecting children and preserving their health and integrity. Sexual exploitation of children and minors by adults has always been a particularly sensitive topic, one that even goes into taboo, something that it is a shame to talk about and take part in in saving a young life. This is why it is even more important in raising awareness of the vulnerability of the child and the dangers that adults may pose. Children cannot protect themselves in situations where they have been sexually abused by adults and it takes a lot of time and effort to gain the trust of other adults, break the silence, and embark on the often long and painful process of solving problems and getting justice.

Speaking specifically about crimes where minors have been exploited for pornographic purposes, the modus operandi is nowadays almost entirely related to the internet and technology. Then, in accessing a reasonable observation of every part of this system, we must have knowledge of the very concept of pornography, its occurrence in crimes and abuse of children and minors, knowledge of legal and any other protection of children and minors, special knowledge of children and minors in general, and then technological knowledge of all possible trends in both software and hardware. All of this can be a complex system for ourselves, but we will do our best to cover the basics of each of these topics in order to have a complete picture and basis from which to begin dealing with the topic of abuse of minors and children for pornographic purposes.

## PORNOGRAPHY FROM ITS CREATION TO THE PRESENT

The term itself, pornography, comes from the Greek words πόρνη • (pórñē) f (genitive πόρνης); - harlot and γράφειν • (gráphein) f (genitive γράφω) - to write. In his “Lexicon of Foreign Words and Expressions”, Milan Vujaklija translates pornography as “anger in his “Lexicon of Foreign Words and Expressions”, Milan Vujaklija translates pornography as “a shameless literature into art, and a pornographic object would be one that is shamelessly painted or written, shabby.” Similar translation is found at Bratoljub Klaić, as “indecent fornication, picture”. Nowadays, pornography has almost completely transferred to be present on the internet, since without the internet it has a completely different flow of being in circulation. In the age of technology, pornography from the emergence to the criminal investigation of being removed from the “market” has been on the Internet. Therefore, these definitions are not an adequate description of the current state of affairs, but rather one of the main associations with pornography and the screen of the particular device on which it is displayed or the internet site from which it is downloaded.

With the development of the Internet, the amount and availability of information is increasing, while anonymity of the network gives users the freedom to access socially tabooed content without fear. According to 2009<sup>5</sup> statistics, 12% of all websites are pornographic content. Daily pornography searches make up 25% of all searches, making pornographic content the single largest online sites on the internet.

The deep web, the latest term that leads to mystification, is in fact a part of the internet that is not searchable for reasons that are not indexed, so classic web browsers do not see that part of the network, but there are other ways of indexing it (which are not of our interest here). Internet indexing involves creating a specific list of words that is linked to and associated with a particular web page, as a short page content that users do not see. The ability to create pages without any control has led to the emergence of a large number of non-indexed pages, so the deep web is several times larger than the searchable part of the internet, the data loss is very large, and the information gap is invaluable, which is why scientific teams are working to find a new type of search engine to include and non-indexed pages. From the point of view of pornography, it is important to note that most

<sup>5</sup> Statistical data have been taken from webpage <http://www.internetworldstats.com/stats.htm> <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/201> last time accessed 11.01.2020.

content such as paedophilia and true “snaf” movies is considered to be somewhere in the deep web.

The behaviour of internet users is different while on the internet than in real life situations. They adhere less to social norms, even when they do not use a pseudonym but their own name. Such behaviour is most similar to the effect of the masses, when people will shout things that they would not otherwise say, which is why reading a comment or telex under news or occurrence can give a false impression of public opinion, which falsely presumes that many more people opposed to something. People who do not have a negative attitude will often not write anything, unlike much louder opposite-thinkers, which will have an impact on both pro and cons votes and the frequency of negative comments. It is the same with negative social phenomena that begin or continue from the real world to the virtual. In a seemingly non-existent environment, the person in front sees only the screen of a particular device and does not have the developed awareness that the same processes take place in this virtual environment as in the real one; that there are also crimes, victims and perpetrators. The consequences of words or actions through the internet and technology are very real, visible and tangible, which is why high-tech (or cyber)crime as a term comes on the scene and carries with it a number of legislative, systemic and sociological changes in people’s lives. New institutions are being established, existing ones are being expanded, new laws are being created, and new social topics are being raised to keep everyone safe, both in the real world and on the Internet. The Law on the Organization and Jurisdiction of State Bodies for Combating High-Tech (or Cyber)Crime (“Official Gazette of RS”, No. 61 / 2005 and 104/2009) regulates the education, organization, jurisdiction and powers of special organizational units of state bodies to detect, prosecute and prosecute offenses determined by this law.

