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Protection of Children against Domestic Violence
Master Thesis

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ABBREVIATIONS

CCP - Code of Criminal Procedure

CRC, UNCRC - the United Nations Convention on Rights of the Child

ECHR - European Convention for the Protection of Human Rights and Fundamental Freedoms

ECtHR - The European Court of Human Rights

EU – European Union

GC No. 8 - General comment No. 8

GC No. 13- General comment No. 13

GREVIO - Group of experts on action against violence against women and domestic violence

TEU – Treaty on the European Union

EU FR Charter - Charter of Fundamental Rights of the European Union

Directive 2011/93/EU - Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA

The Committee – the Committee on the Rights of a Child

The Lanzarote Convention – the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse

The Istanbul Convention - the Council of Europe Convention on preventing and combating violence against women and domestic violence

TFEU - Treaty on the Functioning of the European Union

Victims' Directive - DIRECTIVE 2012/29/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 October 2012 establishing minimum standards on the rights, support, and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA

INTRODUCTION

Relevance of final thesis. “There are many terrible things in the world, but the worst is when a child is afraid of his father, mother or teacher” - important words of Polish famous doctor Janush Korczak.¹

For a long time, up to 20th-century children were not entitled to special protection, they were not considered as separate persons, but rather as an unformed being under full control of parents. In these circumstances, the use of violence within the family was not excluded at all, but rather frequently used.² The problem of domestic violence has always existed and very often it is children who become the victim of violence from their parents, guardians or other relatives.

The historical development of children's rights started with the foundation of the League of Nations and the Geneva Declaration of the Rights of the Child.³ However, the most important legal document is, without any doubt the United Nations Convention on Rights of the Child (hereinafter – UNCRC or CRC)⁴. This convention has been ratified by 195 countries in the world and made it the most ratified human rights treaty.⁵ It was one of the first documents, which determined that every child should be protected from violence, including committed within the family. The Council of Europe made a huge step in the field of protection of children from domestic violence. In the framework of the organization, two important documents were adopted: The Council of Europe Convention on preventing and combating violence against women and domestic violence (hereinafter –the Istanbul Convention)⁶ and the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (hereinafter –the Lanzarote Convention).⁷

The problem of domestic violence against children exists all over the world. The majority of offenses against children in Ukraine are committed within the family. Children are often affected by physical abuse, psychological violence or even sexual violence, which can be caused by any reason. Domestic violence has been widely discussed in recent years. Much attention is paid to women as victims of domestic violence, although it should be noted that children also suffer from this negative phenomenon. Often children become witnesses of domestic violence, and

¹ Thomas Hammarberg, *Human Rights in Europe: No Grounds for Complacency*, (Council of Europe, 2011), 18.

² Н.М. Оніщенко et al., “Права і свободи дитини: вступ до проблеми”, *Часопис Київського університету права* 2 (2013).

³ “Geneva declaration of the Rights of the Child”, OHCHR, accessed 2019 September 13 <http://cpd.org.rs/wp-content/uploads/2017/11/01 - Declaration of Geneva 1924.pdf>

⁴ “United Nations Convention on the Rights of the Child”, OHCHR, accessed 2019 September 16 <https://www.ohchr.org/documents/professionalinterest/crc.pdf>.

⁵ “What is the Convention on the Rights of the Child?”, UNICEF, accessed on 2019 September 10 <https://www.unicef.org/child-rights-convention/what-is-the-convention>

⁶ “Council of Europe Convention on preventing and combating violence against women and domestic violence”, Council of Europe, accessed on 2019 August 01, <https://rm.coe.int/168046031c>

⁷ “Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse”, Council of Europe Treaty Series, accessed on 2019 September 01, <https://rm.coe.int/1680084822>.

what even worse, children become direct victims of violence. Domestic violence causes many negative consequences, such as disturbance of psycho-emotional state, problems with behavior, concentration, development. Moreover, children may lose their empathy to other people, become more prone to bullying and aggression. Besides, studies show that children who are victims of domestic violence are more likely to adhere to this pattern in adulthood in their own families.⁸

Because of the fruitful cooperation of the Ukrainian deputies with the activists of the women's and youth movements, on November 15, 2001, the Law of Ukraine "On Prevention of violence in the family" was adopted. It becomes the first comprehensive legal document in the Commonwealth of Independent States and Eastern European countries aimed at preventing this socially negative phenomenon.⁹ Unfortunately, this instrument was not effective enough, contained a narrow list of persons to whom it extended its legal force and did not have sufficient tools to protect the victim, especially children. Therefore, Ukraine has recently adopted new laws and regulations in the field of protection against domestic violence, such as the Law of Ukraine "On Prevention and Countering Domestic Violence"¹⁰. Also, amendments to the Civil Procedure Code of Ukraine, the Code of Ukraine on Administrative Offenses, Criminal Code of Ukraine and Criminal Procedure Code of Ukraine were made.¹¹

Ukraine was among the countries that drafted The Council of Europe Convention on preventing and combating violence against women and it was signed by Ukraine on November 7, 2011.¹² However, it has not yet been ratified. Ratification is particularly necessary for Ukraine, for the effective implementation of the fundamental principles and for the possibility to Council of Europe to control how Ukraine fulfills its commitments in the field of protection against domestic violence.

Despite the changes, which have been made, the problem of domestic violence against children remains urgent. According to the statistics, approximately 3 mln of children in Ukraine are victims of domestic violence, either directly or indirectly.¹³ It is the high tolerance of physical punishment of children among the Ukrainian. Furthermore, the majority of Ukrainians are still live with the principle "It is not my business". Moreover, the legislation is new and needs to be

⁸"Behind Closed Doors. The Impact of Domestic Violence on Children", UNICEF, accessed on 2019 September 03 <https://www.unicef.org/media/files/BehindClosedDoors.pdf>

⁹ А.В. Запорожець et al., *Домашнє насильство та Діяльність органів Міністерства внутрішніх справ з його подолання: Навчально-методичний посібник для курсантів Вищих навчальних закладів Міністерства Внутрішніх справ України*, (Київ, 2012), 11, <https://www.osce.org/uk/ukraine/93319?download=true>

¹⁰ Закон України "Про запобігання та протидію домашньому насильству № 2229-VIII", Відомості Верховної ради України, accessed 2019 September 01 <https://zakon.rada.gov.ua/laws/show/2229-19>

¹¹ Закон України "Про внесення змін до Кримінального кодексу України щодо захисту дітей від сексуальних зловживань та сексуальної експлуатації 14.03.2018 № 2334-VIII", Відомості Верховної ради України, accessed 2019 October 13, <https://zakon.rada.gov.ua/laws/show/2334-19>.

¹²"Chart of signatures and ratifications of Council of Europe Convention on preventing and combating violence against women and domestic violence", Council of Europe, accessed 2019 October 10, <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/signatures>

¹³ Маріяна Вербовська "Верховна Рада ухвалила закон проти домашнього насильства", ZAXID.NET, December 6, 2017, accessed 2019 September 2019, <https://zaxid.net/verhovna-rada-uhvalila-zakon-proti-domashnogo-nasilstva-n1443399>.

improved, there is no proper enforcement practice, and there is opposition to the ratification of The Council of Europe Convention on preventing and combating violence against women.

Problem of research. The main problem is the inconsistency of the legislation of Ukraine with the existing international and European standards and the inability to effectively protect children from domestic violence. The components of this problem are the lack of proper monitoring mechanisms for children's rights and protection from domestic violence, the existence of legal gaps in the criminal procedural law concerning crimes connected with domestic violence. Another problem is the lack of application by the courts of the principle of the best interests of the child in domestic violence cases. The existence and application of fine as a sanction for committing domestic violence, which is considered ineffective and often leads to revictimization. Moreover, non-ratification by Ukraine of The Council of Europe Convention on preventing and combating violence against women significantly lowers standards of protection against domestic violence and deprives Ukraine of an effective mechanism of monitoring.

Scientific novelty and overview of the research on the selected topic. Regarding the issue of regulation of protection against domestic violence at the international level, major international organizations have developed explanatory reports¹⁴ and comments¹⁵ on the conventions and main provisions. In addition, the basic principles and standards of these conventions have been analyzed in the papers of scholars (Doek¹⁶, Bitenski¹⁷, Tołpa¹⁸). The case-law of the European Court of Human Rights on domestic violence situations has been partially analyzed, however, not focusing on cases involving violence against children.¹⁹

However, since the legislation of Ukraine in the field of protection against domestic violence has changed today, there are not many scientific papers on this topic. Moreover, the majority of papers focuses on common issues without addressing the specific issue of child protection. For the most, they provide some general overview of the legislation, as well as an analysis of new provisions such as the application of emergency protective orders and restrictive orders²⁰. Some papers deal with the analysis of administrative responsibility for domestic violence

¹⁴ "Explanatory report of Council of Europe Convention on preventing and combating violence against women and domestic violence", para 41, Council of Europe, accessed 2019 September 04, <https://rm.coe.int/16800d383a>.

¹⁵ "General comment No. 13 (2011) The right of the child to freedom from all forms of violence", Committee on the Rights of the Child, accessed 2019 September 15, https://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.13_en.pdf.

¹⁶See, for example, Jaap E. Doek, "Child Abuse and Neglect: Article 19 CRC", *International Journal of Children's Rights* 2, no. 1 (1994) <https://heinonline-org.skaitykla.mruni.eu/HOL/P?h=hein.journals/intjchrb2&i=98>

¹⁷See, for example, Susan H. Bitensky, "The United Nations Convention on the Rights of the Child and Corporal Punishment of Children: Ramifications for the United States", *Geo. J. on Fighting Poverty* 226,(1997-1998), <https://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1007&context=facpubs>.

¹⁸See, for example, Ilona Topa and Magdalena Póltorak, "Council of Europe Convention on Preventing and Combating Violence Against Women (Istanbul Convention)", *Gender Equality Encyclopedia of the UN Sustainable Development Goals*, (2019).

¹⁹See, for example, Jamil Ddamulira Mujuzi, "Preventing and Combating Domestic Violence in Europe: The Jurisprudence of the European Court of Human Rights", *International Survey of Family Law* (2016).

²⁰ See, for example, Катерина Левченко та Легенька Марина "Терміновий заборонний припис та обмежувальний припис як особлива форма відповіді на домашнє насильство: міжнародний досвід та національна практика ", *Право та Безпека*, 71(4) (2018). doi: 10.32631/pb.2018.4.08.

and partly highlight the problem of applying fines as sanctions²¹. The analysis of the crime of domestic violence²², as well as the analysis of other changes to the provisions of the Criminal Code of Ukraine, are partially covered by scholars²³. However, there is no detailed analysis of the procedural provisions and issues of monitoring and separation of a child with a family.

Significance of research. The detailed analysis of the United Nations Convention, Conventions of Council of Europe and European Union legislation will help to define main standards and principles of protection and to and will help determine whether Ukrainian legislation meets these standards. Moreover, an analysis of the case-law of the European Court of Human Rights will help to identify the basic principles applied by the Court to protect the rights of the child and to determine whether the courts of Ukraine properly protect the rights of children affected by domestic violence. Taken together, it will help determine whether Ukraine needs to improve its legislation and enforcement measures to effectively prevent domestic violence and protect victims of domestic violence.

The aim of the research. The thesis aims to comprehensively analyze the problem of domestic violence against children from different perspectives and to identify the main problems and obstacles for Ukraine to effectively protect children against domestic violence.

The objectives of the research. To achieve the established aim the research has the following objectives:

1. To determine an international, Council of Europe and European Union standards in a field of protection of children against domestic violence.
2. To analyze new Ukrainian legislation in a field of protection of children against domestic violence.
3. To identify the main problems connected with the protection of children from domestic violence and analyze whether Ukraine complies with standards in a field of protection against domestic violence.
4. To present the necessity for Ukraine to ratify the Council of Europe Convention on preventing and combating violence against women and domestic violence.

Research methodology. To achieve the aim of the thesis, the following methods were used:

1. Analytical method invoked in analysis of relevant international, European and national legislation.

²¹ Олена Ковальова, "Адміністративна відповідальність за вчинення домашнього насильства: особливості впровадження нового законодавства", *Південноукраїнський правничий часопис № 2*, (2018), <http://dspace.oduvs.edu.ua/handle/123456789/1267>.

²² Володимир Пивоваров та Анастасія Ілліна "Кримінологічний аналіз законодавства про запобігання та протидію домашньому насильству", *Порівняльно-аналітичне право №1*, (2018).

²³ Олександр Дудоров та Микола Хавронюк, *Відповідальність за домашнє насильство та насильство за ознакою статі (науковий та практичний коментар до новел Кримінального кодексу України)*, (Kyiv Waite, 2019), https://ukraine.unfpa.org/sites/default/files/pub-pdf/FNOON_Kommentar_A5.pdf

2. Descriptive method was used to present the new Ukrainian legal acts concerning the protection and prevention of domestic violence.
3. Comparative method was applied to determine differences in international and European legal acts and enforcement measures and national legislation of Ukraine.
4. Critical method was used to determine whether the national legislation and enforcement measures of Ukraine meet international and European standards of protection from domestic violence.
5. Systemic method was used throughout the thesis to analyze legal acts and draw conclusions.

Structure of research. The work consists of five main chapters and each of them is divided into subchapters to address the specific issue.

In the first chapter, the author analyzed the provisions of United Nation Conventions on the Protection of Children. Specifically, Article 19 of the UNCRC and states positive obligations enshrined in this article and General Comments of the UN Committee on the Rights of the Child. The second chapter deals with the conventions adopted within the Council of Europe and is divided into three sub-chapters. Each sub-chapters describes states' positive obligations under the Istanbul Convention, Lanzarote Convention, European Convention on Human Rights respectively and presents main principles adopted by the European Court of Human Rights.

The third chapter analyses the secondary legislation of the European Union, and the main issues of protection of children as victims of criminal offenses and protection from sexual exploitation and abuse.

The fourth chapter gives a general overview of the Ukrainian legislation about the protection of children from domestic violence. The author examined the new Law “On prevention and counteraction of domestic violence” as well as changes to the Criminal Code and Code of Administrative offenses and other legal documents.

The fifth chapter is dedicated to specific problems of the thesis as reporting, identifying and investigation of domestic violence, monitoring of such cases, the relevance of sanctions which applied to offenders and separation of the child from a family.

Defense statement. Ukraine does not fully meet the international and Council of Europe standards of child protection against domestic violence and does not provide adequate protection for children as victims and witnesses of violence.

1. PROTECTION OF CHILDREN AGAINST DOMESTIC VIOLENCE UNDER THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD

The United Nations Convention on the Rights of the Child (hereinafter – UNCRC or CRC) was ratified by majority countries of the world, it covers all aspects of a child's life.²⁴ The Preamble of the UNCRC proclaims that every child “[...]should grow up in a family environment, in an atmosphere of happiness, love, and understanding[...]”, but unfortunately occur situations when all this can be broken by violence, especially from family members.²⁵ That is why for the protection of children in the CRC exists Article 19, which obliges states to take measures to protect the child from all forms of violence.

The aforementioned Article 19 provides that all children should be equal in their human rights and have full respect for their dignity and physical and personal integrity. Furthermore, it requires protection from “[...] all forms of physical or mental violence,” while the child is in the care of parents or other persons.²⁶ In General Comment (hereinafter – GC No. 13) under the term “violence” is understood the following: “all forms, without exceptions, of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse and States are obliged to prevent, prohibit and respond to any of such acts.”²⁷ While this article does not concentrate only on domestic violence, the Committee on the Rights of the Child (hereinafter – the Committee) in its GC No.13 recognizes that the majority of violence takes place in the context of families²⁸. Furthermore, the GC No.13 prescribes that parents, foster or adoptive parents as potential perpetrators of violence.²⁹ Besides, the UNCRC recognizes a special role of a family and family relationships for a child, but it also not exclude a possibility to break a unity, where it is necessary for the best interest of the child (Article 9).³⁰

Under article 19, the state is obliged to undertake necessary protective measures. According to paragraph, 2 of Article of UNCRC such measures should include the establishment of the social programs; providing for the prevention, identification, reporting, referral, investigation, and treatment of violence against the child.³¹

²⁴“What is the UN Convention on Child Rights?”, UNICEF United Kingdom, accessed 2019 September 16 <https://www.unicef.org.uk/what-we-do/un-convention-child-rights/>.

²⁵“United Nations Convention on the Rights of the Child”, OHCHR, accessed 2019 September 16 <https://www.ohchr.org/documents/professionalinterest/crc.pdf>.

²⁶UNICEF Implementation Handbook for the Convention on the Rights of the Child: Fully Revised Third Edition, accessed 2019 September 17, (UNICEF 2007), 249.

²⁷Kirsten Sandberg *Children's Right to Protection Under the CRC*. Human Rights in Child Protection. (Palgrave Macmillan, Cham, 2018),19, https://link.springer.com/chapter/10.1007/978-3-319-94800-3_2

²⁸ “General comment No. 13 (2011) The right of the child to freedom from all forms of violence”, para 3(h), ”, Committee on the Rights of the Child, accessed 2019 September 15, https://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.13_en.pdf.

²⁹ *Ibid.* para 25.

³⁰ Kirsten Sandberg *Children's Right to Protection Under the CRC*. Human Rights in Child Protection. (Palgrave Macmillan, Cham, 2018),25, https://link.springer.com/chapter/10.1007/978-3-319-94800-3_2

³¹ Jaap E. Doek, “Child Abuse and Neglect: Article 19 CRC”, *International Journal of Children's Rights* 2, no. 1 (1994): 89, <https://heinonline-org.skaitykla.mruni.eu/HOL/P?h=hein.journals/intjchr2&i=98>.

The important interpretation was given to the Article 19 of the UNCRC, as one, which requires to prohibit all corporal punishment and other cruel or degrading punishment or treatment of children; the Committee stated that “it should be prohibited “however light”.³² The Committee in its General Recommendation No 8 (hereinafter - GC No 8) defines corporal, or physical, punishment as: “[...] any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light. Most involve hitting (‘smacking’, ‘slapping’, ‘spanking’) children, with the hand or with an implement – whip, stick, belt, shoe, wooden spoon, etc. But it can also involve, for example, kicking, shaking or throwing children, scratching, pinching, burning, scalding or forced ingestion[...].”³³ Notwithstanding all negative effect which possesses corporal punishment, it is still allowed or not prohibited in the majority of States and usually used by parents with “educational purposes”. According to available data, in 2018, only 53 countries in the world had banned the usage of corporal punishment.³⁴ In addition to the prohibition provided for in Article 19, the Committee substantiates its position on corporal punishments for a number of reasons, such as the fact that children should not be punished solely because they are children and also because it is contrary to Article 3 of CRC, which speaks of the best interests of the child.³⁵ That is why the Committee deems it necessary to take all measures, including changes in legislation, as well as educational measures, to ban and not use punishment. At the same time, the Committee emphasizes that it is necessary to maintain a balance since any unnecessary interference with family and persecution parents will not promote the best interests of the child.³⁶

Also, the two other articles that could be effective in a system of protection of children’s rights from domestic violence are Art. 37(a) of UNCRC, which afford protection from torture and inhuman and degrading treatment and Art. 34 of UNCRC, which protects children from sexual abuse. The Committee stated that sexual abuses can occur even inside a family and called on to properly investigate and punish perpetrators, concerning the child’s privacy.³⁷

It is important to underline, that Article 19 of UNCRC is one of the most important provisions for eliminating all forms of violence against children, especially domestic violence. Together with other Articles of the UNCRC, it forms a strong foundation in the system of protecting children from domestic violence.

³² UNICEF Implementation Handbook for the Convention on the Rights of the Child: Fully Revised Third Edition, accessed 2019 September 17, (UNICEF 2007), 250.

³³ “General comment No. 8 (2006): The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment (Arts. 19; 28, Para. 2; and 37, inter alia)”, Refworld, accessed 2019 September 15, <https://www.refworld.org/docid/460bc7772.html>.

³⁴ Save The Children Sweden, “Map Of The 53 Countries That Ban The Corporal Punishment Of Children”, Brilliant Maps, accessed on 2019 September 16, <https://brilliantmaps.com/corporal-punishment/>.

³⁵ Susan H. Bitensky, “The United Nations Convention on the Rights of the Child and Corporal Punishment of Children: Ramifications for the United States”, *Geo. J. on Fighting Poverty* 226, (1997-1998), 227, <https://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1007&context=facpubs>.

³⁶ “General comment No. 8 (2006): The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment (Arts. 19; 28, Para. 2; and 37, inter alia)”, Refworld, accessed 2019 September 15, <https://www.refworld.org/docid/460bc7772.html>.

³⁷ Claire Hamilton, “Child Abuse, the United Nations Convention on the Rights of the Child and the Criminal Law”, *Irish Law Times*, (2005):92, <http://mural.maynoothuniversity.ie/6152/1/CH-Child-Abuse.pdf>

2. PROTECTION OF CHILDREN UNDER CONVENTIONS ADOPTED BY THE COUNCIL OF EUROPE

The Council of Europe is an organization one of the objectives of which is the protection and promotion of human rights in Europe, including the rights of children.³⁸ The main legal documents in the system of protection of children's rights from violence in the family are the European Convention on Human Rights and Fundamental freedoms, the Council of Europe Convention on preventing and combating violence against women and domestic violence and the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse. Each of these treaties has its sphere and scope of regulations, but each of them is necessary for every democratic state to prevent and punish each child's right violation.