High-tech (or Cyber)crime is by the definition the commission of criminal offenses where computers, computer systems, computer networks, computer data, as well as their products, in material or electronic form, appear as objects or means of committing criminal offenses. In accordance with this legal definition, high-tech (or Cyber)crime also includes crimes where computers and computer networks occur as a means of committing criminal offenses of misuse of payment cards on the Internet, abuse in the field of electronic commerce and banking, child abuse for pornographic purposes on the Internet (so called child pornography), hate speech on the Internet (spreading national, racial, religious hatred and intolerance, etc.).

## **Sexual abuse of children and minors**

### *Correct terminology*

Before we begin our analysis of this topic, it is necessary to pay attention to terminology that has been recognized as harmful by the world's professional organizations, but has implanted itself as a coin in the people, and sadly in the legislation. Experts have recognized the harmfulness of terminology, which equates child sexual abuse with pornography, and created the 2016 Luxembourg Guidelines. They explain that pornography is a term used for adults engaging in consensual sexual acts that are (generally) legally distributed to the general public for their sexual pleasure. Criticism of this term in relation to children comes from the fact that "pornography" is increasingly normalized and may (inadvertently or not) contribute to weight loss, trivialization or even legitimization of actions what are actually child sexual abuse and/or sexual exploitation. Further, as in the terms described above, "child prostitution" and "child prostitute", the term "child pornography" risks insinuating that the acts were performed with the consent of the child and constitute legitimate sexual material. Therefore, the correct term would be "child sexual abuse" and "pornographic content created by the exploitation of a minor" rather than "child pornography".

So-called "child pornography" includes children who cannot (legally) consent to sexual acts to which they are exposed and who may be the victims of a crime. This is the general approach of the law enforcement sector in recent years, and it is leading the way in characterizing "child pornography" as forensic evidence of sexual abuse or exploitation of children. Law enforcement organizations in many countries, as well as Europol and Interpol internationally, tend to reject the term "child pornography" and use either "child sexual abuse material" or "child sexual exploitation material".

The "Luxembourg Guidelines" also refer to specific cases where photos or video content are created through a computer, but depicts children who have been sexually abused. Specifically, the term "computer-generated (or digitally) generated material for the sexual abuse of children" encompasses all forms of material depicting children engaged in sexual activities and/or in a sexual manner. What is specific in this is that the production of the material does not involve actual abuse and actual contact with the children, but it is artificially created to make it appear that the real children are depicted. This includes what is sometimes called "virtual child pornography" as well as "pseudo photographs." While most computer-gen-

erated material for child sexual abuse is computer-generated, it is important not to exclude the possibility that such material, for example, can be hand-drawn. Computer-generated child sexual abuse material is not illegal everywhere, although it can have a detrimental effect on children. There have been no such examples in the jurisprudence and cases in our country analysed in this paper, but given the evolution of technology and the ever-widening boundaries between the virtual and the real world, we should follow this “trend” and, if necessary, transfer it into a specific legal framework.