2.1. Council of Europe Convention on preventing and combating violence against women and domestic violence

The Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention) was adopted on 7 April 2011 and it entered into force on 1 August 2014.³⁹ The Istanbul Convention applicable mainly to women, because they are more often victims of domestic violence and gender-based violence, the States Parties to the Convention could apply its provisions to other groups of society, such as children.⁴⁰ The Preamble of the Convention directly mentions that children are also victims of violence: "Recognising that children are victims of domestic violence, including as witnesses of violence in the family."⁴¹

The Istanbul Convention presents a new definition of "domestic violence", it means "all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim."⁴² There was no internationally recognized definition of such term but, for example, separate definitions of violence against women (Council of Europe Recommendation Rec (2002)5 on the protection of women against violence).⁴³ These definitions are limited to women as victims and do not include other forms of domestic violence such as

³⁸"Council of Europe", Wikipedia, the free encyclopedia, accessed 2019 September 03, https://en.wikipedia.org/wiki/Council_of_Europe.

³⁹"Historical background of Istanbul Convention", Council of Europe, accessed September 04, <https://www.coe.int/en/web/istanbul-convention/historical-background>.

⁴⁰The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention): Questions and answers, accessed on 2019 September 03, <https://rm.coe.int/istanbul-convention-questions-and-answers/16808f0b80>.

⁴¹"Council of Europe Convention on preventing and combating violence against women and domestic violence", Council of Europe, accessed 2019 August 01, <https://rm.coe.int/168046031c>.

⁴²*Ibid.*

⁴³"Council of Europe Recommendation Rec (2002)5 on the protection of women against violence," Council of Europe, accessed 2019 September 01, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805e2612

against the child.⁴⁴ In accordance with the provisions of the Istanbul Convention, children may be recognized as both direct victims of domestic violence (physical, economic, sexual, psychological) and indirect victims, as witnesses to such violence.⁴⁵ Also, it emphasizes that these types of behavior (violence) are socially dangerous and require criminal penalties.⁴⁶ In addition, it can be defined that the Istanbul Convention applies to two groups of relations, namely between partners and between children and parents.⁴⁷

The Istanbul Convention sets due diligence standard for the States Parties to this Convention. This means that State parties have both negative and positive duties: state authorities could be liable for wrongful acts, even if committed by non-state actors.⁴⁸ This standard reflects the position of the European Court of Human Rights, which was adopted in a case *Opuz v Turkey*.⁴⁹

Under the Convention State-parties are obliged to take measures to fight with domestic violence, those measures are grouped into four types (known as four Ps): prevention, protection and support, prosecution of perpetrators, and integrated policies, these measures are forming an aforementioned due diligence standard.⁵⁰

An important part of the Istanbul Convention is provided for the positive obligations of the state in the field of prevention of domestic violence. The Istanbul Convention obliges States who ratified it, to conduct or promote awareness-raising campaigns on the different forms of violence it covers, including domestic violence.⁵¹ It specifically states that such campaigns should show or emphasize the consequences for children (Article 13).⁵²

In the field of protective measures, the most important is an obligation to change legislation and provide an effective mechanism of protection. In order to achieve the aims and objectives of the Convention, States are obliged to make the appropriate changes to civil, criminal and administrative law.⁵³ The Istanbul Convention introduces several specific criminal offenses,

⁴⁴Ad Hoc Committee on preventing and combating violence against women and domestic violence (CAHVIO) "Report of 2nd meeting", para 81-83, Council of Europe, accessed 2019 September 04, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016805938a3>

⁴⁵ "Children's rights", Council of Europe, accessed on 2019 September 04, <https://rm.coe.int/children-rights-and-the-istanbul-conventionweb-a5/1680925830>

⁴⁶ Я. Оленіна, "Матеріальні джерела положень Конвенції Ради Європи про попередження та боротьбу з насильством щодо жінок та домашнім насильством від 2011 року щодо криміналізації злочинних діянь", *Науковий вісник Ужгородського національного університету*, (2016): 60. http://nbuv.gov.ua/UJRN/nvuzhpr_2016_37%283%29_16

⁴⁷ "Explanatory report of Council of Europe Convention on preventing and combating violence against women and domestic violence", para 41, Council of Europe, accessed 2019 September 04, <https://rm.coe.int/16800d383a>.

⁴⁸ *Ibid.*

⁴⁹"Case of *Opuz v Turkey*, Application no. 33401/02", HUDOC, accessed 2019 September 04, <http://hudoc.echr.coe.int/eng?i=001-92945>

⁵⁰ "Council of Europe Convention on preventing and combating violence against women and domestic violence", Council of Europe, accessed 2019 August 01, <https://rm.coe.int/168046031c>

⁵¹ "Children's rights", Council of Europe, accessed 2019 September 04, <https://rm.coe.int/children-rights-and-the-istanbul-conventionweb-a5/1680925830>.

⁵² "Safe Safe From Fear From Violence, Council of Europe Convention on preventing and combating violence against women and domestic violence, Istanbul Convention", accessed 2019 September 04, <https://rm.coe.int/168046e60a>

⁵³ Ilona Topa and Magdalena Półtorak, "Council of Europe Convention on Preventing and Combating Violence Against Women (Istanbul Convention)", *Gender Equality. Encyclopedia of the UN Sustainable Development Goals*, (2019):6.

including the crime of domestic violence. The provision of the Convention pays attention to the fact that such measures should address the special needs of child victims, as vulnerable persons.⁵⁴ Also, Convention obliges States to take appropriate measures in the best interest of a child to minimize the negative impact on them, moreover, it requires to impose harsher sentences (Article 46) if the offense is committed against or in the presence of a child. The same goes for offenses committed by a family member or a person having abused her or his authority.⁵⁵

For the proper implementation of the Istanbul Convention, the parties have decided to set up a special monitoring mechanism – Group of experts on action against violence against women and domestic violence (hereinafter - GREVIO). GREVIO is responsible for the evaluation of the implementation of the Istanbul Convention by State Parties and when it is necessary to provide general recommendations or even initiate special inquiry procedures.⁵⁶

In general, the Istanbul Convention can be called the most progressive international instrument aimed at combating domestic violence, including violence against children. The Istanbul Convention emphasizes the fact that domestic violence is not only an internal problem of a family but also a problem that states must tackle. The Convention extends its effect not only to women and not only to married couples but also to other forms of relationships, so member states of the Council of Europe need to ratify this Convention as soon as possible.

2.2.Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse

The World Health Organization on its report presented that almost 18 million children had been victims of sexual abuse in Europe: 13.4% of all girls and 5.7% of all boys.⁵⁷ The society usually thinks that children do not become victims of sexual abuse so often, and if they do, it is usually made by a stranger. Although, existing data show a disappointing statistic that children are often at risk of sexual abuse from persons to whom they are in close relationships.⁵⁸ In 2018 the INTERPOL presented a report on sexual violence, where the majority of victims - 56.2 percent where children of prepubescent age (9-14 years), then 25.4 percent were pubescent (15-17 years) children, and 4.3 percent were very young children (infants and toddlers).⁵⁹ Furthermore, the

⁵⁴ “Council of Europe Convention on preventing and combating violence against women and domestic violence”, Council of Europe, accessed 2019 August 01, <https://rm.coe.int/168046031c>.

⁵⁵ *Ibid.*, Art. 46.

⁵⁶ “About GREVIO”, Council of Europe, accessed on 2019 September 04, <https://www.coe.int/en/web/istanbul-convention/grevio>.

⁵⁷ *European report on preventing child maltreatment (Summary)*, (World Health Organization, 2013), <https://apps.who.int/iris/bitstream/handle/10665/108627/e96928.pdf;jsessionid=19B9BF1582D5EC4CAE12F092962C49E2?sequence=1>.

⁵⁸ United Nations Children’s Fund, *A Familiar Face: Violence in the lives of children and adolescents*, (New York: UNICEF, 2017), https://www.unicef.org/publications/files/Violence_in_the_lives_of_children_and_adolescents.pdf

⁵⁹ *Towards a global indicator on unidentified victims in child sexual exploitation material: Summary report*, (INTERPOL, EPACT 2018), <https://www.ecpat.org/wp-content/uploads/2018/03/TOWARDS-A-GLOBAL-INDICATOR-ON-UNIDENTIFIED-VICTIMS-IN-CHILD-SEXUAL-EXPLOITATION-MATERIAL-Summary-Report.pdf>

Council of Europe stated that in Europe the majority of sexual abuse against children is committed in the family, by persons close to the child.⁶⁰

To protect children from any type of sexual violence and criminalize certain forms of sexual abuse the states concluded on 25 October 2007 the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (the Lanzarote Convention) which entered into force on 1 July 2010.⁶¹ The Lanzarote Convention is the first international human right treaty, which criminalizes sexual contacts with a child. It presented main offenses, which should be included in the criminal legislation of State-parties, such as acts of sexual abuse, child prostitution, child pornography, witnessing of sexual activities, and solicitation of children for sexual purposes. Additionally, the Lanzarote Convention obliges to criminalize intentional aiding, abetting, or attempting to perpetrate the foregoing offenses.⁶²

The Lanzarote Convention is aimed, on the one hand, to protect from abuse and exploitation and to help a child who became a victim of sexual abuse, and on the other, to call on countries to overcome this negative phenomenon.⁶³ The term “sexual exploitation and sexual abuse” which are defined under Article 3 of the Lanzarote Convention referred to in the acts described in Articles 18 to 23 of the Lanzarote Convention. Those acts include engaging in sexual activity by a person under the age of puberty, including if made by a person who influences the child, including in the family (Article 18).⁶⁴ The Council of Europe in Explanatory report describes that such definition was necessary because definition from other international instruments was too narrow, and do not protect the child from abuses inside a family and was focused on commercial exploitation, while convention criminalizes also any “non-commercial” exploitation.⁶⁵ Furthermore, in conformity with Article 28 of the Lanzarote Convention, states that ratified the Convention may take into consideration as an aggravating circumstance the fact that “[...] the offense was committed by a member of the family, a person cohabiting with the child [...]”. In a framework of the Lanzarote Convention family means an extended family, it includes parents, care providers; also, a person

⁶⁰ “Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse in brief”, Council of Europe, accessed on 2019 September 06, <https://rm.coe.int/1680471b5a>

⁶¹ “Chart of signatures and ratifications of Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse”, Council of Europe, accessed on 2019 September 06, <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/201/signatures>

⁶² Susan H. Bitensky, “The United Nations Convention on the Rights of the Child and Corporal Punishment of Children: Ramifications for the United States”, *Geo. J. on Fighting Poverty* 226,(1997-1998):1663, <https://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1007&context=facpubs>.

⁶³ “Explanatory Report to the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse”, Council of Europe Treaty Series, accessed on 2019 September 06, <https://rm.coe.int/16800d3832>.

⁶⁴ “Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse”, Council of Europe Treaty Series, accessed on 2019 September 01, <https://rm.coe.int/1680084822>.

⁶⁵ “Explanatory Report to the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse”, Council of Europe Treaty Series, accessed on 2019 September 09, <https://rm.coe.int/16800d3832>.

cohabiting with a child refers to a partner of mother or father of the child or another person who has the same household.⁶⁶

The great role in the Convention is dedicated to the prevention measures, including the education of children. The Lanzarote Convention obliges states to give a necessary primary and secondary education, concerning risks of sexual abuse and exploitation, measures for self-protection and help to request. Of course, the primary responsibility rests with the parents or the persons who replace them, but when this is not possible under certain circumstances (including if the child was a victim of domestic violence), professionals, such as teachers, should provide such a piece of information.⁶⁷

The important steps were made toward a child-friendly justice in cases of child abuse, which, given the specificity of the crime and the vulnerability of the victim, is aimed at reducing the negative impact on the child and protecting his or her privacy⁶⁸. The child who is the victim in such cases is granted witness status, and Convention requires promoting victim safety and comfort. The privacy is granted during all the procedure and after it is prohibited to publish photos or any identified information about the victim, court hearings should be closed and interviews should be provided by specially trained persons.⁶⁹

Notwithstanding all the positive features of the Convention, it has also been criticized, in particular for not including the minimum age at which intimate relations are allowed, which was referred to the States. Critics say that this diminishes the Convention's ability to harmonize states legislation on sexual violence against children

2.3.Obligations of States under the European Convention on Human Rights

The European Convention on Human Rights (hereinafter – ECHR) does not expressly provide an article, which defines the right to be protected from domestic violence, however such a right follows from other articles such as Article 2 (right to life), Article 3 (prohibition of torture, inhumane or degrading treatment) and Article 8 (right to private life).⁷⁰ Based on those articles the European Court to Human Rights (hereinafter – the Court) developed jurisprudence on a problem of domestic violence, including violence against children. The author is going to present a few cases of the Court where the aforementioned articles were invoked because of violence against children inside a family.

⁶⁶ “Explanatory Report to the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse”, Council of Europe Treaty Series, accessed on 2019 September 09, <https://rm.coe.int/16800d3832>.

⁶⁷ *Ibid.*, p.10

⁶⁸ *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, (Council of Europe, 2011), <https://rm.coe.int/16804b2cf3>.

⁶⁹ *Ibid.*

⁷⁰ Jamil Ddamulira Mujuzi, “Preventing and Combating Domestic Violence in Europe: The Jurisprudence of the European Court of Human Rights”, *International Survey of Family Law* (2016), 175.

The violation of the right to life (Article 2) was invoked in the number of cases, usually, the Court by unanimity of votes found a violation of this right (Cases Branko Tomašić and Others v. Croatia, and Kontrova v. Slovakia, etc). In the case of Kontrova v. Slovakia⁷¹, the Court found that all necessary and effective means to prevent the applicant's son's murder had not been taken. That is, the police failed to fulfill their positive obligations. “For a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.”⁷² As the Court found, that local police were aware of the situation in the family, the presence of a firearm in the man and the real threat to the life of the applicant and the children, as the police did not take all necessary measures, the court found a breach of positive obligations under Article 2 of ECHR. Similarly, in the case of Branko Tomašić and Others v. Croatia,⁷³ the Court also found a breach of positive obligations to protect the lives of those killed at the hands of the husband and father. Despite repeated threats and conclusions about the need for psychiatric treatment, the authorities did not respond appropriately.

In aforementioned judgments the Court used the classical test known as Osman test (Case Of Osman v. The United Kingdom⁷⁴) that the State’s obligation to act arises where the national authorities “knew or ought to have known” at the time of the existence of a ‘real and immediate risk’ to a person’s life from the criminal acts of another person. However, in those cases, the Court did not mention the specific issue of domestic violence but did it in the more recent case of Talpis v Italy⁷⁵. In this case, the Court found a violation of Art. 2 and 3 of the ECHR, with the respect to the violation of Article 2 the Court underlined that “the presence of a real and imminent threat to life should be assessed with due regard to the specific context of domestic violence”.⁷⁶ It showed that the Court slightly changed the approach to the use of the Osman test and took into account the dissenting opinion of the judge Pinto de Albuquerque in the case Valiulienė v. Lithuania.⁷⁷

⁷¹“Kontrova v. Slovakia, application no. 7510/04”, HUDOC, accessed on 2019 September 20, <http://hudoc.echr.coe.int/eng?i=001-80696>

⁷² Ibid., para 50.

⁷³“Branko Tomašić and others v. Croatia, application no. 46598/06”, HUDOC, accessed on 2019 September 20, <http://hudoc.echr.coe.int/eng?i=001-90625>.

⁷⁴“Osman v. The United Kingdom (87/1997/871/1083)”, HUDOC, accessed on 2019 September 20, <http://hudoc.echr.coe.int/eng?i=001-58257>.

⁷⁵ “Talpis v. Italy, Application no. 41237/14”, HUDOC, accessed on 2019 September 20, <http://hudoc.echr.coe.int/eng?i=001-171994>.

⁷⁶ Ibid., para 122.

⁷⁷“Valiulienė v. Lithuania, Application no. 33234/07”, HUDOC, accessed on 2019 September 20, <http://hudoc.echr.coe.int/eng?i=001-117636>

Furthermore, this case shows that the Court in the cases concerning domestic violence is increasingly turning to the standards and commitments set out in the Istanbul Convention.⁷⁸

Article 3 of the European Convention on Human Rights provides “that no one shall be subjected to torture or inhuman or degrading treatment or punishment”.⁷⁹ Jurisprudence from the European Court of Human Rights shows that domestic violence victims have alleged inhuman or degrading treatment, not torture.⁸⁰ In case *A v The United Kingdom*⁸¹ the Court found that the State had breached its obligations under Article 3 of ECHR. In this case the stepfather, who had resorted to beating his son was acquitted in a national court, because, according to his father, “the boy had bad behaviour and was not disciplined, so such punishment was necessary” (in the United Kingdom law protected parents if they used punishments that were justified in the specific circumstances).⁸² The applicant alleged that the State had not protected him against ill-treatment from his stepfather. In this case, Court reiterated its position that “ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3” accordingly, the Court found that such treatment, which had been attributed to the applicant (systematic beating by a stick with extreme force), reached a level of severity under Article 3 of the Convention.⁸³ The court also found that UK law did not provide adequate protection to the applicant from his treatment and punishment, which in turn led to the violation of Article 3 of the Convention. In its judgment, the Court stated that “the obligation of the High Contracting Parties under Article 1 of the Convention was to guarantee to everyone within their jurisdiction the rights and freedoms set out in the Convention that, in conjunction with Article 3, required States to take measures intended to ensure that persons are located under their jurisdiction, they have not been subjected to torture or to inhuman or degrading treatment or punishment, including abuse by individuals.”⁸⁴ Furthermore, the Court underlined that children should be protected by the state against any violation of their personal integrity.⁸⁵

In another case *M. and M. v Croatia* a child – daughter was a victim of abuse and ill-treatment by her father, the Court found that authorities breach their positive obligation under Art. 3 of the ECHR to conduct an effective investigation into allegations of ill-treatment, because of

⁷⁸ Sara De Vido, “States’ Positive Obligations to Eradicate Domestic Violence: The Politics of Relevance in the Interpretation of the European Convention on Human Rights”, 6:6 *ESIL Reflection* (2017):9, <http://www.esil-sedi.eu/sites/default/files/ESIL%20Reflection%20De%20Vido%20.pdf>.

⁷⁹ “The Convention for the Protection of Human Rights and Fundamental Freedoms”, Council of Europe, accessed on 2019 August 30, https://www.echr.coe.int/Documents/Convention_ENG.pdf.

⁸⁰ Jamil Ddamulira Mujuzi, “Preventing and Combating Domestic Violence in Europe: The Jurisprudence of the European Court of Human Rights”, *International Survey of Family Law* (2016):175.

⁸¹ “*A. v. The United Kingdom* (100/1997/884/1096)”, HUDOC, accessed on 2019 September 21, <http://hudoc.echr.coe.int/eng?i=001-58232>

⁸² *Ibid.*, para 10.

⁸³ *Ibid.*, para 21.

⁸⁴ *Ibid.*, para 22.

⁸⁵ *Ibid.*, para 22.

long-lasting court proceeding and no violation of that Article because of their obligation to prevent such treatment, because the situation of the child was well-monitored by social authorities.⁸⁶ This case shows that the Court divides three different obligations under Art. 3: to prevent ill-treatment, to effectively investigate and prosecute ill-treatment.

In the case of *O.C.I. And Others V. Romania*⁸⁷ the Court decided what forms the “grave risk” in child custody cases and found a violation of Article 8 of the ECHR and did not decide on article 3 of the ECHR.⁸⁸ The case arose because the applicant disagreed with the national courts' decision to return the children to their country of residence since there was a risk of ill-treatment, violence from their father. The Court said “[...]that respect for children’s dignity cannot be ensured if the domestic courts were to accept any form of justification of acts of ill-treatment, including corporal punishment. [...]Member States should strive to expressly and comprehensively protect children’s dignity which in turn requires in practice an adequate legal framework affording protection of children against domestic violence”.⁸⁹ Furthermore, the Court emphasized the existence of a complete ban on corporal punishment in the domestic law and disagreed with the domestic courts' findings that there was no grave the risk for children since cases of parental violence were not permanent but occasional. The Court also considers that even the existence of the belief that the authorities in which the children have permanent residence have the ability to prevent cases of violence cannot be a justification for sending them back “to an environment where they will incur a grave risk of domestic violence”,⁹⁰ therefore it was not necessary for democratic society. In some cases, for example, *Bevacqua and S. v. Bulgaria* the Court, considering cases of domestic violence against the mother of the child and justifying the violation of Article 8, alleges that the failure of the state to fulfill its positive obligations could affect adversely the well-being of the child, as witness of such violence.⁹¹

We can observe, that the judicial practice of the European Court of Human Rights demonstrates that the problem of domestic violence recognized not as a problem of “one family”, but the issue of public interest, the violation of fundamental rights. The Court found the inability of States to fulfill their positive obligations to protect rights guaranteed under ECHR and inability to act with due diligence towards persons within its jurisdiction to prevent domestic violence.