*(Unused) terminology in the country and the world*

Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS 201)<sup>6</sup> has not implemented the recommendations on correct terminology in the field of child sexual abuse, which we find extremely strange, given the role and importance of this European organization. The aforementioned Convention still uses the term “child pornography” and defines it as: “any material that visually depicts a child who has sexually or explicitly sexually explicitly acted or simulated child sexual organs for primarily sexual purposes” (Article 20, paragraph 2). This Convention provides for States Parties to sanction: the production of child pornography; providing or making available child pornography; distribution or transmission of child pornography; obtaining child pornography for themselves or another person; possession of child pornography; knowingly obtaining and accessing child pornography through information and communication technologies. Also, the Convention on High-Tech Crime uses the term “child pornography, which states that, among other criteria, child pornography includes a person who appears to be a minor (Article 9, paragraph 2, item b), who is engaged in an explicit sexual act. It is necessary to ask what parameters can objectively be interpreted to mean that a person “looks” like a minor. It would also be logical that in the case of a pornographic play depicting a person who is 19 years old and who “looks” like is a minor, despite its willingness, there are sufficient grounds for prosecution. Although logically it would be desirable to leave less space which is subject to different interpretations, due to the sensitivity of the topic and categories that protects these definitions.

Neither has domestic legislation implemented recommendations to change terminology for the protection of children and minors, and pornographic content arising

<sup>6</sup> <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/201> last time accessed 11.01.2020.

from the exploitation of a minor (what the legislator calls child pornography) is based on an explicit legal provision (Article 185 (6) Criminal Code – CC). material that visually depicts a minor engaging in actual or simulated sexually explicit behaviour, as well as any depiction of the sexual organs of a child for sexual purposes. Analyzing the Republic of Serbia's Criminal Code, especially Art. 112, explaining the meaning of the terms of this Code, it can be seen that the legislature nowhere explicitly states what the term pornography actually means. This omission diminishes the clarity of the criminal law provisions that are related to this term, so defining the concept of pornography from a criminal point of view is extremely important. The criminal law definition of pornography must necessarily rely on the social sources of the term.

### **Criminal law framework in Serbia for combating child pornography**

#### *Criminal Law*

For the first time, criminal offenses concerning high-tech crime in the Republic of Serbia were criminalized in the RS Criminal Code in 2003. This was expected and necessary, given that technological advances did not bypass Serbia, and there needed to be some legal framework in place to regulate any possible unlawful behaviour on the internet and via technology in general. With minor changes, the Serbian Penal Code of 2005 took over existing criminal offenses, thus allowing Serbia joining a little later to those countries that have legally regulated the punishment of various types of misuse of computers and computer technology.

Within the defined manifestations of high-tech crime, criminal offenses belong to the group consisting of acts against the freedoms and rights of man and citizen, sexual freedom, public order and peace, and the constitutional order and security of the Republic of Serbia, which because of the manner of perpetration or the means used may be considered criminal acts of high-tech crime. Also, by adopting the Law on Amendments to the Criminal Code in 2009, changes were made to the legal description of the criminal offense of displaying pornographic material and exploitation of children for pornography (Article 185 CC), and two new criminal offenses were introduced: Indication of a minor to attend sexual acts (Article 185a CC) and use of a computer network or communication with other technical means for committing criminal offenses against sexual freedom against a minor (Article 185b CC).



Finally, in the current Criminal Code, it looks like this:

Displaying, obtaining and possessing pornographic material and exploiting a  
minor for pornography

(Article 185)

(1) Whoever sells, displays, or publicly presents or otherwise makes available texts, images, audio-visual or other objects of pornographic content to a minor, or shows him a pornographic performance, shall be punished by a fine or imprisonment for a term not exceeding six months.

(2) Whoever uses a minor for the production of images, audio-visual or other objects of pornographic content or for pornographic performance shall be punished by imprisonment for a term between six months and five years.

(3) If the act referred to in para. 1 and 2 of this Article committed against a child (0-14 years old), the perpetrator shall be punished for the offense referred to in paragraph 1 by imprisonment for a term between six months and three years, and for the offense referred to in paragraph 2 by imprisonment for a term between one and eight years.

(4) Whoever procures for him(her)self or another, owns, sells, displays, publicly exhibits or electronically or otherwise makes available images, audio-visual or other objects of pornographic content resulting from the exploitation of a minor, shall be punished by imprisonment for a term between three months and three years .