⁸⁶“*M.S. v. Croatia* (No. 2), Application no. 75450/12” HUDOC, accessed 2019 September 21, <http://hudoc.echr.coe.int/eng?i=001-152259>

⁸⁷“*O.C.I. and other v. Romania*, Application no. 49450/17”, HUDOC, accessed 2019 September 22, <http://hudoc.echr.coe.int/eng?i=001-193069>

⁸⁸ Petra Ágnes Kanyuk, “How Much Is Enough? – The Interpretation of „Grave Risk” in an International Child Custody Dispute”, PUBLIC GOODS & SERVICES, accessed 2019 September 22, <https://publicgoods.eu/how-much-enough-interpretation-grave-risk-international-child-custody-dispute>.

⁸⁹“*O.C.I. and other v. Romania*, Application no. 49450/17”, HUDOC, accessed 2019 September 22, <http://hudoc.echr.coe.int/eng?i=001-193069>.

⁹⁰ *Ibid.*, para 42,45.

⁹¹“*Bevaqua A and S. v. Bulgaria*, Application no. 71127/01”, HUDOC, accessed 2019 September 22, <http://hudoc.echr.coe.int/eng?i=001-86875>.

3. PROTECTION OF CHILDREN AGAINST DOMESTIC VIOLENCE IN THE EUROPEAN UNION

The entry into force of amendments into the Treaty of European Union (hereinafter – TEU) by the Lisbon Treaty recognized a child rights protection as one of the objectives of the EU (para 5 of Article 3 TEU).⁹² Furthermore, the obligation to protect the rights of the child is an explicit objective in the Charter of Fundamental Rights of the European Union (hereafter – EU FR Charter).⁹³ Member States have primary responsibility for protecting the rights of children, including from domestic violence, while at the same time the European Union can act in such a way that it will have a significant impact on Member States' policies regarding the children's rights. Over the previous past years, the EU institutions have adopted a few important legislative measures⁹⁴:

- DIRECTIVE 2012/29/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 October 2012 establishing minimum standards on the rights, support, and protection of victims of crime, and replacing Council Framework Decision 2001/220/JH.⁹⁵
- Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA.⁹⁶

The important part of the child protection system in the EU takes soft-law. In 2006 the European Commission adopted Communication Towards an EU Strategy on the Rights of the Child the purpose of which is to establish a strategy for the protection of the rights of the child and to assist Member States in the protection of the rights of the child. Also, Communication recognizes that a large number of children in the EU suffer from violence, including domestic violence.⁹⁷

In 2011 the European Commission adopted the Agenda for the Rights of the Child which includes principles such as the importance of the rights of the child in the EU's fundamental rights system policy. Furthermore, in the Stockholm program for the period 2010-2014, specific attention

⁹² “Consolidated version of the Treaty on European Union”, EUR-Lex, accessed 2019 September 11, <http://data.europa.eu/eli/treaty/teu/2012/oj>

⁹³ “Charter of Fundamental Rights of the European Union”, Official Journal of the European Union, accessed 2019 September 11, https://www.europarl.europa.eu/charter/pdf/text_en.pdf

⁹⁴ Anna Dimitrova-Stull *Violence towards children in the EU Current situation*, (EPRS | European Parliamentary Research Service, France, 2014), [https://www.europarl.europa.eu/RegData/etudes/IDAN/2014/542139/EPRS_IDA\(2014\)542139_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2014/542139/EPRS_IDA(2014)542139_EN.pdf).

⁹⁵ “Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA”, EUR-Lex, accessed 2019 September 20, <http://data.europa.eu/eli/dir/2012/29/oj>

⁹⁶ “Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA”, EUR-Lex, accessed 2019 September 18, <https://eur-lex.europa.eu/eli/dir/2011/93/oj>

⁹⁷ Ivana Čulo “VIOLENCE AGAINST CHILDREN AND INTEGRATED CHILD PROTECTION SYSTEMS IN THE EUROPEAN UNION”, *Pravni vjesnik* 35, (2019):49, <https://doi.org/10.25234/pv/5852>.

has been paid to the rights of a child, especially in vulnerable situations such as sexual exploitation, violence, and sort.⁹⁸

All of the above leads to the conclusion that in recent years the European Union has established child protection as one of the important areas of its internal policy. All legislation that has been adopted has a significant impact on the laws of the Member States and promotes better protection of children from violence, including sexual exploitation within the family.

3.1. Protection of children as victims of crimes in the European Union

The Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support, and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (hereinafter – Victims’ Directive) was adopted because of objectives set out in the Stockholm Program.⁹⁹ According to the Stockholm Programme Member States and European Commission were asked to find possible ways to improve the status of the victim, on June 2011 a resolution on a roadmap (known as - “Budapest roadmap”) for improvement of rights of the victim was adopted and adoption of horizontal legislation was one of the steps of it. The Victims’ Directive was adopted on 25 October 2012, entered into force on 15 November 2012 and the Member States were obliged to implement it by transposition into national legislation which complies with the Directive by 16 November 2015. The aforementioned Directive sets the minimum standards to be applied in all EU countries. Its main purpose is to improve the rights of the victim by granting and securing procedural rights and ensuring the principle of non-discrimination, fair trial and professionalism.¹⁰⁰ Furthermore, The Victims’ Directive applies the principle of the best interests of the child when involved in the process, thus highlighting the particular vulnerability of the child victim.¹⁰¹ Under para 14 of the preamble of Victims’ Directive “Child victims should be considered and treated as the full bearers of rights set out in this Directive and should be entitled to exercise those rights in a manner that

⁹⁸ Anna Dimitrova-Stull, *Violence towards children in the EU Current situation*, (EPRS | European Parliamentary Research Service, France, 2014), accessed on 2019 September 20 [https://www.europarl.europa.eu/RegData/etudes/IDAN/2014/542139/EPRS_IDA\(2014\)542139_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2014/542139/EPRS_IDA(2014)542139_EN.pdf).

⁹⁹ “DG JUSTICE GUIDANCE DOCUMENT related to the transposition and implementation of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA”, European Commission, accessed 2019 September 11, <https://e-justice.europa.eu/fileDownload.do?id=05758a3a-9e2e-49a5-a7ec-3737c3ad6876>

¹⁰⁰ Amandine Scherrer et al., *The Victims' Rights Directive 2012/29/EU European Implementation Assessment*, (EPRS | European Parliamentary Research Service, 2017), 12, accessed on 2019 September 20, [https://www.europarl.europa.eu/RegData/etudes/STUD/2017/611022/EPRS_STU\(2017\)611022_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2017/611022/EPRS_STU(2017)611022_EN.pdf).

¹⁰¹ QUESTIONS AND ANSWERS On the rights to support and protect victims of gender-based violence, including women affected by female genital mutilation, (Belgium, 2016), 5, accessed 2019 September 20 https://www.endfgm.eu/editor/files/2016/10/FINAL_Q_A_Victims_rights_directive_End_FGM_European_Network.pdf

takes into account their capacity to form their own views.”¹⁰² A child is defined by the Directive as an individual who is below the age of 18 years.¹⁰³

The Victims’ Directive provides that victims of the crime could have rights prescribed there, meaning that rules will be applicable if the crime committed in the European Union regardless of the residency status or the proceeding which takes place in the European Union. It is an important achievement of Victims Directive that it extends its effect to all victims without discrimination, including nationality or residence status.¹⁰⁴ Nevertheless, the Victims’ Directive applies only to crimes which already exist in the Member States, the Directive does not criminalize acts that are not already punishable under Member States criminal law. Therefore, if an act of domestic violence is not defined in the criminal code of several Member states, the affected person is not a victim for the Victims Directive and a victim cannot access their rights thereunder.¹⁰⁵

The Directive, in the Article 2, defines the term victim and also divides it into two categories, as direct victim: “a natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence”; and indirect victims: “family members of a person whose death was directly caused by a criminal offence and who have suffered harm as a result of that person's death”.

One of the aims of the Victims Directive was to establish a range of procedural rights and guarantees for victims; it consists of procedural and administrative measures. In the field of legal procedural guarantees the most important are: the right to be heard (Article 10), to understand and be understood (Article 2); the right to receive information (Article 4), to make a complaint (Article 5) and to access support services (Article 7,8,9) etc., which were successfully transposed into the legislation of Member States.¹⁰⁶ This right is also closely connected with a right to be heard under Article 10 of the Victims’ Directive. Concerning the child-victim, his or her age and maturity should be taken into account when exercising the right to be heard.

Besides, the Victims’ Directive stresses that child-victims have a specific need and it is necessary to give them special protection from second victimization, intimidation, and

¹⁰² “Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA”, EUR-Lex, accessed 2019 September 20, <http://data.europa.eu/eli/dir/2012/29/oj>

¹⁰³ *Ibid.*, Art. 2(c).

¹⁰⁴ “Victims’ Rights Directive: Frequently asked Questions”, European Commission, accessed on 2019 October 01, https://ec.europa.eu/commission/presscorner/detail/en/MEMO_15_6113.

¹⁰⁵ ¹⁰⁵ QUESTIONS AND ANSWERS On the rights to support and protect victims of gender-based violence, including women affected by female genital mutilation, (Belgium, 2016), 8, accessed 2019 September 20 https://www.endfgm.eu/editor/files/2016/10/FINAL_Q_A_Victims_rights_directive_End_FGM_European_Network.pdf

¹⁰⁶ “Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA”, EUR-Lex, accessed on 2019 September 20, <http://data.europa.eu/eli/dir/2012/29/oj>

retaliation.¹⁰⁷ From the very beginning of negotiations, the European Parliament insisted on the importance of including definitions of “gender-based violence” and “violence in closed relationships” to the operative part of the text, but the Member States were opposed. Therefore, the parties found some type of consensus and included the reference to such terms in other Articles of Victims Directive¹⁰⁸.

In addition, Article 22 of the Victims’ Directive recognizes that some victims could have special needs and the Directive provides that the Member States need to make an individual assessment of victim according to these criteria:

- a) The characteristics of the victim,
- b) The nature or type of crime involved and the,
- c) Circumstances surrounding the crime.

Furthermore, such criteria should also be taken into account: the severity of the crime (for example – organized crimes), the motivation of a crime if it based on victims’ special characteristics and relationships between victim and perpetrator (especially violence in close relationships, sexual violence).¹⁰⁹ Article 22 is recognized as one of the most significant aspects of the Directive as an individual assessment of victims helps them to effectively exercise their rights.¹¹⁰ However, according to Victims Directive, all child victims, in any case, shall be entitled specific protection needs due to its vulnerability.¹¹¹

Article 23 provides the rules of interviews with victims with special needs, such as that all interviews with victims of sexual violence and domestic violence should be conducted by a person with the same sex as the victim unless conducted by a prosecutor or a judge. In addition, during proceedings, the victim, including child victim, shall have the possibility to avoid contact with the offender and unnecessary questions concerning his or her private life not related to the criminal offense; have a hearing to without the presence of the public.¹¹² The special obligation of appointing a representative for a child, as provided in article 24, is due to the fact that the child victim of domestic violence has a conflict of interest with the parents, guardians, etc. or the child

¹⁰⁷ Anna Dimitrova-Stull, *Violence towards children in the EU Current situation*, (EPRS | European Parliamentary Research Service, France, 2014), accessed on 2019 September 20 [https://www.europarl.europa.eu/RegData/etudes/IDAN/2014/542139/EPRS_IDA\(2014\)542139_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2014/542139/EPRS_IDA(2014)542139_EN.pdf).

¹⁰⁸ Buczma, S.R., “An overview of the law concerning protection of victims of crime in the view of the adoption of the Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime in the European Union”, *ERA Forum* (2013), <https://doi-org.skaitykla.mruni.eu/10.1007/s12027-013-0305-0>.

¹⁰⁹ Ibid, p.244.

¹¹⁰ Amandine Scherrer et al., *The Victims’ Rights Directive 2012/29/EU European Implementation Assessment*, (EPRS | European Parliamentary Research Service, 2017), accessed on 2019 September 20 [https://www.europarl.europa.eu/RegData/etudes/STUD/2017/611022/EPRS_STU\(2017\)611022_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2017/611022/EPRS_STU(2017)611022_EN.pdf)

¹¹¹ Maria McDonald, *Know Your Rights on the Victims’ Directive*, (Dublin, 2012), 29, accessed 2019 September 02 http://eujusticia.net/images/uploads/pdf/Victims_Directive_36_page.pdf

¹¹² Amandine Scherrer et al., *The Victims’ Rights Directive 2012/29/EU European Implementation Assessment*, (EPRS | European Parliamentary Research Service, 2017), 62, accessed on 2019 September 20, [https://www.europarl.europa.eu/RegData/etudes/STUD/2017/611022/EPRS_STU\(2017\)611022_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2017/611022/EPRS_STU(2017)611022_EN.pdf)

has been separated from the parents.¹¹³ It is especially important in the cases of domestic violence when a member of a family is a perpetrator of a crime to not to cause further trauma. Besides, the child has a right to a lawyer where there is a conflict of interest between the parents or guardian and the child.¹¹⁴

Many provisions of the Victims Directive are in line with the Istanbul Convention, furthermore, Recital 6 makes a clear reference that one of the priorities of the EU is to combat domestic violence and make this issue as one of the bases for legislative criminal-law instruments.¹¹⁵ Also, Member States should take into account the Istanbul Convention while transposing and implementing the Victims Directive. The Directive gives the narrower scope of protection from domestic violence compared with the Istanbul Convention. Notwithstanding that fact, the Directive emphasizes that violence in the family “[...]is a serious and often hidden social problem which could cause systematic psychological and physical trauma with severe consequences[...].”¹¹⁶

The essence of this directive is the individual approach to each victim¹¹⁷, which is particularly necessary and important in the case of a victim of domestic violence. Moreover, recognizing the special needs of the child victim will increase the chance that the negative effect of the crime will be reduced as much as possible.

3.2. Protection of children from sexual violence and abuse in the European Union

One of the prior aims of the Stockholm Programme is combating with sexual abuse and exploitation, as it is clearly stated in the program: “Protecting children against the danger of sexual abuse is an important element in the strategy of children's rights.”¹¹⁸

The Directive 2011/93/EU of the European Parliament and of the Council on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA (hereinafter - Directive 2011/93/EU) was adopted 13 December 2011. The aforementioned Directive entered into force on 17 December 2011 and the Member States were obliged to transpose it into national legislation 18 December 2013.¹¹⁹

¹¹³ “Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA”, EUR-Lex, accessed 2019 September 20, <http://data.europa.eu/eli/dir/2012/29/oj>

¹¹⁴ Ibid., Article 24 (1)(b).

¹¹⁵ Ibid., para 6.

¹¹⁶ Ibid., para 18.

¹¹⁷ Bernt Bahr and Jenny E. Melum, 2017. “EU’s ‘Victims’ Directive’ – a legal act for a cultural change?” *International Journal for Court Administration* 9(1), (2017):17, <http://doi.org/10.18352/ijca.246>.

¹¹⁸ “The Stockholm Programme - An open and secure Europe serving and protecting the citizens”, EUR-Lex, accessed 2019 September 20, <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:115:0001:0038:EN:PDF>.

¹¹⁹ “Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA”, EUR-Lex, accessed 2019 September 18, <https://eur-lex.europa.eu/eli/dir/2011/93/oj>. (Articles 27,29)

By the analysis of the Directive 2011/93/EU, it could be stated that it consists of two components, namely the prevention measures and measures aimed to combat the sexual exploitation and abuse. At the first point, the author would like to present preventive measures of the Directive 2011/93/EU. It is possible to divide them into the following categories:

- measures aimed to raise awareness of society on a problem of sexual exploitation and abuse (informational campaigns, educational programs);
- programs and measures for people who previously committed crimes, such intervention programs should have a comprehensive approach focusing on medical and psychosocial aspects;
- training programs for professionals (police, prosecutors, lawyers, judicial staff, etc) who are likely to come into contact with the child victim.¹²⁰

As to the protection measures, firstly, it is important to underline, that the Directive 2011/93/EU has the definition of 20 offenses, and gives minimum sanctions for all of them allowing the Member States to put in their national legislations the higher penalties.¹²¹ Furthermore, the Directive allows triggering prosecution *ex officio*, without requiring the existence of prior complaint of the child victim.¹²² This is a very necessary step for protection from sexual abuse or exploitation because the child is very vulnerable and often ashamed and afraid to report any incidents.

The jurisdiction for crimes included in the Directive 2011/93/EU is also not limited by the territory of the EU or residency of the EU. It provides that perpetrator could be prosecuted for crimes in his or her own country even if the crime committed in other Member State or a third country, also obliges Member State to take necessary steps when the crime committed within its territory by a non-resident.¹²³

In addition, Article 19(1) of the Convention provides for special protection for children reporting abuse within the family. Under Article 19(1), Member States shall “[...] ensure that assistance and support are provided to victims before, during and for an appropriate period after the conclusion of criminal proceedings[...]”, in particular ensuring the protection of children.¹²⁴

Similarly, to the Lanzarote Convention, the Directive 2011/93/EU recognizes the existing problem of the sexual abuse and exploitation within the families; therefore it also provides that all

¹²⁰ Ion Rusu, “Preventing Offenses of Sexual Abuse, Sexual Exploitation of Children and Child Pornography in the European Union”, *Acta U. Danubius Jur.* 44 (2012):45.

¹²¹ “Child sexual abuse”, European Commission, accessed on 2019 September 20, https://ec.europa.eu/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/child-sexual-abuse_en

¹²² A. Nour, “Sexual Abuse against Minors. The Correlation between the Directive 2011/92/ EU and the Offenses against Sexual Freedom and Integrity”, *Conf. Int’l Dr.* 839, (2015):840.

¹²³ “Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA”, EUR-Lex, accessed 2019 September 18, Article 17, <https://eur-lex.europa.eu/eli/dir/2011/93/oj>.

¹²⁴ *Ibid.*, Art.19

actions should be taken with the regard to the best interest of the child. “Measures to protect child victims should be adopted in their best interest [...]. Child victims should have easy access to legal remedies and measures [...] where sexual abuse or sexual exploitation of a child occurs within the family.”¹²⁵ However, unlike the Lanzarote Convention, the Directive does not include in the definition of “sexual abuse” a phrase about an engaging in sexual activities when it is “made of the recognized position of trust, authority or influence over the child, including within the family.” The definition from the Directive includes only engaging in the sexual activities when “[...] it is made of a recognized position of trust, authority or influence over the child[...]”, so it lacks those particular family components. Nevertheless, the Directive provides as one of the aggrieving circumstances the situation when a member of the child’s family, a person cohabiting with the child, committed the offense.¹²⁶ According to the report of the European Commission, the legislation of the majority of Member States are in place with this provision.¹²⁷

3.3. Protection of children from corporal punishments in the European Union

Existence and use of corporal punishment as a method of education is still popular in many countries of the world, including countries of the European Union. It is still socially and culturally accepted forms of violence against children in many families and constitute deeply entrenched barriers in the EU.¹²⁸ The problem of corporal punishment has long been addressed in legal literature and practice as such that violates human dignity and constitutes a degrading treatment or punishment for a child. For example, the European Court of Human Rights first challenged the corporal punishment of children in 1978. In *Tyrer v. UK*¹²⁹ this case involved the use of this type of punishment in school. The Court stated that “33. [...] The very nature of judicial corporal punishment is that it involves one human being inflicting physical violence on another human being,” and concluded that “[...] that the judicial corporal punishment inflicted on the applicant amounted to degrading punishment within the meaning of Article 3 (art. 3) of the Convention.”¹³⁰ However, the first case connected with the usage of corporal punishment at home was in 1998 *A v the United Kingdom*, which the author analyzed in another part of work (chapter 2.3).

¹²⁵“Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA”, EUR-Lex, accessed 2019 September 18, <https://eur-lex.europa.eu/eli/dir/2011/93/oj>.

¹²⁶ *Ibid.*, Article 9(b).

¹²⁷ “Report from the commission to the european parliament and the council assessing the extent to which the Member States have taken the necessary measures in order to comply with Directive 2011/93/EU final”, EUR-Lex, accessed 2019 September 19, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016DC0871>.

¹²⁸ Nathalie duRivage, et al., “Parental use of corporal punishment in Europe: intersection between public health and policy”, *PLoS one* vol. 10,2 e0118059. (2015), <https://doi.org/10.1371/journal.pone.0118059>

¹²⁹ “*Tyrer v. The United Kingdom*, Application no. 5856/72”, Hudoc, accessed on 2019 September 19, <http://hudoc.echr.coe.int/eng?i=001-57587>

¹³⁰ Reis Monteiro A. *Human Dignity Principle*. In: Ethics of Human Rights. (Springer Cham, 2014), <https://doi.org/10.1007/978-3-319-03566-6>.