(5) Who, through the means of information technology, knowingly accesses images, audio-visual or other objects of pornographic content resulting from the exploitation of a minor, shall be punished by a fine or imprisonment of up to six months.

(6) As such, subject of pornographic content resulting from the exploitation of a minor (child pornography) shall be considered any material that visually depicts a minor engaged in actual or simulated sexually explicit behaviour, as well as any depiction of the sexual organs of a child for sexual purposes.

(7) The objects of para. 1 to 4 of this Article shall be forfeited.

Accordingly, the basic and the more severe form of this crime can be perpetrated against the minor, and a new more severe form is added (by last changes of CC), which exists if either of the first two forms is perpetrated against to the child (0-14). Criminal offenses, as last amended, basically, can take four forms. The first form of the act exists when to the minor is sold, displayed or publicly presented, or otherwise made available texts, images, audio-visual or other objects of pornographic content or is presented with pornographic performances. For this form of criminal offense is proscribed fine or imprisonment of up to six months (Article 185, paragraph 1 of the CC). Thus, in the first case, pornography is made available to the minor, while in the second form involves the exploitation of the minor for the production of objects or performances of pornographic content. Second form of this criminal act exists in the situation of exploitation of minors for the production of images, audio-visual or other objects of pornographic content or for pornographic performance. A person who takes a photographic, film or other footage of a minor for the purpose of producing pornographic content or forcing him to participate in a pornographic play will commit the offense of exploiting a minor for pornography. For the second form of the offense there is proscribed a sentence of six months to five years in prison (Article 185, paragraph 2 of the CC).

The third form is a qualified form of the first and second parts and exists if any of these acts were perpetrated against the child. For a first offense against a child, a prison sentence of 6 months to 3 years is provided, while for a second offense against a child, a sentence of imprisonment of 1 to 8 years is provided (Art. 185 (3) CC). The fourth form is a special form of act that exists when a person obtains for himself or another, owns, sells, displays, publicly exhibits or electronically and otherwise makes available images, audio-visual and other objects of pornographic content created by exploitation of a minor. The proscribed sentence for the fourth form of the offense is imprisonment for three months to three years (Article 185, paragraph 4 of the CC). So it's about spreading and marketing child pornography. The fifth paragraph stipulates that the objects created by the perpetration of the above three forms of act will be seized (Article 185, paragraph 5 of the CC).

#### *Other legal acts*

In addition to the Criminal Code, there are other legal acts that form the legal framework for combating the exploitation of children and minors for pornographic purposes. Some of these are: Law on Special Measures to Prevent the Commitment of Criminal Offenses Against Sexual Freedom against Minors ("RS Official

Gazette”, No. 32/2013), Criminal Procedure Code (“RS Official Gazette, No. 72 / 2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014 and 35/2019), Law on Organization and Competence of State Bodies for Combating High-Tech Crime (“Official Gazette of RS”, No. 61 / 2005 and 104/2009), Regulation on the Safety and Protection of Children in the Use of Information and Communication Technologies (“Official Gazette of RS, No. 61/2016.) When talking about all these laws, it is important that We emphasize the importance of extending the term “child” to “juvenile” because it is necessary to protect all victims of these crimes who are minors, not just those who belong to the age group of children by law. Law on minors as criminal perpetrators and criminal procedure protection of minors in Article 3 states the Age of the offender as a clearly defined category, with division into younger and older juveniles, younger adults, but also the demarcation with respect to children in Article 2. Therefore, it is necessary to harmonize other acts with the existing legal provisions in order to more clearly define what this vulnerable age group and its protection.

In the Law on Special Measures for Prevention of Committing Crimes against the Sexual Freedom of Minors, the introductory provision states that this Law prescribes special measures to be applied to the perpetrators of sexual offenses committed against minors specified in this Law and regulates the running of special records of persons convicted for these criminal acts.