Regarding the legal ban on this type of punishment in EU countries, Sweden was the first country which in 1979 banned the corporal punishment of children in any form.¹³¹ The Swedish Children and Parents Code proclaimed, “Children are entitled to care, security and a good upbringing. Children are to be treated with respect for their person and individuality and may not be subjected to corporal punishment or any other humiliating treatment.”¹³²

Since that time, the European Union emphasized the promotion and protection of children’s rights, including the prohibition of corporal punishment as a priority issue. In the survey, which was committed by the Committee in the countries of the European Union in 2006, the result showed that in many states the legal prohibition of corporal punishment was only concerning the schools and not in the family.¹³³

In 2009, the European Parliament in its resolution about the situation of fundamental rights in the European Union 2004-2008 condemned all forms of violence against children and outlined the need to fight with domestic violence and corporal punishments in schools. In addition, it called all Member states to totally ban corporal punishment as it is one of the most widespread forms of violence against children¹³⁴. In 2014, the European Parliament in the resolution on the 25th anniversary of the United Nations Convention on the Rights of the Child again condemned the usage of corporal punishments and called the Member States to uphold their obligations to formally prohibit and sanction usage of corporal punishment against children.¹³⁵

By the year 2013, 16 Member States of the European Union have enacted laws that prohibit corporal punishment of children in all settings – the home, schools, penal system and care settings. The states which have fully prohibited were Austria, Bulgaria, Cyprus, Denmark, Finland, Germany, Greece, Hungary, Latvia, Luxembourg, Netherlands, Poland, Portugal, Romania, Spain, Sweden.¹³⁶

¹³¹ Anna Dimitrova-Stull, *Violence towards children in the EU Current situation*, (EPRS | European Parliamentary Research Service, France, 2014), accessed 2019 September 20 [https://www.europarl.europa.eu/RegData/etudes/IDAN/2014/542139/EPRS_IDA\(2014\)542139_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2014/542139/EPRS_IDA(2014)542139_EN.pdf).

¹³² Cecilia Modig, *Never Violence – Thirty Years on from Sweden’s Abolition of Corporal Punishment*, (Sweden, 2009), <https://www.government.se/contentassets/6bfb214c582448b6ace4d32978361577/never-violence---thirty-years-on-from-swedens-abolition-of-corporal-punishment>.

¹³³ *Survey on the CRC Committee’s Concluding Observations on the last EU Countries’ Reports*, (Italy, 2009), http://www.childoneurope.org/issues/crc_committee/su00-Survey.pdf

¹³⁴ “European Parliament resolution of 14 January 2009 on the situation of fundamental rights in the European Union 2004-2008 (2007/2145(INI))”, European Parliament, para 114,115 accessed 2019 September 24, <https://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2009-0019+0+DOC+XML+V0//EN>.

¹³⁵ “European Parliament resolution of 27 November 2014 on the 25th anniversary of the UN Convention on the Rights of the Child (2014/2919(RSP))”, European Parliament, para 28, accessed 2019 September 24, https://www.europarl.europa.eu/doceo/document/TA-8-2014-0070_EN.html?redirect, para 28

¹³⁶ *Prohibiting corporal punishment: achieving equal protection for children in EU member states Progress report* (Global Initiative to End All Corporal Punishment of Children, 2013), accessed 2019 September 2019 <http://endcorporalpunishment.org/wp-content/uploads/regional/European-Union-report-2013.pdf>

As to the year 2015, the numbers changed and among the 28 EU member states, 19 have fully prohibited all corporal punishment of children, including within the family, which showed the positive dynamics for changes.¹³⁷

As to this year, 23 Member States of the European Union, including Lithuania, banned the usage of corporal punishments.¹³⁸ In February 2017 the Lithuanian parliament amended law and prohibited all forms of corporal punishments of children in the home and other care settings. Unfortunately, the trigger of this decision became a tragic death of the 4-year boy who was beaten to death by his mother and stepfather.¹³⁹

It is also important to note that states that completely prohibit the use of these types of punishments also make changes to the law imposing penalties for non-compliance with the law. For example, the criminal legislation of the Republic of Poland provides a sanction for a term of between 3 months and 5 years of imprisonment for physical or mental mistreatment of the person close to him, or person or another person being in a permanent or temporary state of dependence to the perpetrator or a minor.¹⁴⁰ The Criminal Code of Latvia (article 174), any person who found guilty of cruelty towards and violence against a minor, could be deprived of liberty for up to three years, community service, or a fine with probationary supervision up to three years.¹⁴¹

It can be concluded that, in recent years, the European Union has strengthened its position on the protection of the rights of the child and promotes the idea of a total ban on the corporal punishment of children. Moreover, most Member States have changed their legislation and imposed sanctions for the use of physical punishment of children, which is an important step in protecting children from violence.

¹³⁷ “Progress towards prohibiting all corporal punishment of children in EU member states”, Launched at the 9th European Forum on the Rights of the Child, June 2015 <http://endcorporalpunishment.org/wp-content/uploads/regional/EU-briefing-2015.pdf>

¹³⁸ “Violence against children Promoting the prevention of and responses to violence against children.”, European Commission, accessed 2019 October 01, https://ec.europa.eu/info/policies/justice-and-fundamental-rights/rights-child/violence-against-children_en

¹³⁹ Dinesh Sethi et al., *European status report on preventing child maltreatment* (WHO, 2018), 26 http://www.euro.who.int/_data/assets/pdf_file/0017/381140/wh12-ecm-rep-eng.pdf?ua=1

¹⁴⁰ “Criminal Code of the Republic Poland (1997) (English version)”, Legislationonline, accessed 2019 October 05, <https://www.legislationline.org/documents/section/criminal-codes/country/10/Poland/show>

¹⁴¹ “Criminal Law of the Republic of Latvia (1998, amended 2018) “; Legislationonline, accessed 2019 October 05, <https://www.legislationline.org/documents/section/criminal-codes/country/19/Latvia/show>

4. PROTECTION OF CHILDREN AGAINST DOMESTIC VIOLENCE IN UKRAINE

According to the statistics, 44% of the population in Ukraine are affected by domestic violence, 30% are experiencing violence in childhood.¹⁴² Kateryna Levchenko from the organization “La Strada Ukraine” says that about 3 million children in Ukraine suffer from domestic violence as a witness.¹⁴³ During 2017, more than 110,900 domestic violence allegations were received by the national police, of which 1,400 were submitted by children. In 2018, police received 1,418 messages from children about domestic violence.¹⁴⁴ However, it should be remembered that these figures do not show the real state of affairs since most cases of domestic violence against children are left unobserved because children are afraid to inform or due to lack of awareness they do not inform the relevant authorities about such cases.

Ukraine as a former post-Soviet started its way on protection the rights of the child after independence in 1991 and after the adoption of the Constitution of Ukraine in 1996. Article 52 of the Constitution of Ukraine stated: “Children are equal in their rights, regardless of their origin.... Any abuse and exploitation of a child shall be persecuted by law.”¹⁴⁵ After the adoption of the Constitution of Ukraine, significant changes were been made in the area of family law. On January 10, 2002, the new Family Code of Ukraine entered into force, which forms a basis for child rights protection. In addition, other necessary laws were adopted in that period they are as follows: “On the protection of childhood” (2001), “On State Juvenile Agencies and Services. Special Institutions for Juvenile” (1995), “On State Assistance for Families with Young Children” (2001), “On Prevention of Violence in a Family” (2001), “On Guaranteeing Legal and Organizational Conditions of Social Protection of Orphans and Children Deprived of Parental Care” (2005), “On the Basis of Social Protection of Homeless Citizens and Neglected Children” (2005).¹⁴⁶ Furthermore, The United Nations Convention on the Rights of the Child, which is the main instrument setting legal standards in the field of the protection of the rights of the child, was ratified by Ukraine on 27 February 1991 and entered into force on 27 September 1991.¹⁴⁷

However, for a long time the legislation of Ukraine was not effective enough in the field of protection of children against domestic violence, so only in 2017, a new Law of Ukraine “On

¹⁴² R. Perelygina and U. Mytnyk, “Phenomenology of Domestic Violence in Ukraine and the European Union”, *LAW REV. KYIV U.L.* 181 (2018):186.

¹⁴³ “200 дітей потерпіли від насильства у сім’ї - нацполіція показала статистику за 2017 рік”, ПРЯМИЙ UA, accessed 2019 October 10, <https://prm.ua/uprodovzh-minulogo-roku-nadiyshlo-ponad-110-tisyach-zavav/>.

¹⁴⁴ “Статистика злочинів проти дітей”, LB.UA, accessed on 2019 October 10, https://ukr.lb.ua/society/2019/02/01/418602_torik_diti_povidomili_pro_1418.html.

¹⁴⁵ “Конституція України, Закон від 28.06.1996 № 254к/96-ВР”, Відомості Верховної Ради України, accessed on 2019 October 10, <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80>.

¹⁴⁶ Irina Zhylinkova, “Children’s Rights in Post-Soviet Ukraine”, *17 INT’L J. CHILD. RTS.* 647, 662 (2009):647.

¹⁴⁷ “Convention on the Rights of the Child, List of ratifications”, UN Treaty Collection, accessed on 2019 October 10 https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en

the prevention and counteraction of domestic violence”¹⁴⁸ was adopted. Furthermore, the necessary changes were been made to the administrative and criminal legislation, to the law “On the protection of childhood” and Family Code of Ukraine. Concerning the other important international instruments, in 2011, Ukraine signed the Istanbul Convention, but still not ratified it.¹⁴⁹ However, Ukraine ratified the Lanzarote Convention on 27 August 2012 and it entered into force for Ukraine on 1 December 2012.¹⁵⁰

The notion of domestic violence is not new for Ukraine, but in 2017 it was changed in Ukrainian legislation according to the European standards of protection from domestic violence and with the adoption of Law “On prevention and counteraction to domestic violence”. The new law defines domestic violence as: “...acts (acts or omissions) of physical, sexual, psychological or economic violence perpetrated in the family or within the place of residence or between relatives or between former or current spouses or between other persons cohabiting (residing)) to the same family but not (not) in a family relationship or in marriage, regardless of whether the person who committed the domestic violence (s) lived in the same place as the victim and threats of committing such acts.”¹⁵¹ At the same time, the Law extends the list of persons who is subject to it.¹⁵²

The explanatory note to the law "On Prevention and Countering Domestic Violence" states that the necessity of the adoption of the act is because of the inefficiency of existing legislation, and because of the preparation of Ukraine for ratification of the Istanbul Convention.¹⁵³ Therefore, as the Istanbul Convention, the aforementioned Law identifies 4 types of domestic violence, namely physical, psychological, sexual and economic. As the very name of the law shows, it sets out two types of measures - measures aimed at preventing violence and measures aimed at combating domestic violence. Particular attention should be paid to preventive measures, as they are partially new to the Ukrainian legislation:

- emergency protective order;
- restrictive order against the abuser;
- taking abuser for preventive accounting and carrying out preventive maintenance with him;
- directing the offender to undergo a special program for abusers.¹⁵⁴

¹⁴⁸ “Закон України Про запобігання та протидію домашньому насильству № 2229-VIII”, Відомості Верховної ради України, accessed 2019 September 01, <https://zakon.rada.gov.ua/laws/show/2229-19>

¹⁴⁹ “Chart of signatures and ratifications of Council of Europe Convention on preventing and combating violence against women and domestic violence”, Council of Europe, accessed 2019 September, <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/signatures>

¹⁵⁰ “Chart of signatures and ratifications of Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse”, Council of Europe, accessed 2019 September 06, <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/201/signatures>

¹⁵¹ “Закон України Про запобігання та протидію домашньому насильству № 2229-VIII”, Відомості Верховної ради України, accessed 2019 September 01 <https://zakon.rada.gov.ua/laws/show/2229-19>

¹⁵² Ibid., Art.3 (2).

¹⁵³ “Пояснювальна записка до проекту закону України Про запобігання та протидію домашньому насильству”, Відомості Верховної ради України, accessed 2019 September 01, <http://w1.c1.rada.gov.ua/pls/zweb2/webproc34?id=&pf3511=63891&pf35401=453442>

¹⁵⁴ “Методичні рекомендації на тему: запобігання та протидія домашньому насильству”, Головне територіальне управління Міністерства Юстиції в Дніпропетровській області, accessed 2019 October 11.

It is difficult to say that those measures are clearly preventive, as they come in force when the violence was committed, but such measures are aimed to prevent further violent behaviour in the future. That is, by their very nature, these measures should help the relevant authorities respond quickly and correctly to cases of violence.¹⁵⁵ It is important to distinguish between two types of orders. The emergency protective order may provide measures such as the obligation to leave the victim's place of residence (stay), a ban on entry and stay in the place residence (stay) of the victim, prohibition in any way from contacting the victim. It is handed down to the offender by authorized units of the bodies of the National Police of Ukraine for up to 10 days in the case of an immediate threat to the life or health of the injured person for immediate ending domestic violence, preventing it from continuing or re-committing.¹⁵⁶ The restrictive order is set by the court in the manner prescribed by law. Issuing of a restricted order may be sought by the victim or his or her representative, and if the victim is a child, by the parents, relatives, other legal representatives, guardianship authority. The aforementioned order may specify one or more measures of restriction of the rights of the offender or imposing on him certain duties, which could include prohibition to stay in the place of cohabitation or stay with the victim, restriction of communication of the offender with the injured child, prohibition to search person, etc.¹⁵⁷

It should be noted that the Law separately defines a child victim of domestic violence as a person under the age of 18 and affected by any type of violence (physical, psychological, economic or sexual) or witnesses of such violence.¹⁵⁸ Furthermore, the Law introduces a list of the rights conferred on the child victim of domestic violence, which includes all the rights conferred on any victim of domestic violence, as well as additional rights, such as the exercise of rights based on age, gender, maturity, etc, and also possibility to be transferred for temporary care to relatives or guardianships.¹⁵⁹

In Part 2 of Art. 4 stated that, “[...] if the child is a victim of domestic violence, any action taken against him or her is based on the principles set out in the United Nations Convention on the Rights of the Child, the Council of Europe Convention on the Protection of Children against sexual exploitation and sexual abuse, the European Convention on the Rights of the Child and the legislative acts of Ukraine in the field of protection of the rights of the child.”¹⁶⁰

¹⁵⁵ Володимир Пивоваров та Анастасія Ілліна, “Кримінологічний аналіз законодавства про запобігання та протидію домашньому насильству”, *Порівняльно-аналітичне право* №1, (2018):282.

¹⁵⁶ Закон України “Про запобігання та протидію домашньому насильству № 2229-VIII”, Відомості Верховної ради України, accessed 2019 August 01, <https://zakon.rada.gov.ua/laws/show/2229-19>,” quoted in Катерина Левченко та Маріяна Легенька, “До проблеми вдосконалення законодавчого забезпечення запобігання та протидії домашньому насильству”, *Вісник Харківського національного університету внутрішніх справ*, No. 4, (2017):122.

¹⁵⁷ Катерина Левченко та Маріяна Легенька, “Терміновий заборонний припис та обмежувальний припис як особлива форма відповіді на домашнє насильство: міжнародний досвід та національна практика”, *Право та Безпека*, 71(4) (2018), 60-65. doi: 10.32631/pb.2018.4.08.

¹⁵⁸ “Закон України Про запобігання та протидію домашньому насильству № 2229-VIII”, Відомості Верховної ради України, accessed 2019 August 01 <https://zakon.rada.gov.ua/laws/show/2229-19>

¹⁵⁹ Ibid, art. 22

¹⁶⁰ “Закон України Про запобігання та протидію домашньому насильству № 2229-VIII”, Відомості Верховної ради України, accessed 2019 August 01, <https://zakon.rada.gov.ua/laws/show/2229-19>,

The law also imposes a duty on all citizens of Ukraine as well as persons who are legally in Ukraine to report all cases of domestic violence against children.¹⁶¹

In addition to the law mentioned by the author above, in 2017 Ukraine adopted the Law of Ukraine “On Amendments to the Law Criminal and Criminal Procedure Codes Ukraine in order to implement the provisions of the Council of Europe Convention on the preventing and combating violence against women and domestic violence”¹⁶² which has significantly changed and increased criminal responsibility for domestic violence. Unlike the Law “On Prevention and Counteraction of domestic violence”, criminal law sets out the concept of domestic violence in a slightly different light.¹⁶³ Under Article 126¹ “domestic violence is the intentional systematic commission of physical, psychological or economic violence against a spouse or ex-spouse or ex-spouse with whom the perpetrator is (has) been in a family or close relationship, leading to physical or psychological suffering, health disorders, disability, emotional dependence or worse in the quality of life of the victim.”¹⁶⁴ The victim of domestic violence under this article can only be one of the spouses or former spouse or other person with whom the perpetrator is staying or had a family or close relationship.¹⁶⁵ As required by the Istanbul Convention by Art. 53 of the Istanbul Convention the general part of the Criminal Code of Ukraine was supplemented by Art. 91¹ “Restrictive measures applicable to persons who committed domestic violence.”¹⁶⁶ If the sentenced person does not fulfill one or more duties prescribed to him by the court, such person may be liable under Article 390¹ of Criminal Court of Ukraine and be sentenced for failure to comply with restrictive measures or failure to pass a program for offenders.

Besides provision prescribed in the Criminal Code, Ukrainian legislation also provided for administrative responsibility for domestic violence. Depending on the consequences for the victim, lack of systematic factor, domestic violence could be act of criminal nature or administrative offence.¹⁶⁷ Article 173² of Code of Administrative Offenses contains a non-exhaustive list of actions that could be qualified as a form of domestic violence (except sexual abuse for which only criminal responsibility provided): the use of violence that did not cause bodily harm, threat, insult

¹⁶¹ “Закон України Про запобігання та протидію домашньому насильству № 2229-VIII”, Відомості Верховної ради України, art. 19 (3), accessed 2019 August 01, <https://zakon.rada.gov.ua/laws/show/2229-19>

¹⁶² “Закон України Про внесення змін до Кримінального кодексу України щодо захисту дітей від сексуальних зловживань та сексуальної експлуатації 14.03.2018 № 2334-VIII”, Відомості Верховної ради України, accessed 2019 October 13, <https://zakon.rada.gov.ua/laws/show/2334-19>.

¹⁶³ В. Голіна, “Насильство в сім’ї: правові та кримінологічні напрями й заходи запобігання його проявам в Україні”, *ефективність кримінального законодавства: доктринальні, законотворчі та правозастосовні проблеми її забезпечення Матеріали міжнародного науково-практичного круглого столу*, (2019):36.

¹⁶⁴ “Кримінальний кодекс України 05.04.2001 № 2341-III”, Відомості Верховної ради України, accessed on 2019 October 01, <https://zakon.rada.gov.ua/laws/show/2341-14>

¹⁶⁵ Олександр Дудоров та Микола Хавронюк, *Відповідальність за домашнє насильство та насильство за ознакою статі (науковий та практичний коментар до новел Кримінального кодексу України)*, (Kyiv Waite, 2019), 696 https://ukraine.unfpa.org/sites/default/files/pub-pdf/FNOON_Kommentar_A5.pdf

¹⁶⁶ В. Голіна “Насильство в сім’ї: правові та кримінологічні напрями й заходи запобігання його проявам в Україні”, *ефективність кримінального законодавства: доктринальні, законотворчі та правозастосовні проблеми її забезпечення Матеріали міжнародного науково-практичного круглого столу*, (2019):37.

¹⁶⁷ Тамара Бугаєць, “Домашнє насильство: фокус на hard skills”, *Юридична газета*, March 05, 2019, <http://yur-gazeta.com/publications/practice/kriminalne-pravo-ta-proces/domashne-nasilstvo-fokus-na-hard-skills.html>

or harassment, deprivation of housing, food, clothing, other property or funds. Furthermore, the Code imposes administrative responsibility for failure to comply with an urgent restraining order and failure to notify his / her temporary place of residence.¹⁶⁸ In general, the sanction of the article has been much criticized, since it provides for the imposition of a fine on the offender, which is completely ineffective in cases of domestic violence. Firstly, the offender usually pays a fine from the family budget. Secondly, such sanction does not guarantee effectiveness and can even worsen the victims' situation.¹⁶⁹

It is important to highlight the question of protection of children from sexual violence separately since Ukraine ratified the Lanzarote Convention and become bound by it. According to the National Police, 70% of child victims of sexual abuse are victims of persons they knew. Step by step, Ukraine is harmonizing national legislation according to European standards for the protection of the rights of children against sexual abuse and sexual exploitation and the fact that such violence exists within the family has been taken into account. The Law of Ukraine "On protection of childhood" proclaims that the state protects the child from all forms of domestic violence and other manifestations of child abuse, exploitation, including sexual abuse, including by parents or their substitute.¹⁷⁰ Additionally, the Ukrainian Parliament adopted the law by which amended provisions of the Criminal Code of Ukraine and criminalized:

- any sexual interactions with a person under 16 committed by close relatives or family members or the person charged with the responsibility of or caring for the victim (Article 155 part 2)
- and molestation of minors committed by close relatives or family members or the person charged with the responsibility of or caring for the victim (Article 156 part 2).¹⁷¹

Furthermore, recently two projects of the law were registered in the Ukrainian Parliament, both of them had an aim to increase the criminal responsibility for sexual violence against children. The law №6607 proposed to amend provisions of Criminal Code with the provisions on voluntary chemical castration¹⁷², at the same time law №6449 contains provisions about obligatory chemical

¹⁶⁸ "Кодекс про адміністративні правопорушення (статті 1 - 212-21) of 07.12.1984 No. 8073-X", Відомості Верховної ради України, accessed 2019 October 02, <https://zakon.rada.gov.ua/laws/show/80731-10>.

¹⁶⁹ Олена Ковальова, "Адміністративна відповідальність за вчинення домашнього насильства: особливості впровадження нового законодавства", *Південноукраїнський правничий часопис* № 2., (2018),63 <http://dspace.oduvs.edu.ua/handle/123456789/1267>.

¹⁷⁰ "Закон України Про охорону дитинства 2001 No. 2402-III", Інформація Верховної Ради України, accessed 2019 October 13, <https://zakon.rada.gov.ua/laws/show/2402-14>.

¹⁷¹ "Закон України Про внесення змін до Кримінального кодексу України щодо захисту дітей від сексуальних зловживань та сексуальної експлуатації 14.03.2018 № 2334-VIII", Відомості Верховної ради України, accessed 2019 October 13, <https://zakon.rada.gov.ua/laws/show/2334-19>.

¹⁷² "Проект Закону про внесення змін до деяких законів України (щодо впровадження Єдиного реєстру осіб засуджених за злочини проти статеві свободи та статеві недоторканості малолітньої чи малолітнього та посилення відповідальності за злочини, вчинені проти статеві свободи та статеві недоторканості малолітньої чи малолітнього)", Верховна Рада України офіційний веб-портал, accessed 2019 October 13, http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=62078

castration¹⁷³. The Verkhovna Rada of Ukraine passed the law №6449, however, the President of Ukraine vetoed the law.¹⁷⁴

The next issue, which is important to highlight, is that Ukraine has fully prohibited the usage of corporal punishments – at school, at home, at alternative care settings. Under article 150 of the Family Code of Ukraine “Physical punishment of the child by the parents, as well as other inhuman or degrading treatment or punishment are prohibited.”¹⁷⁵ Furthermore, depending on the consequences parents could be responsible under the Code of Administrative offenses for domestic violence or under the Criminal Code of Ukraine for beating and torture. However, notwithstanding the existence of legal prohibition, the majority of parents believe that it is appropriate and necessary to use physical punishment against children. The resent examination of 294 biological mothers from different regions of Ukraine showed that: 48% of them sometimes or often use spankings, 48% answered that at least sometimes they hit their children and the majority answered that they rarely use slapping.¹⁷⁶ Report of the Council of Europe about the violence in the family showed that almost every third adult in Ukraine is convinced that the upbringing of a child cannot be effective without the physical punishments. In addition, the majority of respondents stated that almost all their friends who have children at least sometimes could slap a child for educational purposes.¹⁷⁷

In general, as practice in Ukraine shows, the level of tolerance of physical punishment in families remains quite high. The main reason is the lack of sufficient awareness of children about their rights and the acceptance by society of such behavior as the correct one. It can also be added that the pattern of this behavior goes from generation to generation and usually persons who were punished in such a way by their parents use the same way of child upbringing.

It can be concluded that in the last three years Ukraine has made significant changes in the field of protection of the rights of children against domestic violence. In particular, the adopted law “On preventing and combating domestic violence», and amendments to the Criminal Code and Code of Administrative offenses reaffirmed that the problem of domestic violence is not just an internal family problem. Notwithstanding all positive measures taken, many problems in the field of protection of children from domestic violence still exist and remain unsolved, thus the author considers it necessary to examine them in the next chapter.

¹⁷³ Пропозиції Президента до Закону "Про внесення змін до деяких законодавчих актів України щодо посилення відповідальності за злочини, вчинені стосовно малолітньої особи, неповнолітньої особи, особи, яка не досягла статеві зрілості", Верховна Рада України офіційний веб-портал, accessed 2019 October 13, https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=61790

¹⁷⁴ “Зеленський ветовав закон про хімічну кастрацію”, Укрінформ accessed 2019 October 13, <https://www.ukrinform.ua/rubric-economy/2773094-nbu-u-serpni-kupiv-na-mizbanku-316-miljoniv.html>

¹⁷⁵ “Сімейний кодекс України 2002 № 2947-III”, Відомості Верховної ради України, accessed 2019 October 13, <https://zakon.rada.gov.ua/laws/show/2947-14>

¹⁷⁶ Grogan-Kaylor et al., “Predictors of parental use of corporal punishment in Ukraine”, *Children and Youth Services Review*, 88 (2018):68-69, <https://doi.org/10.1016/j.childyouth.2018.03.003>.

¹⁷⁷ Павилишин et al., *Насильство щодо дітей в Україні. Всеукраїнське опитування громадської думки*, (ФОП Клименко Київ 2015), <https://rm.coe.int/poll-druk1-2-/168075de65>

5. PROBLEMATIC ISSUES IN THE FIELD OF PROTECTION OF CHILDREN AGAINST DOMESTIC VIOLENCE IN UKRAINE

It is obvious that nowadays the global community made a significant contribution to fight with domestic violence. The main legal documents such as UNCRC, the Istanbul Convention, and the Lanzarote Convention have established effective frameworks and mechanisms to protect victims of domestic violence, furthermore, the European Union made an issue of protection from domestic violence as one of the priorities for its policy. Ukraine also recognized the importance of combating domestic violence, including against children.

However, it is still necessary to examine whether Ukraine complied with international and European standards of protection from domestic violence. In particular, to reveal the importance of Ukraine's ratification of the Istanbul Convention, the positive obligations of the state to monitor domestic violence cases. In addition, the issue of opening criminal proceedings for domestic violence against children and the removal of a child from a family in cases of domestic violence remains problematic.

5.1. Positive obligations of the state to identify, open and investigate cases of domestic violence against children

At the international law, the United Nations Convention held on states a clear obligation to establish effective measures for identification and investigation of child maltreatment (Article 19 para 2 of UNCRC).¹⁷⁸ As it is defined at the GC No 13 there is no discretion for a State with the regard to measures prescribed in the Article 19, including measures of identification and reporting, the term “shell take” which is used in the Article underline the strict obligation to undertake such measures. The laws and regulations of the State shall be constructed in such a way, that would allow intervening appropriately when a violation will take place.¹⁷⁹ The GC No 13 pays attention to the identification of risk factors and possible cases of violence against the child. This obliges states to train those who came into contact with a child, to give clear guidance about how to interpret possible signals of domestic violence. Those persons who can meet the child on an everyday basis, such a teacher, pre-school teacher, social workers, medical staff, etc., and shall be able to identify the possible case of domestic violence against a child and inform special state organs, including cases when the child is not asking for help directly.¹⁸⁰ Furthermore, the children must be given “as many opportunities as possible to signal emerging problems before they reach

¹⁷⁸“United Nations Convention on the Rights of the Child”, OHCHR, accessed 2019 September 16, <https://www.ohchr.org/documents/professionalinterest/crc.pdf>

¹⁷⁹ “General comment No. 13 (2011) The right of the child to freedom from all forms of violence”, Committee on the Rights of the Child, accessed 2019 September 15, https://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.13_en.pdf

¹⁸⁰ *Ibid.*, para 48

a state of crisis”. Also, children and another person should have the possibility to report about violations, it means that the state shall establish hotlines and other forms of informing.¹⁸¹

The Istanbul Convention provides an effective system of protection from and prevention of domestic violence. The absence or improper implementation of each part of this system can make a whole system ineffective and weaken the other elements of the system. Therefore, the provisions of the Istanbul Convention requires States to provide an effective mechanism for opening and investigation of cases of domestic violence.¹⁸² Article 5 of the Istanbul convention underlines the obligation of states, in particular, to investigate such cases notwithstanding that they committed by non-state actors.¹⁸³ This statement is interpreted as requiring States to take real measures that allows competent organs to take immediate action in cases of domestic violence, which includes effective prevention, investigation or punishment.¹⁸⁴ Furthermore, the Istanbul Convention requires States to take necessary measures for the protection of victims, in particular, that such measures should not depend on the victim’s direct address. As it is stated in the Explanatory Report to the Istanbul Convention, usually the authorities take necessary measures only when the victim is explicitly expressed a will to make a statement about the violation. However, often victim, in particular, child-victim, because of fear or other reasons, is not able to take such direct measures and as a consequence will not be able to receive necessary protection, for example, shelter or consultation. For the proper implementation of a States’ due diligence standards, the Convention requires to provide a necessary and sufficient number of shelters and hotlines.¹⁸⁵ The Group of Experts suggested that the State should establish one shelter for every 10,000 inhabitants and at least one free hot-line, which would work for 24 hours a day and 7 days a week.¹⁸⁶

Similarly to the UNCRC, the Istanbul Convention prescribed a possibility for other persons to inform about cases of domestic violence. Under Article 28 the professionals (f.e. doctors) who, by virtue of their activities, may report such a case of violence.¹⁸⁷ The Convention itself provides

¹⁸¹ “General comment No. 13 (2011) The right of the child to freedom from all forms of violence”, Committee on the Rights of the Child, accessed 2019 September 15, https://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.13_en.pdf

¹⁸² Олександр Дудоров та Микола Хавронюк, *Відповідальність за домашнє насильство та насильство за ознакою статі (науковий та практичний коментар до новел Кримінального кодексу України)*, (Kyiv Waite, 2019), https://ukraine.unfpa.org/sites/default/files/pub-pdf/FNOON_Kommentar_A5.pdf

¹⁸³ “Council of Europe Convention on preventing and combating violence against women and domestic violence”, Council of Europe, accessed 2019 September 01, <https://rm.coe.int/168046031c>.

¹⁸⁴ “Explanatory report of Council of Europe Convention on preventing and combating violence against women and domestic violence”, Council of Europe, accessed 2019 September 04, <https://rm.coe.int/16800d383a>.

¹⁸⁵ Bonita C. Meyersfeld, “Introductory Note to the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence”, *International Legal Materials* 51, no. 1 (2012): 106-107, <https://heinonline-org.skaitykla.mruni.eu/HOL/P?h=hein.journals/intlm51&i=117>.

¹⁸⁶ “Task Force to Combat Violence against Women, including Domestic Violence (EG-TFV) – Final Activity Report”, Council of Europe (2008):51; quoted in: “Explanatory Report to the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse”, Council of Europe (2011):80.

¹⁸⁷ “Council of Europe Convention on preventing and combating violence against women and domestic violence”, Council of Europe, accessed 2019 September 01, <https://rm.coe.int/168046031c>.

not an obligation, but an opportunity, and states that in this case, it will not be a breach of confidentiality rules. The main aim of such a provision is to ensure that no rules about confidentiality will not prevent reporting a serious act of violence.¹⁸⁸ The same provision is provided in the Lanzarote Convention. Under Article 12, States parties to the Convention must ensure that professionals having reasonable grounds, without breaching confidentiality rules, could inform special authorities about cases of sexual abuse of violence against the child.¹⁸⁹ The Lanzarote Convention does not make it obligatory, but rather possible to report without breaching of professional rules. However, the States should determine the categories of professionals to which this provision applies.¹⁹⁰ In addition, other persons are encouraged to inform about all suspected sexual abuse cases. The same approach is fully reproduced by the European Union Directive on combating the sexual abuse and sexual exploitation of children and child pornography.¹⁹¹

Concerning the Ukrainian legislation, it can be stated that it complies with international standards only partially.

An important prerequisite for the protection of children from domestic violence is the early detection of such violence that is why international standards emphasize that national legislation should enable other persons to identify and report cases of violence. Under Ukrainian legislation, the possibility to inform authorities about domestic violence have:

- The victim of domestic violence;
- Educational institutions (Article 11 p.2(2));
- Health care institutions (Article 12 p.2(1));
- Citizens of Ukraine and other persons (Article 19 p.3).¹⁹²

It is also mentioned that such institutions/persons should inform the units of National Police and if the offense committed against the child - the Children's affairs service, no later than one day (24 hours).¹⁹³

For the proper identification of domestic violence, the procedure for conducting and documenting the results of medical examination of victims of domestic violence, and providing them with medical care was established. It enshrined in the order of the Ministry of Health of

¹⁸⁸ "Explanatory report of Council of Europe Convention on preventing and combating violence against women and domestic violence", para 41, Council of Europe, accessed 2019 September 04, <https://rm.coe.int/16800d383a>

¹⁸⁹ "Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse", Council of Europe Treaty Series, accessed 2019 September 01, <https://rm.coe.int/1680084822>

¹⁹⁰ "Explanatory Report to the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse", Council of Europe treaty series, accessed 2019 September, <https://rm.coe.int/16800d3832>

¹⁹¹ "Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA", EUR-Lex, accessed 2019 September 18, <https://eur-lex.europa.eu/eli/dir/2011/93/oj>.

¹⁹² "Закон України Про запобігання та протидію домашньому насильству № 2229-VIII", Відомості Верховної ради України, accessed 2019 September 01, <https://zakon.rada.gov.ua/laws/show/2229-19>

¹⁹³ Ibid., art. 11.

Ukraine No. 278 of 01.02.2019¹⁹⁴. The document defines the procedure for conducting a medical examination of victims of domestic violence and documenting the results of the examination, as well as the procedure for providing medical assistance to the victims. As in the law, the order stipulates that the health care institution shall not later than one day, inform about violence to the National Police and Children's affairs Service (guardianship authority). It is also noted that messages are transmitted via telephone or e-mail, subject to the legal regime of restricted information.¹⁹⁵ The latter is particularly important and has two aspects. On the one hand, information on victims of violence must be protected by confidentiality rules, as required by international standards, including the Istanbul Convention.¹⁹⁶ On the other hand, as the Council of Europe standards require that reports of domestic violence from the health care provider shall not be restricted by confidentiality requirements, that is, such persons will not be responsible for the dissemination of such information.¹⁹⁷

According to the Law of Ukraine “On Information” (Article 11), one of the types of restricted information is confidential. Confidential information is information relating to an individual, in particular on the state of health. Such type of information can be disseminated only after the agreement of a person or in cases provided for by law.¹⁹⁸ According to Art. 39-1,40 of the Law of Ukraine "Fundamentals of the legislation of Ukraine on health care"¹⁹⁹ and Art. 286 of the Civil Code of Ukraine the patient has the right to secrecy about his state of health, the fact of seeking medical help, diagnosis, as well as about the information obtained during his medical examination.²⁰⁰ Healthcare workers and other persons who have become aware of illness, medical examination, examination and their results, intimate and family aspects of a citizen's life in connection with the performance of their professional or official duties, are not allowed to disclose this information, except as provided by legislative acts cases. It is noted that one of the cases where medical secrecy may be lawfully disseminated is the detection of injuries that may

¹⁹⁴ “Наказ Міністерства охорони здоров'я Про затвердження Порядку проведення та документування результатів медичного обстеження постраждалих осіб від домашнього насильства або осіб, які ймовірно постраждали від домашнього насильства, та надання їм медичної допомоги 01.02.2019 №278”, Відомості Верховної Ради України, accessed 2019 October 16, <https://zakon.rada.gov.ua/laws/show/z0262-19>

¹⁹⁵ “Наказ Міністерства охорони здоров'я Про затвердження Порядку проведення та документування результатів медичного обстеження постраждалих осіб від домашнього насильства або осіб, які ймовірно постраждали від домашнього насильства, та надання їм медичної допомоги 01.02.2019 №278”, Відомості Верховної Ради України, accessed 2019 October 16, <https://zakon.rada.gov.ua/laws/show/z0262-19>

¹⁹⁶ “Council of Europe Convention on preventing and combating violence against women and domestic violence”, Council of Europe, art.65 accessed 2019 August 01, <https://rm.coe.int/168046031c>

¹⁹⁷ Ibid., Art.28

¹⁹⁸ “Закон України Про інформацію 02.10.1992 № 2657-XII”, Відомості Верховної ради України, accessed 2019 October 16, <https://zakon.rada.gov.ua/laws/show/2657-12>

¹⁹⁹ “Закон України про Основи законодавства України про охорону здоров'я 19.11.1992 № 2801-XII”, Відомості Верховної Ради України, accessed 2019 October 16, <https://zakon.rada.gov.ua/laws/show/2801-12>

²⁰⁰ “Цивільний кодекс України 16.01.2003 № 435-IV”, Відомості Верховної Ради України, accessed 2019 October 16, <https://zakon.rada.gov.ua/laws/show/435-15>

have occurred because of domestic violence.²⁰¹ However, such legislative provisions are not sufficiently clear and do not state explicitly that in the event of such information being disseminated, the health care workers will not be held criminally liable. For example, The Belgian Criminal Code provides that doctors, pharmacists, midwives and other persons who are required to keep medical secret are not criminally responsible for disclosing information related to domestic violence if they informed relevant authorities about committed violence or risk.²⁰²

Workers of educational institutions in their activities on preventing and combating domestic violence are guided by the Order of the Ministry of Education and Science of Ukraine No. 1047 of 02.10.2018 "On Approving of Methodological Recommendations for Detecting, Responding to Domestic Violence and Interaction of workers of educational institutions with other bodies and services" (hereinafter – Recommendations No.1047)²⁰³ and Methodological Guidelines for the prevention and counteraction to domestic violence Ministry of Education and Science of Ukraine (hereinafter – guidelines No 1/11-5480).²⁰⁴ In the Recommendations No1047 a list of features that can characterize the existence of a particular type of violence against a child. The following Recommendations have been adopted for use in schools and other educational institutions. The document also outlines how workers of educational establishments should interact with each other in cases of domestic violence. Undoubtedly, the existence of such Methodological Recommendations is indispensable for an effective response to domestic violence against children and meets international and European standards. At the same time, it is possible to pay attention to some drawbacks of Recommendations No 1047. First of all, the document simply lists the possible factors which could indicate the existence of domestic violence against the child, the Recommendations does not prescribe that in order to determine domestic violence it should be either a certain set of such factors, or the presence of only one but a significant factor. For example, dirty fingernails and hair of the child itself, without other signs, are not necessarily a sign of economic domestic violence. It should be noted that such a factor should be taken into account by the education worker but should be considered on a case-by-case basis. In addition, aforementioned Recommendations No 1047 of the Ministry of Education and Science of Ukraine does not contain an indication of the obligation to report during the day in case of identification of a case of domestic violence, the authorized bodies of the National Police, the authorized persons

²⁰¹ Олександр Савченко, "Коли інформацію про пацієнта можна розголошувати?", *Bright Advice*, July 12, 2019, <https://brightadvise.com/blogs/100>

²⁰² Михайло Акімов, "Правове регулювання запобігання та протидії домашньому насильству в деяких державах Європи", *Новели законодавства про запобігання та протидію домашньому насильству, матеріали міжнародного круглого столу* (2019):11 http://napu.com.ua/wp-content/uploads/2019/09/VERSTKA_NOVELU_ZAKONODAVSTVA.pdf

²⁰³ "Наказ Міністерства освіти і науки про затвердження методичних рекомендацій щодо виявлення, рагування на випадки домашнього насильства і взаємодії педагогічних працівників із іншими органами та службами № 1047", *Відомості Верховної Ради України*, accessed 2019 October 21.

²⁰⁴ "Методичні рекомендації щодо запобігання та протидії насильству Лист Міністерства освіти і науки; No. 1 / 11-5480, 2018", *Відомості Верховної Ради України*, accessed 2019 October 21, <https://zakon.rada.gov.ua/rada/show/v5480729-18>

of the local authorities and the children's affairs service (guardianship bodies).²⁰⁵ This is not entirely correct either since the Recommendations states that they are “[...] designed to provide a comprehensive integrated approach for the prevention of domestic violence [...] by effectively responding to domestic violence.”²⁰⁶

The Guidelines No 1/11-5480 gives a detailed description of types of violence, as well as the consequences for the victim. These recommendations are designed to be used by education workers in their educational activities to help formulate intolerance to violence, indifference to victims, and recognition that domestic violence is a violation of human rights.²⁰⁷

Article 22 of the Law on Preventing and Combating Domestic Violence states that appeals and reports of domestic violence against children are received and considered in accordance with the procedure approved by the Cabinet of Ministers of Ukraine. The Law does not specify in detail document it is, but it can be concluded that the Law refers to the Cabinet of Ministers of Ukraine Decree on Some issues of social protection of children in difficult life circumstances, including those that may endanger their lives and health.²⁰⁸ The aforementioned decree covers a wider range of circumstances, but not explicitly domestic violence. Specifically, there are situations such as child ill-treatment, difficult life circumstances, and circumstances that may indicate a threat to the child's' life and health which are non-exhaustive.²⁰⁹ Also, the Decree establishes the procedure for the interaction of the state authorities, local authorities, educational institutions, individuals during the reporting and identification of children who have found themselves in difficult life circumstances. Deputy Minister of Social Policy Natalia Fedorovchi noted in her interview that “[...] at a certain stage of the adoption of the Decree the part was removed from it that the acceptance and consideration of reports about domestic violence against children, providing them with help and protection is regulated by a separate document. This has seriously weakened further work to resolve these issues ...”²¹⁰

The Law “On prevention and counteraction of domestic violence” prescribes that one of the spheres in a field of protection of victims of domestic violence should be an establishment of a free 24-hours call center to provide an immediate response to domestic violence cases, provide

²⁰⁵Олена Постол, “Субекти запобігання та протидії домашньому насильству”, *Новели законодавства про запобігання та протидію домашньому Насильству*, матеріали міжнародного круглого столу, (2019):149, http://napu.com.ua/wp-content/uploads/2019/09/VERSTKA_NOVELU_ZAKONODAVSTVA.pdf

²⁰⁶ “Наказ Міністерства освіти і науки про затвердження методичних рекомендацій щодо виявлення, рагування на випадки домашнього насильства і взаємодії педагогічних працівників із іншими органами та службами № 1047”, Відомості Верховної Ради України, accessed 2019 October 21.