This law applies to perpetrators who have committed the following offenses:

- 1) Rape (Article 178, paragraphs 3 and 4 of the Criminal Code);
- 2) Sexual act against a helpless person (Article 179, paragraphs 2 and 3 of the Criminal Code);
- 3) Sexual act with the child (Article 180 of the Criminal Code);
- 4) Sexual act of abuse of office (Article 181 of the Criminal Code);
- 5) Unlawful sexual acts (Article 182 of the Criminal Code);
- 6) Undertaking and facilitating sexual intercourse (Article 183 of the Criminal Code);
- 7) Intermediation in the practice of prostitution (Article 184, paragraph 2 of the Criminal Code);
- 8) Displaying, obtaining and possessing pornographic material and exploiting a minor for pornographic (Article 185 of the Criminal Code);
- 9) Instigation of a minor to attend sexual acts (Article 185a of the Criminal Code);

10) Exploitation of a computer network or communication by other technical means for committing crimes against sexual freedom against a minor (Article 185b of the Criminal Code).

What is particularly interesting about this law is that it prescribes special measures that apply to perpetrators after serving a prison sentence, as well as certain legal consequences of a conviction. We consider this an excellent way of preventing and controlling perpetrators, given the high level of recidivism in the perpetrators. However, it remains unclear whether these special measures apply only if the sentence imposed a sentence of imprisonment as stated, which in fact applies to a small number of judgments, given that most of the convictions are conditional or fined. The type of sanction and the severity of punishment is always a concept that is subjectively perceived in society. The fact is that repression also has a preventive role to play here and that imposing maximum proscribed sentences would create a climate in a society where it is clear to all that the state has zero tolerance when exploiting children and minors for pornographic purposes and other forms of child sexual abuse and the minor in question.

Special measures and additional solutions offered by other laws must be used to the maximum; all branches of society must be adequately involved in order to protect children and minors. Discussions on these topics highlight a huge lack of quality databases and generally state-supported research. The acts that have already been committed must serve as a source of information, knowledge and tools for the fight against the future, in order to adapt and improve legal norms, and to improve and transform the work of police, prosecutors and courts in accordance with current technological trends.

## CONCLUSION

The presented theoretical, criminal - legal, criminological and legislative framework provides a relatively optimal space for action by the competent authorities in this field. If this involves additional activities in the signing and implementation of the norms of international conventions, for example Lanzarote CETS 201, into domestic legislation, by-laws, but generally the relationship at the global level is not absolutely satisfactory in this respect. Namely, while everyone is sworn in the application of the norms of international acts, the overall, systematic and comprehensive implementation must have absolute uniformity, even in terms of terms, as well as their absolute strict application. The most probable reason for not bal-

ancing terminological terms is the fact that in most parts of the world it is normal to use the term “child pornography” despite certain explanations, clarifications and arguments. How and on what manner or by which tools to combat such phenomena? In the same way as explained in this text, very plastic and completely realistic explaining, defining uniform definitions, harmonizing in implementation, and rejecting inappropriate terms and interpreting phenomena.

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## ИСКОРИШЋАВАЊЕ МАЛОЛЕТНИКА И ДЕЦЕ КАО ПИТАЊЕ И ПРОБЛЕМ

### Апстракт

У нашем окружењу, правном систему, свести грађана проблем искоришћавања малолетника и деце није довољно адекватно разматран, без обзира што већ једну деценију уназад постоји оперативна акција „Армагедон“ МУП-а РС. У првим моментима имплементације у законодавству са пропустима које су и стручна јавност и стручне службе парламента, као и радне групе на изради Кривичног законика али и пратећих системских аката направиле, рекло би се да су се дечје болести превазишле. Наравно, то није био случај. И данас, може се рећи да постоје недостаци, недоречености, неадекватна примена и имплементација конвенција Савета Европе у наше законодавство. Аутори разматрају стање и ситуације у правном дискурсу, позитивне и негативне елементе у постојећем систему, указују на упоредно – правну и упоредно терминолошку проблематику, покушавајући, безуспешно, да дођу до идеалног решења.

**Кључне речи:** искоришћавање малолетника и деце у порнографске сврхе, „дечја порнографија“, терминолошке одреднице, неадекватна имплементација норми.