²⁰⁷Ватсон Клум et al., *Моніторинг ситуації реагування системи правосуддя на домашнє насильство та насильство щодо жінок*, (La Strada Ukraine 2018), 12.

²⁰⁸ “Постанова Кабінету Міністрів України про Деякі питання соціального захисту дітей, які перебувають у складних життєвих обставинах, у тому числі таких, що можуть загрожувати їх життю та здоров’ю 03.10.2018 № 800”, Відомості Верховної Ради України, accessed 2019 October 21, <https://zakon.rada.gov.ua/laws/show/800-2018-%D0%BF>

²⁰⁹ *Ibid.*, para 3.

²¹⁰ Котляр Алла, “Домашнє насильство: хто захистить дітей? Або Про слабкість держполітики у сфері дитинства”, ZN.UA, accessed 2019 October 30, https://dt.ua/interview/domashnye-nasilstvo-hto-zahistit-ditey-317241_.html.

advice on all forms of violence.²¹¹ Under Article 14 of the aforementioned law, the call-center should be a state organ that has its territorial offices throughout Ukraine.²¹² The Ministry of Social Police issued an Order “On Establishment of the State Institution “Call Center of the Ministry of Social Policy of Ukraine on Combating Trafficking in Human Beings, Preventing and Combating Domestic Violence, Gender-Based Violence, and Violence Against Children”. The document establishes two different lines for different crimes, statements on domestic violence are received by telephone 1588 or by the electronic address of the call center.²¹³ However, as the representatives of La Strada Ukraine emphasized, there are some risks in the activities of this call center. The provision does not provide that the anonymity of the subscribers will be ensured²¹⁴, as defined in Article 24 of the Istanbul Convention. Provisions of the order provide that „All conversations are conducted by the Call Center staff using the appropriate digital registrar to document the speech information, with the obligatory notification of the person addressing it. The order of recording of audio information on applications and messages, its removal from the registrar and the storage period shall be determined in the prescribed manner.”²¹⁵

The issue of shelters for victims of domestic violence is also limited in law. Only two articles of the Law referred to shelters, in particular, Article 20 emphasizes that victims of violence must be provided with temporary shelter if it is needed.²¹⁶ The Decree of Cabinet of Ministers of Ukraine Approving the Model Provision on Shelters for Persons Suffering from Domestic and / or Gender-Based Violence determine the procedure for the functioning of the shelter for the victims of domestic violence and the procedure for placing such persons in the shelter.²¹⁷ The Decree defines that shelter for victims of domestic and/or gender-based violence is a specialized support service for victims of domestic and/or gender-based violence.²¹⁸ One of the main aims of the shelter is to provide a complex help for a victim, including medical, psychological, legal and other types of assistance. Furthermore, the legal document provides that each victim of domestic

²¹¹ “Закон України Про запобігання та протидію домашньому насильству”, Відомості Верховної Ради України, accessed 2019 September 01, <https://zakon.rada.gov.ua/laws/show/2229-19>

²¹² *Ibid.*, Art.14.

²¹³ “Про утворення Державної установи «Кол-центр Міністерства соціальної політики України з питань протидії торгівлі людьми, запобігання та протидії домашньому насильству, насильству за ознакою статі та насильству стосовно дітей» від 11.12.2018 № 1852”, Відомості Верховної Ради України, accessed 2019 October 21, <https://zakon.rada.gov.ua/laws/show/z1458-18>

²¹⁴ Ватсон Клум et al., *Моніторинг ситуації реагування системи правосуддя на домашнє насильство та насильство щодо жінок*, (La Strada Ukraine 2018), 11.

²¹⁵ “Про утворення Державної установи «Кол-центр Міністерства соціальної політики України з питань протидії торгівлі людьми, запобігання та протидії домашньому насильству, насильству за ознакою статі та насильству стосовно дітей» від 11.12.2018 № 1852”, Відомості Верховної Ради України, accessed 2019 October 21, <https://zakon.rada.gov.ua/laws/show/z1458-18>

²¹⁶ Закон України Про запобігання та протидію домашньому насильству”, Відомості Верховної Ради України, accessed 2019 September 01, <https://zakon.rada.gov.ua/laws/show/2229-19>

²¹⁷ “Постанова Кабінету Міністрів Типове положення про притулок для осіб, які постраждали від домашнього насильства та/або насильства за ознакою статі 22.08.2018 №655”, Відомості Верховної Ради України, accessed 2019 September 21, <https://zakon.rada.gov.ua/laws/show/655-2018-%D0%BF>

²¹⁸ *Ibid.*, para 1.

violence should receive an individual approach, and the number of services should also be determined to take into account the individual needs and all services are free of charge.²¹⁹

In addition, a shelter cannot accommodate an unaccompanied child who has been a victim of domestic violence, it is stipulated that the child when admitted to the shelter, must be with the mother/father or the person who replaces them. The shelter informs the Children's affairs Service and the relevant unit of the National Police in the course of one day.²²⁰ However, the shelters for children – victims are provided by The Decree of Cabinet of Ministers of Ukraine About the Standard Provision for Children's Shelter of Childrens' affairs Service.²²¹ The para 9 of this Decree (which was adopted in 2019) provides, that the shelter accommodate a child who has suffered from domestic violence, *“in the event that the child cannot be accommodated with the parents, other legal representatives in connection with ... domestic violence, and in the absence of contact between the victim of domestic violence, child abuse and child molestation in any form”*.²²² The shelter should be free of charge and work for 24 hours a day.

As it was underlined by the organization La-Strada Ukraine that the functioning of shelters is a complicated issue, up to December 2018 the shelters, which exist nowadays, were established before the entry into force of a Decree and no new shelter was opened.²²³ According to information which exists in the network the shelters for a person, who suffered from domestic violence opened in Kyiv, Kharkiv, Rivne, Kryvyi Rig, Vinnycia, and planning to open in Ivano-Frankivsk. Information on the availability of shelters is disseminated, but without specifying their addresses, while information about state social and psychological care centers their addresses is public.²²⁴ According to available data about shelters of Service for children, such shelters are present in all regions.²²⁵ However, it is worth noting that there is also some discrepancy here, as shelters for children of Childrens' affairs Service, including those who have been affected by domestic violence, do not hide their address and does not provides for individual approach for victims of violence.

²¹⁹ “Постанова Кабінету Міністрів Типове положення про притулок для осіб, які постраждали від домашнього насильства та/або насильства за ознакою статі 22.08.2018 №655”, Відомості Верховної Ради України, accessed 2019 October 21, <https://zakon.rada.gov.ua/laws/show/655-2018-%D0%BF>.

²²⁰ *Ibid.*, para 19.

²²¹ “Постанова Кабінету Міністрів України Про Типове положення про притулок для дітей служби у справах дітей 09.06.1997 № 565”, Відомості Верховної Ради України, accessed 2019 October 21, <https://zakon.rada.gov.ua/laws/show/565-97-%D0%BF>

²²² *Ibid.*, para 9.

²²³ Ватсон Клум et al., *Моніторинг ситуації реагування системи правосуддя на домашнє насильство та насильство щодо жінок*, (La Strada Ukraine 2018), 10.

²²⁴ “Притулок для осіб, які постраждали від домашнього насильства,” WikiLegalAid, accessed 2019 October 21, [https://wiki.legalaid.gov.ua/index.php?title=Притулок для осіб, які постраждали від домашнього насильства та/або насильства за ознакою статі&oldid=13044](https://wiki.legalaid.gov.ua/index.php?title=Притулок_для_осіб,_які_постраждали_від_домашнього_насильства_та/або_насильства_за_ознакою_статі&oldid=13044)

²²⁵ “Мережа закладів соціального захисту дітей”, Міністерство соціальної політики <https://www.msp.gov.ua/content/merezha-zakladiv-socialnogo-zahistu-ditey.html?PrintVersion>

As to the obligation of the state to open a proceeding and investigate, the GC No 13 describes that investigation can be opened either when it is reported by the child or another person, but in any case, it shall be conducted in child-based and child-sensitive approach.²²⁶

One of the main achievements of the Istanbul Convention is Article 55 and provision about the investigation and prosecution *ex parte* and *ex officio*. Dictionaries define the term “*ex officio*” as “By virtue of his office. 2. Many powers are granted and exercised by public officers which are not expressly delegated. A judge, for example, may, *ex officio*, be a conservator of the peace, and a justice of the peace,”²²⁷ and “*ex parte*” term as “from one party”²²⁸ In the context of the Istanbul Convention, such terms mean that the authorities concerned have the ability to open proceedings even regardless of the victim's wishes. The investigation of domestic violence cases is not reliant on the victim's report and may continue even if the victim withdraws their statement or complaint. Mainly, this rule shall be effective in cases of physical violence, sexual violence (including rape), forced marriage, forced sterilization or forced abortion, because Article 55 also, allows States to make a declaration concerning the minor offenses.²²⁹ This provision has particular importance for domestic violence cases, especially for children, who could be in a state of fear or under pressure of the abuser, or because of other reasons will not be able to report about violence.²³⁰ In order to encourage victims to initiate criminal proceedings, paragraph 2 prescribes that State should allow special organizations, counselors and other specially trained persons to provide the necessary support for the victim.²³¹ The similar provision prescribed in the Lanzarote Convention (Article 32), which allows initiating a proceeding even when the victim withdraws its complaint. It also allows public authorities to prosecute sexual crimes against a child without its complaint.²³² The main purpose is to ensure an effective criminal investigation and punishment of abusers in cases when victims because of pressure or threats could withdraw its complaint.

The European Union Directive on combating the sexual abuse and sexual exploitation of children and child pornography adopts the same approach to initiating proceedings in cases of sexual abuse against children. Article 15 of the Directive prescribes that the Member States should

²²⁶ “General comment No. 13 (2011) The right of the child to freedom from all forms of violence”, Committee on the Rights of the Child, accessed 2019 September 15, https://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.13_en.pdf.

²²⁷ John Bouvier, A Law Dictionary, *Adapted to the Constitution and Laws of the United States*, (1856) accessed 2019 October 20, <https://legal-dictionary.thefreedictionary.com/ex-officio>

²²⁸ “*Ex parte*”, Legal Information Institute, accessed 2019 October 20, https://www.law.cornell.edu/wex/ex_parte

²²⁹ Olga Jurasz, “The Istanbul Convention: a new chapter in preventing and combating violence against women,” *Australian Law Journal*, 89(9), (2015):8, http://oro.open.ac.uk/46126/3/Jurasz-Istanbul%20Convention_ORO.pdf

²³⁰ Ronagh J.A. McQuigg, “What potential does the Council of Europe Convention on Violence against Women hold as regards domestic violence?”, *The International Journal of Human Rights*, 16(7), (2012):953, <https://doi.org/10.1080/13642987.2011.638288>.

²³¹ Rosa Loga and Vanessa Depeyre, *Report identifying good practices in the field of violence against women in the light of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention)*, (Vienna:WAVE 2015),12.

²³² “Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse”, Council of Europe Treaty Series, accessed 2019 September 01, <https://rm.coe.int/1680084822>

ensure that investigation and prosecution of sexual violence crimes should not be dependent of victims report and will not be closed even if victim withdraw his or her statement.²³³

The European Court of Human Rights in the number of decisions had considered the controversial issue of private prosecution in domestic violence cases. In the recent case of *Volodina v Russia* where the Court find a violation of Article 3 of the ECHR and that the Russian Federation does not fulfill its positive obligations concerning the protection of the physical integrity of a person²³⁴. The Court examined whether the State fulfills positive obligations under Article 1 of the Convention, read in conjunction with Article 3, and one of such obligations is to establish and apply in practice an adequate legal framework affording protection against ill-treatment by private individuals. In this context, the Court finds that the Russian legal framework, which requires for crimes against physical integrity to take a minimum threshold of gravity for launching public prosecution was not effective.²³⁵ The Court underlined that the ECHR does not require public prosecution in all cases of attack by private individuals, but in cases of domestic violence, the possibility to bring private prosecution is not effective. The private prosecution “[...] puts an excessive burden on the victim of domestic violence, shifting onto her the responsibility for collecting evidence capable of establishing the abuser’s guilt to the criminal standard of proof”.²³⁶

Furthermore, in a landmark case of *Opuz v Turkey*, the Court established a number of criteria, which could be taken into account in cases when public prosecution is necessary in domestic violence cases.²³⁷ The Court examined a practice of member States and identified such factors as: “the seriousness of the offense, whether the victim’s injuries are physical or psychological, if the defendant used a weapon, if the defendant has made any threats since the attack; if the defendant planned the attack, the effect (including psychological) on any children living in the household, the chances of the defendant offending again, the continuing threat to the health and safety of the victim or anyone else who was, or could become, involved, etc.”²³⁸ In the very case, the applicant, who had been a victim of domestic violence, repeatedly withdrew her allegations of domestic violence, because of fear and threats from a perpetrator. In conclusion, the Court stated that in cases where a serious offense occurred a public prosecution is necessary, even if the applicant withdraws its complaint.²³⁹ In the writing submission of INTERIGHTS for the case

²³³ “Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA”, EUR-Lex, accessed 2019 September 20, <http://data.europa.eu/eli/dir/2012/29/oj>

²³⁴ “*Volodina v. Russia*, Application no. 41261/17”, HUDOC, accessed 2019 September 16, <http://hudoc.echr.coe.int/eng?i=001-194321>.

²³⁵ *Ibid.*, para 76.

²³⁶ *Ibid.*, para 82.

²³⁷ “*Opuz v Turkey*, Application no. 33401/02”, HUDOC, accessed 2019 September 04, <http://hudoc.echr.coe.int/eng?i=001-92945>

²³⁸ *Ibid.*, para 138.

²³⁹ *Ibid.*, para 168.

Opuz v Turkey, expressed an opinion, that in cases of domestic violence the investigation should take into account the views of the victim, however, the law must also take into account the realities of domestic violence, the pressure on the victim. Furthermore, making a prosecution dependent on submission or initiation by a victim may render the victim to further pressure and/or reprisals if she or he continues the process.²⁴⁰

From January 2019 changes to the criminal and criminal procedure, legislation has entered into force, these changes subsequently modified the provisions about domestic violence, including the prosecution of acts of domestic violence. Under Article 26 para 4 of Criminal Procedure Code of Ukraine Criminal proceedings in the form of private prosecution begin only based on the statement of the victim.²⁴¹ The refusal of the victim, and in the cases provided for in this Code, by his / her representative from the prosecution is an absolute ground for closing the criminal proceedings in the form of private prosecution. Ukraine, in order to implement the provisions of the Istanbul Convention, modified the rules of procedure in the form of private prosecution. One of the changes is that today under article 284 the refusal from prosecution by the victim or his/her representative cannot be a ground for closing criminal proceedings related to domestic violence.²⁴² At the same time, according to Article 477 of the Code of Criminal Procedure, the following crimes shall be carried in a form of private prosecution - Article 126¹ ("Domestic violence"), Article 134 ("Illegal abortion or sterilization"), Article 151² ("Coercion to marriage"), part 1 of article 152 ("Rape"), part 1 of article 153 ("Sexual violence"), article 154 ("Compulsion for sexual intercourse") of the Criminal Code of Ukraine.²⁴³

It should be noted that Article 477 provides for filling a claim about a crime committed, only by the victim. However, the Criminal Procedure Code does not regulate an issue when a child has been the victim of domestic violence. Often enough, because of their age, children are unable to contact the investigating authorities to file a complaint about violence committed. In practice, these issues are resolved in such a way that the Children's affairs Service, guided by the right to bring before the executive authorities the issue of bringing to justice those who have committed violations of children's rights.²⁴⁴ On the other hand, the investigator or the prosecutor may open the case himself if the victim is a child, but in that case, the qualification of the crime would not be domestic violence. Under the Article 44 of the Criminal Procedure Code of Ukraine "Parents (adoptive parents) may be involved as legal representatives, and in their absence, guardians of the

²⁴⁰ "Opuz v. Turkey, Application No. 33401/02 Nahide WRITTEN SUBMISSIONS OF INTERRIGHTS", Refworld, accessed 2019 October 21 <https://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&dclid=4a366f972>

²⁴¹ "Кримінальний процесуальний кодекс України 13.04.2012 № 4651-VI", Відомості Верховної ради України, accessed on 2019 October 20, <https://zakon.rada.gov.ua/laws/show/4651-17>

²⁴² *Ibid.* art. 284.

²⁴³ *Ibid.* art. 477

²⁴⁴ "Закон України Про органи і служби у справах дітей та спеціальні установи для дітей Відомості Верховної Ради України", Art.4, accessed 2019 November 01, <https://zakon.rada.gov.ua/laws/show/20/95-%D0%B2%D1%80>

person, other adult close relatives or family members, as well as representatives of guardianship bodies, institutions and organizations...”.²⁴⁵ Therefore, it would be correct if in cases of domestic violence, including sexual abuse, legal representatives of children would have the legal capacity to file a statement about the committed crime if there is no conflict of interests between the child and parent, who is not prepatrator of violence.

Moreover, article 284 allows not to close criminal proceedings, even if the victim withdraws its statement when it is connected with the crime connected with domestic violence.²⁴⁶ Therefore, this raises some questions and contradictions, namely whether this article applies only to Article 1 of the Criminal Code of Ukraine, or whether the effect of the article extends to other crimes, based on the concept of “domestic violence,” under the law on the prevention and counteraction of domestic violence.²⁴⁷ The debate on this issue arises not only in legal doctrine but also in practice. For example, the Judge of the Poltava Court of Appeal Nizelkovskaya L.V. in its separate opinion considers that the provisions of Article 284 of the Criminal Procedure Code of Ukraine are applicable not only to a specific crime, which is provided for in Article 126¹ of the Criminal Code but has a broader interpretation. The Judge points out that the Criminal Code of Ukraine does not contain, in addition to the crime provided for in Article 126¹ of the Criminal Code of Ukraine, a list of crimes related to domestic violence. Furthermore, she notices that the wording of paragraph 7 of part 1 of Article 284 of the Criminal Procedure Code also does not contain a list of crimes related to domestic violence. However, a systematic analysis of the legislation gives grounds to conclude that crimes related to domestic violence may be other than crimes under Article 126-1 of the Criminal Code of Ukraine, based on the definition of domestic violence contained in Article 1 of the Law of Ukraine On Prevention and Countering Domestic Violence. The Judge also notes that the investigation authorities should prove that the crime is related to domestic violence.²⁴⁸

Therefore, if a child, becomes a victim of domestic violence, he or she must file a claim for the opening of the case, but if the victim withdraws his or her application, such proceedings will not be closed. Consequently, it does not comply fully with Article 55 of the Istanbul Convention and Article 32 of the Lanzarote Convention and with practice and principles adopted by the European Court of Human Rights.

²⁴⁵ “Кримінальний процесуальний кодекс України 13.04.2012 № 4651-VI”, Відомості Верховної ради України, accessed on 2019 October 20, <https://zakon.rada.gov.ua/laws/show/4651-17>

²⁴⁶ *Ibid.* art.284.

²⁴⁷ Ірина ГЛЮБЮК, “Із приватного в публічне. Коли відмова потерпілого від обвинувачення є недостатнім аргументом”, Закон і Бізнес, <https://zib.com.ua/ua/print/136156-koli-vidmova-poterpilogo-vid-obvinuvachennya-e-ndostatnim-a.html>

²⁴⁸ “Полтавський апеляційний суд справа No. 531/1913/18 провадження 11-кр/814/725/19”, Окрема думка, Єдиний реєстр судових рішень, accessed 2019 October 30 <http://reyestr.court.gov.ua/Review/85044148>

The analysis shows that there are no important elements of a mechanism to protect a child from domestic violence and the provisions on the acceptance and investigation of cases of domestic violence do not meet the standards and obligations of states.

5.2.Issue of separation of the child with family and deprivation of parental rights in domestic violence cases.

The right to be cared for by parents is one of the bases of children's right to respect for family life. Under Article 8 of the ECHR, the state should not intervene in family life, at the same time it has a positive obligation to protect children and parents against abuse.²⁴⁹ However, in cases where the child becomes a victim of domestic violence, the state must be confronted with the question of protecting the child's best interests. In such cases, the state, in accordance with its positive obligations, must limit the child's communication with the abuser, even when it is one of the parents or both of them. Therefore, the main issue is the removal of the child from family and/or deprivation of parental rights. International and European standards do not give clear instructions on how the state should act in such cases, but rather allow the margin of appreciation for the state. However, there are still some standards and guidelines, which underline the main principles and directions for states.

General Comment No 13 repeatedly emphasizes that the family is in the best position to protect the child and prevent violence. However, the Committee also when violence takes place within a family, and in such cases, it may be necessary for the State to intervene.²⁵⁰ The Guidelines for Alternative Care provides that a family is a fundamental group of society, natural environment for growth and well-being for the child.²⁵¹ When the family is unable to provide care for the child, the State should be responsible for the protection of a child, through its competent organs the State should ensure appropriate alternative care.²⁵² However, the state itself must create conditions for the protection of children which are in difficult life circumstances and to support families in order to prevent a separation of the child with the family. General Comment No 8 also emphasizes that family relations are important for the child and it is necessary to preserve a unique intimacy of such relations for the child. The Committee provides that not all cases should result in punitive measures, but rather on supportive and educational.²⁵³ The same position could be found in the GC 13, under which in the case when violence committed by caregivers but also depending on the

²⁴⁹ "The Convention for the Protection of Human Rights and Fundamental Freedoms", Council of Europe, accessed 2019 August 30, https://www.echr.coe.int/Documents/Convention_ENG.pdf.

²⁵⁰ "General comment No. 13 (2011) The right of the child to freedom from all forms of violence", Committee on the Rights of the Child, accessed 2019 September 15, https://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.13_en.pdf.

²⁵¹ "Resolution adopted by the General Assembly 64/142. Guidelines for the Alternative Care of Children", accessed 2019 October 21, https://www.unicef.org/protection/alternative_care_Guidelines-English.pdf

²⁵² *Ibid.*, p.5.

²⁵³ "General comment No. 8 (2006): The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment (Arts. 19; 28, Para. 2; and 37, inter alia)", Refworld, accessed 2019 September 15, <https://www.refworld.org/docid/460bc772.html>.

severity and other factors, the intervention measures such as educational or restorative ones are preferable.²⁵⁴ The authorities before the intervention should weight where it is necessary to protect the child, where the child is in the risk of significant harm and whether it is in the best interests of the child.²⁵⁵

However, by protecting family unity, the Committee also does not rule out the possibility of separating the child with the family if it is in the best interests of the child.²⁵⁶ The removal of a child from the care of the family should be seen as a measure of last resort, also, the decision to remove should have time frames and be reviewed regularly.²⁵⁷ It is required that the state should identify specific and appropriate criteria regarding the ability of families to take care of the child, the following criteria must be correctly applied to each case when there is a question of separating the child from the family.²⁵⁸ Furthermore, such provisions as that the child has a right to provide its own view, that family-based alternative care is preferable over the residence care, forms main principles for situations of separation of the child from the family.

Under Article 45 p.2 of the Istanbul Convention, the Parties to the Convention could apply as a measure of protecting the child - deprivation of the offenders' parental rights, if the interests of the child, including the safety of a child, cannot be otherwise preserved.²⁵⁹ The Istanbul Convention also stipulates that, where a child is a victim of violence, all steps to protect it must be taken with the best interests of the child. Furthermore, Article 50 of the Istanbul Convention demands that law enforcement organs should respond promptly and effectively to all forms of violence by providing effective and appropriate protection to victims of violence.²⁶⁰ The State can take all possible measures that are necessary to protect the victim. For example, we can consider the practice of the Republic of Poland, which law envisages the creation of the so-called "blue line." In cases where domestic violence is reported, the police, together with the prosecutor, take immediate steps to protect the victim. In particular, if a child is abused in the family, he or she may be immediately removed even without a court order. In this case, the child is held in the hospital,

²⁵⁴“General comment No. 13 (2011) The right of the child to freedom from all forms of violence”, Committee on the Rights of the Child, accessed 2019 September 15, https://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.13_en.pdf.

²⁵⁵“General comment No. 8 (2006): The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment (Arts. 19; 28, Para. 2; and 37, inter alia)”, Refworld, accessed 2019 September 15 <https://www.refworld.org/docid/460bc7772.html>

²⁵⁶“General comment No. 13 (2011) The right of the child to freedom from all forms of violence”, Committee on the Rights of the Child, accessed 2019 September 15, https://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.13_en.pdf.

²⁵⁷“Resolution adopted by the General Assembly 64/142. Guidelines for the Alternative Care of Children”, accessed 2019 October 21, https://www.unicef.org/protection/alternative_care_Guidelines-English.pdf

²⁵⁸ *Ibid.*, p. 39

²⁵⁹ “Council of Europe Convention on preventing and combating violence against women and domestic violence”, Council of Europe, accessed 2019 August 01, <https://rm.coe.int/168046031c>

²⁶⁰ *Ibid.*, art. 50.

a temporary family, and within 24 hours, the court considers the matter and determines the next steps.²⁶¹

The Lanzarote Convention also takes into account the possibility of separation of the child from the family or deprivation of parental rights. Article 14 para 3 allows removing the perpetrator or victim from the family environment when the parents are involved in the case of sexual exploitation or abuse.²⁶² It also underlines, that such measure is rather a protective measure, but not a sanction. One of the parents can be removed from the family when a child could be protected by another parent, however, when it is not possible, the child can be removed taking into account his or her best interests.²⁶³ Moreover, a State may require the deprivation of parental rights in respect of a person who has been separated from the family following Article 14 of this Convention.

The European Court of Human Rights has repeatedly raised the issue of interference into family life in cases where the child becomes a victim of domestic violence. In its decisions, the Court tried to find a balance between the protection of family life, which is provided in Art. 8 of the ECHR and protection of the best interests of the child.

In the case *K.A. v Finland* the Court stated that “[...] family is a natural environment for the growth and well-being of a child, however, when the family is not able to protect the child, removal to alternative care may be required.”²⁶⁴ Such measures, should be provided for by law, have a legitimate aim and be necessary in the democratic society. In this case, the children were removed from the family on suspicion of sexual abuse by parents and were put to foster care. The parents complained to the Court the decision about care was in breach of Article 8 of the Convention. In its decision, the Court considered separately the issue of application of emergency care orders and ordinary care order and found that there was no violation of Article 8 of the ECHR. The Court stated that the two requirements shall be considered, namely that a care order is based on “relevant” and “sufficient” reasons and that the parent is entitled to participate adequately in the decision-making. Furthermore, “the reasoning adopted should reflect the careful scrutiny which the competent organs can be expected to carry out in a matter of such magnitude by weighing the various evidence militating in favor and against the care measure”.²⁶⁵ The Court found that both orders were grounded on “relevant” and “sufficient” reasons and that the applicant was sufficiently involved in the decision-making,

²⁶¹ Митник У.М., “Кримінально-правова протидія домашньому насильству в окремих країнах Європейського Союзу”, *Наукові записки НаУКМА. Юридичні науки. Том 3* (2019):86.

²⁶² “Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse *in brief*”, Council of Europe, accessed 2019 September 06, <https://rm.coe.int/1680471b5a>

²⁶³ “Explanatory Report to the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse”, para 99, Council of Europe Treaty Series, accessed 2019 September 06, <https://rm.coe.int/16800d3832>

²⁶⁴ “*K.A. v. Finland* (Application no. 27751/95)”, HUDOC, accessed 2019 October 24, <http://hudoc.echr.coe.int/eng?i=001-60885>

²⁶⁵ *Ibid.*, para 103

The Court in the case *Y.C. v the UK* formulated similar principles.²⁶⁶ In the present case, the relevant authorities have taken measures – such as emergency protection order, interim care order, and foster placement order to protect a child who has repeatedly witnessed violence between his father and mother and was injured in one of these situations. The Court again underlined that the case-law regarding care proceedings establishes the obligation to consider two aspects “133. whether, in the light of the case as a whole, the reasons adduced to justify the measures were “relevant and sufficient”; second it must be examined whether the decision-making process was fair and afforded due respect to the applicant’s rights under Article 8 of the Convention.”²⁶⁷ Furthermore, the two points should be considered while identifying the child’s best interests:

- whether it is in the child’s best interests to maintain his family ties with family except in cases where the family has proved particularly unfit;
- and whether is it in the child’s best interests to ensure his development un a safe and secure environment.²⁶⁸

But the court also stressed that parents cannot require family ties to be maintained in cases where it harms the child. In addition, the domestic courts in such cases should take into account the age, maturity, and wishes of a child, also the relationships with the family.²⁶⁹

The Court again underlined the principle that in such sensitive cases as placement of children for alternative care, national authorities shell have a wide margin of appreciation, but “the margin of appreciation to be accorded to the competent national authorities will vary in the light of the nature of the issues and the seriousness of the interests at stake, such as, on the one hand, the importance of protecting a child in a situation which is assessed as seriously threatening to his or her health or development and, on the other hand, the aim of reuniting the family as soon as circumstances permit”.²⁷⁰

With regard to the decision-making process, the Court states, that such issues have to be considered:

- the circumstances of the case;
- the seriousness of the decision taken;
- the degree of the involence of parents into the decision-making process, namely the ability to protect their interests and to present their case.²⁷¹

²⁶⁶ “*Y.C. v. The United Kingdom* (Application no. 4547/10)”, HUDOC, accessed 2019 October 24, <http://hudoc.echr.coe.int/eng?i=001-109557>

²⁶⁷ *Ibid.*, para 133.

²⁶⁸ *Ibid.*, para 134.

²⁶⁹ “*Y.C. v. THE United Kinggdom* (Application no. 4547/10)”, para 135 HUDOC, accessed 2019 October 24, <http://hudoc.echr.coe.int/eng?i=001-109557>

²⁷⁰ *Ibid.*, para 137.

²⁷¹ *Ibid.* para 138.

Consequently, by examination of all facts of the case and application them to main principles, the Court found no violation of Article 8 of the Convention, because the threshold criteria were met. The child's best interests to maintain family ties, in the case, were outraged by the child's need to develop in a safe and secure environment.

In cases *Tlapak and Others v. Germany* (nos. 11308/16 and 11344/16) and *Wetjen and Others v. Germany* (application nos. 68125/14 and 72204/14) where parents of children belonging to the Twelve Tribes Church (Zwölf Stämme) were partially withdrawn of parental authority and their children were taken into care, because they punished their children by caning.²⁷² The Court found no violation of Article 8 of the ECHR because the children were in the risk of inhuman or degrading treatment, which is prohibited in absolute terms under Article 3 of the ECHR. The systematic caning of a children's amount on corporal punishment, therefore the withdrawal of parental rights was completely justified. Furthermore, the Court gave reasoning that there were no other options because parents were convinced that corporal punishment was legitimate and necessary for the child's upbringing.²⁷³

Under the Ukrainian legislation, the State through its organs, such as organs of guardianship, children's affairs service, centers of social security is obliged to give necessary protection for a child.²⁷⁴ It also underlines the principle, that family is a natural environment for the development of the child and each child has a right to live in a family together with parents. The child should not be separated from parents against its will, except such is needed for the best interests of a child according to the decision of the court.²⁷⁵

Article 8 of the Law "On prevention and counteraction of domestic violence" the relevant state organs (organs of guardianship, service for child) are responsible for the protection of the child in cases of domestic violence, including representation in the court concerning the restraining order. In addition, such organs are responsible for consideration of issue the removal of a child or the deprivation of parental rights and for placing a child in a center for social psychological rehabilitation, or in a shelter for children.²⁷⁶

Since it is necessary to protect the best interests of the child, his/her emotional, psychological, physical well-being especially in cases when the child has become a victim of domestic violence, the actions of the state's organs should be aimed at the minimization of traumatic effect for the

²⁷² "Cases *Tlapak and Others v. Germany* (nos. 11308/16 and 11344/16) and *Wetjen and Others v. Germany* (application nos. 68125/14 and 72204/14)", accessed 2019 October 24 <http://hudoc.echr.coe.int/eng-press?i=003-6040082-7759646>

²⁷³ *Ibid.*

²⁷⁴ "Закон України Про охорону дитинства 2001 No. 2402-III", Відомості Верховної Ради України, accessed on 2019 October 13, <https://zakon.rada.gov.ua/laws/show/2402-14>

²⁷⁶ *Handbook on European law relating to the rights of the child*, (Luxembourg Publications Office of the European Union, 2017), 75.

child. Therefore, it is necessary to determine the detailed algorithm of the action of responsible authorities and to define whether it is in line with the principle of best interests of the child.

The Law “On the protection of the childhood”(Art.1), and the Family Code of Ukraine uses the term child ill-treatment, which is a broader one and includes domestic violence. That is why the provisions of the law on preventing and combating domestic violence apply to cases of ill-treatment of the child.²⁷⁷

First of all, after the receiving of the report by the National Police, about cases when the child is a victim of domestic violence or he/she become a witness of domestic violence, the police shall conduct a risk assessment of the child's safety. According to the Law “On prevention and counteraction of domestic violence” “risk assessment - assessment of the likelihood of continuation or recurrence of domestic violence, of the grave or particularly grave consequences of committing it, and of the death of the victim.”²⁷⁸ For the proper risk assessment, the police officers should use in their activity the Procedure for assessing the risks of domestic violence which were approved by the Order of the Ministry of Social Policy and Ministry of interiors of Ukraine No 369/180. The Procedure involves verification of risks, using a customized question form, but since a particular situation may have unique factors/circumstances that could affect the level of danger a police officer may, at its own discretion, assess the level of danger.²⁷⁹ Also, a police officer is required to notify the guardianship body if the child is affected by domestic violence.

If after the assessment of risks it will be determined the level of danger is high, the police officer is obliged and have the possibility to do several actions. One of such actions is emergency protective order concerning the perpetrator of violence. The procedure of issuance of such order prescribed by the Articles 24 to 25 of the Law²⁸⁰ and by the Order On Approval of the Procedure of Issue by the Authorized Units of Bodies of the National Police of Ukraine of the Emergency Protective Order on the Offender.²⁸¹ An emergency protective order is issued on the statement of the victim, as well as on an own initiative by an officer of the authorized unit of the National Police of Ukraine on the results of risk assessment. From the very definition of an emergency protective order, it can be seen that it is issued if there is a danger to the life and health of the person, ie when

²⁷⁷ “Закон України Про охорону дитинства 2001 No. 2402-III”, Відомості Верховної Ради України, accessed on 2019 October 13, <https://zakon.rada.gov.ua/laws/show/2402-14>

²⁷⁸ “Закон України Про запобігання та протидію домашньому насильству”, Відомості Верховної Ради України, accessed 2019 September 01, <https://zakon.rada.gov.ua/laws/show/2229-19> ,

²⁷⁹ “Наказ Міністерства внутрішніх справ України та Міністерства соціальної політики Про затвердження Порядку проведення оцінки ризиків вчинення домашнього насильства 13.03.2019 № 369/180 “ , Відомості Верховної Ради України, accessed 2019 October 24, <https://zakon.rada.gov.ua/laws/show/z0333-19>.

²⁸⁰ “Закон України Про запобігання та протидію домашньому насильству”, Відомості Верховної Ради України, accessed 2019 September 01, <https://zakon.rada.gov.ua/laws/show/2229-19> ,

²⁸¹ “Наказ міністерства внутрішніх справ України Про затвердження Порядку винесення уповноваженими підрозділами органів Національної поліції України термінового заборонного припису стосовно кривдника 01.08.2018 № 654”, Відомості Верховної ради України, accessed 2019 October 24, <https://zakon.rada.gov.ua/laws/show/z0965-18>

the risk is assessed as high. However, the legislation provides that if the level of danger is assessed as low or medium, and other factors/circumstances that may affect the level of danger are absent, an emergency protective order against the offender is can be issued at the discretion of the police officer.²⁸² Furthermore, in the event of a threat to the life or health of the injured child, the police officer shall contact the guardianship and custody body for immediate removal of such a child from the parents, other legal representatives to stop domestic violence, prevent domestic violence. If a police officer finds that there is an imminent threat to the life and health of the child, he or she may remove the child from the family by own initiative.²⁸³ The next step is to provide the necessary safety conditions for the child who has been affected by domestic violence. The affected child should be immediately referred to a health care facility to be examined, to be provided with the necessary medical care in a hospital setting and to document the facts of his or her ill-treatment.

The law provides that if, because of the commission of domestic violence against a child, he/she cannot live with parents, other legal representatives, the child can be placed with relatives, patronage educator, to the center of social and psychological rehabilitation of children, shelters for children of children's services, other institutions for children.²⁸⁴ The issue of temporary placement of a child is provided in the Procedure of the conduct by the guardianship of activities related to the protection of the rights of the child according to which the child can be arranged in a family of patronage caregivers, a shelter for children of the children's service, a center for social and psychological rehabilitation of children, a center for social support for children, a specialized child home, an orphanage.²⁸⁵ Furthermore, the child may be placed with relatives, neighbors with whom the child has a close relationship, and who have expressed a desire to take up temporary care.²⁸⁶ In addition, if the child has been injured with another family member, it may be placed in a special shelter for victims of domestic violence.²⁸⁷

Once the child has been removed from the family as a matter of urgency, the guardianship authorities must, within seven days after the decision has been taken, bring an action for the deprivation of the parents or one of their parental rights, for the removal of the child without the

²⁸² “Наказ Міністерства внутрішніх справ України та Міністерства соціальної політики Про затвердження Порядку проведення оцінки ризиків вчинення домашнього насильства 13.03.2019 № 369/180 “ , Відомості Верховної Ради України, accessed 2019 October 24, <https://zakon.rada.gov.ua/laws/show/z0333-19>.

²⁸³ “Постанова Кабінету Міністрів України про Деякі питання соціального захисту дітей, які перебувають у складних життєвих обставинах, у тому числі таких, що можуть загрожувати їх життю та здоров’ю 03.10.2018 № 800”, Відомості Верховної Ради України, accessed 2019 October 21, <https://zakon.rada.gov.ua/laws/show/800-2018-%D0%BF>

²⁸⁴ “Закон України Про запобігання та протидію домашньому насильству”, Відомості Верховної Ради України, accessed 2019 September 01, <https://zakon.rada.gov.ua/laws/show/2229-19> ,

²⁸⁵ “Постанова Кабінету Міністрів Питання діяльності органів опіки та піклування, пов’язаної із захистом прав дитини, 24.09.2008 № 866”, Відомості Верховної Ради України, accessed 2019 October 21, <https://zakon.rada.gov.ua/laws/show/866-2008-%D0%BF>

²⁸⁶ *Ibid.*,

²⁸⁷ “Постанова Кабінету Міністрів Типове положення про притулок для осіб, які постраждали від домашнього насильства та/або насильства за ознакою статі 22.08.2018 №655”, Відомості Верховної Ради України, accessed 2019 October 21 <https://zakon.rada.gov.ua/laws/show/655-2018-%D0%BF>.

deprivation of parental rights under the Family Code of Ukraine, in the civil proceeding²⁸⁸. In accordance with the Family Code of Ukraine, the court may decide on the removal of the child without deprivation of parental rights²⁸⁹, in particular, if the parents ill-treated the child or are convicted of a criminal offense against the child. For the same reasons, the court may deprive of the parental rights of either parent or both.²⁹⁰

Courts in Ukraine are guided by the plenum of the Supreme Court of Ukraine. The Plenum Resolution states that the deprivation of parental rights is an extreme measure of influence, and the question of its application should be resolved only after a complete and objective clarification of the case. In such cases, the conclusion of the guardianship authority is mandatory, but the court may disagree with such a conclusion if it is not substantiated and contrary to the interests of the child.²⁹¹ However, this document does not reflect the current problems and does not address the issue of domestic violence. Quite often, Ukrainian courts do not take into account the child's opinion when deciding whether to separate the child from parents or do not take into account the best interests of the child, especially in cases of domestic violence.

Recently, news about a girl killed by her biological parents stirred up in Ukraine. The child was found to have been taken into the care of another family because of domestic violence and later returned to biological parents. In March 2015, the child was taken away from the parents without deprivation of parental rights. The case file indicated that the Children's' affairs Service had been notified of a threat to the life and health of the child and had made a decision to immediately remove the child and hospitalize. The court found that the child had not been cared for, had not been given the necessary treatment, and had found traces of physical violence on the body.²⁹² In 2017, the guardianship authorities appealed against the claims of paternity, but neither the trial court nor the appeals granted the claim. Accordingly, in 2018 the Court of Appeal of the Zhytomyr region ruled on the return of the child to the family.²⁹³

This case has shown shortcomings in the activities of the authorities responsible for protecting the rights of the child and the court's failure to comply with the principle of the best interests of the child. That is, the court failed to investigate sufficiently and reasonably all the

²⁸⁸ “Постанова Кабінету Міністрів Питання діяльності органів опіки та піклування, пов'язаної із захистом прав дитини, 24.09.2008 № 866”, Відомості Верховної Ради України, accessed 2019 October 21, <https://zakon.rada.gov.ua/laws/show/866-2008-%D0%BF>

²⁸⁹ “Сімейний кодекс України 2002 № 2947-III”, Відомості Верховної ради України, <https://zakon.rada.gov.ua/laws/show/2947-14>

²⁹⁰ *Ibid.*, Art. 164

²⁹¹ “Узагальнення Верховного суду України, Практика розгляду судами справ, пов'язаних із позбавленням батьківських прав, поновленням батьківських прав, усиновленням, установленням опіки та піклування над дітьми”, Відомості Верховної ради України, accessed 2019 October 24 <https://zakon.rada.gov.ua/laws/show/n0020700-08>

²⁹² “Овруцький районний суд Житомирської області Справа № 286/8024/14-ц”, Єдиний реєстр судових рішень, accessed 2019 November 03, <http://www.reyestr.court.gov.ua/Review/43272726>

²⁹³ “Апеляційний суд Житомирської області Справа №286/1736/17,” Єдиний реєстр судових рішень, accessed 2019 November 03.

circumstances of the case. Deputy Minister of Social Policy in her interview said: “The girl was returned to a biological family for good reasons because it is proved that the child is the best in the family. But, on the other hand, there was an absolute misunderstanding that one cannot return to a family where the child's rights were violated.”²⁹⁴

However, in recent cases, such as the case of the Husyatyn District Court found necessary to separate a child from his father, because of psychological violence against him. The court thoroughly examined all the circumstances of the case, taking into account the fact that the guardianship authorities had previously documented the fact that the parental duties had been improperly fulfilled and that the recommendations of the guardian authority had been ignored. The court duly considered the child's opinion, ascertained all the circumstances of the case and was guided by the best interests of the child. Moreover, the court emphasized that maintaining family ties is necessary for the child, so it does not exclude the possibility that in the future if the negative attitude towards the son is completely corrected and there is no risk of re-psychological abuse, the possibility of returning the minor son to the father will be considered.²⁹⁵ Furthermore, the Supreme Court of Ukraine agreed with the decision of the Court of the First instance and The Appeal Court.²⁹⁶

In another case of the Demidov district court of Rivne region about the separation of children without the deprivation of parental rights, the Court of First Instance did not properly investigate all the circumstances of the case. The guardianship authority fills the claim about the separation of children from the family, because of systematic physical violence against them from their mother and sexual violence against two of their children from the step-father. The Court of First Instance dismissed the claim, arguing that there was no evidence of a real threat to the life and health of the children.²⁹⁷ However, the Court of Appeal and the Supreme Court of Ukraine disagreed with the findings of the court of the first instance and decided that it was necessary to separate children from the family. The Supreme Court underlined that the decision about the necessity to protect the child from the danger should be properly examined, be proved that such a danger actually exists. In its reasoning the Supreme Court stated that the mother of the children was registered with the guardianship and custody body. Furthermore the Supreme Court took into account her guilty behavior in evading the upbringing of her children, deliberately neglecting parental responsibilities, as well as the real threat of unlawful acts against children by the mother's

²⁹⁴ Котляр Алла, “Домашнє насильство: хто захистить дітей? Або Про слабкість держполітики у сфері дитинства”, ZN.UA, accessed 2019 October 24, https://dt.ua/interview/domashnye-nasilstvo-hto-zahistit-ditey-317241_.html.

²⁹⁵ Гусятинський районний суд Тернопільської області Справа № 596/2451/16-ц

²⁹⁶ “Верховний суд України Справа № 596/2451/16-ц провадження № 61-80св18”, Єдиний реєстр судових рішень, accessed 2019 November 05, <http://reyestr.court.gov.ua/Review/74342241>

²⁹⁷ “Демидівський районний суд Рівненської області Справа № 558/410/16-ц номер провадження 2/558/6/1, Єдиний реєстр судових рішень”, accessed 2019 November 05 <http://reyestr.court.gov.ua/Review/64413192>

immediate environment.²⁹⁸ That is, the Supreme Court stated that the decision of the Court of First Instance was without detailed consideration of all the circumstances and the examination of all the evidence.

The decision of *M.S. against Ukraine*, showed some current problems of law enforcement practice in Ukraine.²⁹⁹ The Court has found a violation of Article 8 of the ECHR, which covers both the criminal sphere (conducting a proper investigation into the use of violence against a child) and the civil sphere in determining the separation of a child with a mother. The facts of the case stated that the child was the victim of sexual abuse by her mother's uncle while living with the mother. Father had suspected physical abuse of the child and molestation of his daughter. The girl said that she saw her mother and uncle kissing, as well as showing by her uncle how to kiss as an adult and showing his genitalia and asking to touch. The father repeatedly appealed to the police about his daughter's sexual abuse, but all cases were closed due to insufficient evidence. The issue of the child's place of residence was also decided in civil proceedings. The national courts did not take into account or investigate the allegation of sexual and physical abuse. Furthermore, they relied on the UN Declaration of the Rights of the Child, UN Convention of the Rights of the Child and Article 161 of the Family Code of Ukraine found that “the facts did not disclose any exceptional circumstances which could justify the separation of the child from her mother.”³⁰⁰ Thus, the national court concluded that there exists a certain principle that a child could not be separated from the mother (unless there were exceptional circumstances). Therefore, the important issue was underlined by a Judge Ranzoni in his concurring opinion. The Judge said that national courts entailed a presumption of deciding in favor of mother in childcare cases.³⁰¹ Furthermore, the Judge underlined that there is no such presumption in U.N. standards, it does not correspond to the position of Council of Europe and the Court. “The application of a presumption based on a non-binding U.N. Declaration from 1959 was the real cause of the failure to conduct a sufficiently thorough analysis at domestic level [...] That presumption undermined, from the outset, a balanced assessment of both parents’ situations and, more importantly, of the child’s best interests.”³⁰² The Judge finds that such an issue is the root cause of the shortcomings in the domestic courts’ proceedings.

It can be concluded that the judicial system of Ukraine does not work effectively in cases of domestic violence against children. The courts of Ukraine are guided by outdated principles and do not take into account the current circumstances and peculiarities of domestic violence against

²⁹⁸ “Верховний суд України, справа № 558/410/16-ц провадження № 61-23391св18”, accessed 2019 November 05 Єдиний реєстр судових рішень, <http://reyestr.court.gov.ua/Review/78979269>

²⁹⁹ “*M.S. v. Ukraine*, Application no. 2091/13”, HUDOC, accessed 2019 October 15, <http://hudoc.echr.coe.int/eng?i=001-175140>

³⁰⁰ *Ibid.*, para 41.

³⁰¹ *Ibid.*, CONCURRING OPINION OF JUDGE RANZONI, para 3-4.

³⁰² “*M.S. v. Ukraine*, Application no. 2091/13”, HUDOC, accessed 2019 October 15, <http://hudoc.echr.coe.int/eng?i=001-175140>

a child. For this reason, courts should exercise particular caution and precision in handling the circumstances and resolving such cases to ensure the best interests of the child.

5.3.Sanctions for domestic violence cases

The provisions of Article 45 of the Istanbul Convention provide that punishments for domestic violence cases should be effective, proportional and convincing, taking into account the gravity of committed actions.³⁰³ The Explanatory Report to the Istanbul Convention explains that these criteria should be made in all types of sanctions for both criminal and non-criminal offenses.³⁰⁴ The aforementioned article should be read in connection with the para 2 of Article 48 of the Istanbul Convention, which provides that State-parties to the Convention while imposing fines on the perpetrator of domestic violence, should take into account his/her financial ability to pay such a fine. The aim of this article was to limit the possible negative outcome for the victim of a crime because such sanction could be an indirect problem for a victim.³⁰⁵

The Ukrainian legislation divided responsibility for domestic violence into criminal and administrative. Administrative responsibility is provided for in Article 173² of the Code of Ukraine on Administrative Offenses. One of the sanctions for committing domestic violence is the imposition of a fine on the person who committed the offense.³⁰⁶ This sanction was introduced along with the changes that came into force with the Law “On Prevention and counteraction of domestic violence”. Many scholars and practitioners have opposed the return of the fine as a sanction, as it is considered that the imposition of the fine is inefficient and does not improve the situation of the victim of domestic violence. Moreover, the fine will not help to reduce domestic violence cases in the future.³⁰⁷ Besides, the article was amended by the sanctions of community service, administrative arrest. The experts said that this step of the legislator is more than positive because application to persons who have committed domestic violence, community service, or administrative arrest impose negative personal effects on the offender.³⁰⁸ Furthermore, the fine has a low preventative effect and leads to the revictimization.³⁰⁹

In one of the studies, the authors examined the impact of different sanctions on the possibility of recidivism among domestic violence offenders. Among such sanctions were: fines,

³⁰³ “Council of Europe Convention on preventing and combating violence against women and domestic violence”, Council of Europe, accessed on 2019 August 01, <https://rm.coe.int/168046031c>

³⁰⁴ “Explanatory report of Council of Europe Convention on preventing and combating violence against women and domestic violence”, Council of Europe, accessed 2019 September 04, <https://rm.coe.int/16800d383a>.

³⁰⁵ “Council of Europe Convention on preventing and combating violence against women and domestic violence”, Council of Europe, accessed 2019 August 01, <https://rm.coe.int/168046031c>

³⁰⁶ “Кодекс про адміністративні правопорушення (статті 1 - 212-21) of 07.12.1984 No. 8073-X”, Відомості Верховної ради України, accessed 2019 October 02, <https://zakon.rada.gov.ua/laws/show/80731-10>.

³⁰⁷ Олена Ковальова, “Адміністративна відповідальність за вчинення домашнього насильства: особливості впровадження нового законодавства”, *Південноукраїнський правничий часопис* № 2., (2018), 63 <http://dspace.oduvs.edu.ua/handle/123456789/1267>.

³⁰⁸ Бандурка І.О. et al., *Моніторинг стану виконання законодавства України щодо протидії насильству в сім'ї*. (Київ-Харків, Права людини, 2011), 130.

³⁰⁹ *Ibid.*, 131.

supervision of the offender, jail sentence, probation programs etc. The study was made in central Virginia in the United States of America among the male domestic violence offenders. The results showed that offenders sentenced to jail or such sentences as fines were more likely to commit such an offense again. However, the main conclusion which was made by the authors is that individual treatment is necessary to limit the recidivism of domestic violence cases.³¹⁰

Furthermore, the Ukrainian courts rarely determine the financial status of a family before applying a fine and use it as a main sanction in cases of domestic violence. For example, Khmelnytskyi City Court of Khmelnytskyi Oblast in its decision established the guilt of the person under Article 173², namely for profane abuse and threats of physical violence, and imposed a fine on the offender. The court did not in any way determine the financial situation of the offender and his family.³¹¹ In another case, Theophopol District Court Of The Khmelnytsky Oblast found a violation of Article 173² in conjunction with other articles of Code of Administrative offenses. In particular, the Court finds that a person left her son without proper care and abused alcohol in the presence of the child, moreover, in the presence of the child, committed psychological violence against her mother. The court found that the actions were of minor importance and relieved him of his responsibility by confining his oral argument.³¹² In the case of Snigurov District Court of Mykolaiv region concerning the domestic violence committed by an offender to his wife and daughter the court also sentences offenders with a fine. However, in the materials of a case, it is written that the offender is unemployed, and the reason for the conflict was that the daughter did not repay the debt to her father. In general, in the judgments analyzed by the author, only on October 30, 2019 (122 cases) the courts in 86 cases apply the fine as a sanction for domestic violence. As the facts of the cases showed, most offenders were unemployed.³¹³

Therefore, it can be concluded that in most cases the application by Ukrainian courts of a fine as a sanction for domestic violence does not meet the efficiency requirements of the Istanbul Convention. Moreover, the courts do not take into account the financial status of the persons and do not take into account the fact that such a punishment may adversely affect the victim itself and could lead to re-victimization.

³¹⁰ Gross, M., et al., "The impact of sentencing options on recidivism among domestic violence offenders: A case study", American Journal of Criminal Justice (2000). <https://doi-org.skaitykla.mruni.eu/10.1007/BF02887600>

³¹¹ "Хмельницький міськрайонний суд Хмельницької області ПОСТАНОВА Справа № 86/21860/19 Провадження № 3/686/5513/19", Єдиний реєстр судових рішень, accessed 2019 November 06, <http://reyestr.court.gov.ua/Review/85133139>

³¹² "Теофіопольський районний суд Хмельницької області ПОСТАНОВА Справа № 685/1239/19 Провадження № 3/685/688/19", Єдиний реєстр судових рішень, accessed 2019 November 06, <http://reyestr.court.gov.ua/Review/85133082>

³¹³ "Снігурівський районний суд Миколаївської області, Справа № 485/1781/19 Провадження №3/485/529/19", Єдиний реєстр судових рішень, accessed 2019 November 06, <http://reyestr.court.gov.ua/Review/85299139>

5.4. Monitoring of domestic violence cases

The obligation to collect data on violence against children was imposed on States by the United Nations Convention on the Rights of the Child, they shall take “all appropriate legislative, administrative, social and educational measures”.³¹⁴ The Committee explained that the State should establish a comprehensive data collection system.³¹⁵ The main aim of such a system is the monitoring of the quality of services, programs, and results of taken measures.

In 2011 in the Concluding Observations of the UN Committee on the Rights of the Child, find necessary for Ukraine to ensure comprehensive and systematic monitoring of children's rights. Furthermore, The Committee underlines that there is still no national database with disaggregated data on children's rights DevInfo System to oversee implementation of the National Plan of Action. The Committee recommended for Ukraine to create a national database with comprehensive data, disaggregated by age, sex, and ethnic and socioeconomic origin, on the observance of children's rights. In particular, the system should provide adequate attention to children in vulnerable situations which may require special protection measures.³¹⁶ In 2018 Ukraine submitted a report to the UN Committee in which stated that the Ukrainian government is working on the Unified Information and Analytical System “Children”. Additionally, the Ukrainian parliament is working on a draft of the Law of Ukraine “On the National Bank on Children and Families with Children”.³¹⁷ Until this time, the Law was not adopted, and there is no official draft on the web page of Verkhovna Rada, the Ministry of Health of Ukraine rejected this draft. Furthermore, with the support of UNICEF, Ukraine is developing a system of Devinfo.³¹⁸ Devinfo is the database managed by UNICEF which is used to disseminate data on human rights.³¹⁹ However, the UN committee said that it is not enough and a comprehensive data collecting system is needed.

The Istanbul Convention requires state parties to regularly collect data on cases of domestic violence and to examine the causes and consequences of domestic violence, the number of cases of violence and the efficiency of measures taken. The explanatory report shows that data collecting

³¹⁴“United Nations Convention on the Rights of the Child”, OHCHR, accessed 2019 September 16 <https://www.ohchr.org/documents/professionalinterest/crc.pdf>.

³¹⁵ “General comment No. 13 (2011) The right of the child to freedom from all forms of violence”, para 3(h), accessed on 2019 September 15, https://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.13_en.pdf

³¹⁶ *UN Committee on the Rights of the Child Concluding Observations: Ukraine CRC/C/UKR/CO/3-4*, Committee on the Rights of the Child, accessed 2019 October 25,

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC/C/UKR/CO/3-4&Lang=En

³¹⁷ National report consolidated v and vi periodic national report on ukraine's implementation of the convention on the rights of the child (2011-2017), Kyiv 2018 ,

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fUKR%2f5-6&Lang=en

³¹⁸ Кривачук Л., “Особливості інформаційного та громадського механізмів формування та реалізації державної політики у сфері охорони дитинства в Україні, Науковий вісник“, Демократичне врядування 15, (2015).

³¹⁹ “DevInfo”, Statistic and Monitoring UNICEF, https://www.unicef.org/statistics/index_24300.html

is important for effective prevention and counteraction of domestic violence. The States parties to the Istanbul Convention should collect necessary data by responsible organs.³²⁰

The data which should be collected by the state can be divided into the following categories:

- administrative data (administrative data about the results of work of state bodies; data on services provided for victims by state organs; court data on sentences imposed and characteristics of the perpetrator).
- data collected from the polls (questioning).³²¹

It is important to underline, that such data should be collected regularly. The Convention does not explain the time limits for the term “regularly”, but at least once a year such data should be published, which means that such data should be available to the society through the web-page.³²² The process of collecting, processing and storing data does not require, and cannot be anonymous, however, the Convention requires that such data comply with the data protection standards set out in the Council of Europe Convention on the Protection of Citizens with regard to Automatic Processing of Personal Data (ETS No. 108)³²³. Obviously, this is necessary to protect the privacy and privacy of individuals. Furthermore, the Istanbul Convention imposes the obligation of the Parties to provide the group of independent experts referred to in Chapter IX with the information collected.

There are no clear guidelines on which particular information should be collected as part of administrative data, however the standards of Council of Europe recommend to collect at least the sex of the victim and the offender; the age of the victim and the offender; the relationship between the victim and the offender; type of violence. In addition, the police, prosecutors, and courts should collect data on the outcome of cases.

The Convention requires parties to endeavor to conduct regular surveys to assess the spread and trends of domestic violence (Article 11, paragraph 2). The requirement to conduct surveys at well-defined intervals was put forward to reveal the nature of changes over time.

The importance of data collection is also enshrined in the Lanzarote Convention, the aim of such monitoring is to observe and evaluate the phenomenon of sexual exploitation and abuse of children. However, the Lanzarote Convention (Article 10) underlines that collected data should not cover the personal data of individuals, which on the contrary should be strongly protected, but cover statistical data on victims and offenders. The lack of reliable data on the phenomenon of

³²⁰ “Explanatory report of Council of Europe Convention on preventing and combating violence against women and domestic violence”, Council of Europe, accessed 2019 September 04, <https://rm.coe.int/16800d383a>.

³²¹ “Ensuring data collection and research on violence against women and domestic violence: Article 11 of the Istanbul Convention (2016)”, Council of Europe, accessed 2019 October 25, <https://rm.coe.int/168066dcc4>

³²² *Ibid.*

³²³ “Council of Europe Convention on the Protection of Citizens with regard to Automatic Processing of Personal Data”, Council of Europe Treaty series, accessed 2019 October 25, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680078b37>

sexual abuse of children and the number of victims makes some obstacles to develop the best policies and measures to deal with a problem.³²⁴ “The most effective weapon for combating violence against children is knowledge and pooling of information. The more states choose to invest in creating ad hoc statistical systems, the better will be the quality of the policies”³²⁵ As to the information which should be collected by the relevant authority it is recommended to monitor: types of crimes committed; age and sex of the victim; context in which the abuse or exploitation occurred; the way of reporting about the case. Importantly, as the Lanzarote Convention provides that majority of crimes of sexual violence is committed within the family, the State should collect data on relationships between victim and offender, also any relevant data about family (professional background of parents, the education given to a child, general conditions of victim’s life, etc). Such data are necessary to plan further preventing actions based on results that may determine the susceptibility of the social conditions when violence committed within the family.³²⁶

The Law of Ukraine “On prevention and counteraction of domestic violence” provided that the Ministry of social policy is responsible for data collection about domestic violence and monitoring of the effectiveness of legislation and enforcement measures concerning domestic violence. Besides, as a subject which is responsible for data collection, the Law prescribes the local authorities and regional state administrations, which should collect data on organs/bodies which takymeasures to prevent and combat domestic violence.

The new legislation created in Ukraine of the Unified State Register of Cases of Domestic Violence and Article-Based Violence (Article 16 of the Law).³²⁷ The definition of the Unified State Register of Cases of Domestic and Gender-Based Violence (hereinafter - the Register) is an automated information and telecommunication system designed to collect, register, accumulate, store, adapt, modify, renew, use, distribute (distribute, transfer), the personalization and destruction of gender-specific domestic violence and violence data defined by this Law.³²⁸ The idea of creating such a Register was perceived rather ambiguously, and many practitioners and scholars criticized the existence of such a registry. Among the positive sides, the Registry's data is thought to help shed light on the scale of domestic violence in Ukraine.³²⁹ The Registry must provide details of each incident of violence, information about the victim and the assistance given to him/her and information on the offender. A detailed list of information to be provided for each

³²⁴ “Explanatory Report to the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse”, Council of Europe Treaty Series, accessed on 2019 September 09, <https://rm.coe.int/16800d3832>

³²⁵ Cinzia Grassi et al., “Gathering data on sexual violence against children”, 194 <https://www.coe.int/t/dg3/children/lin5/Source/PublicationSexualViolence/Grassi.pdf>

³²⁶ *Ibid.*, 192-193.

³²⁷ “Закон України Про запобігання та протидію домашньому насильству № 2229-VIII”, Відомості Верховної ради України, accessed 2019 September 01, <https://zakon.rada.gov.ua/laws/show/2229-19>

³²⁸ *Ibid.*, art. 16

³²⁹ Катерина Гуссева “Переваги та недоліки створення та функціонування в Україні Єдиного державного реєстру випадків домашнього насильства і насильства за ознакою статі”, *Актуальні проблеми кримінального права*, (2018):99.

of the aforementioned points is disclosed in the Cabinet of Ministers Resolution On Approving the Procedure for Forming, Maintaining and Accessing the Unified State Register of Domestic and Gender-Based Violence Cases.³³⁰ As stated in the decree, the purpose of the Register is to, in particular, protect the interests of victims, record cases of violence and summarize information on violence, prevent recurrent cases of violence, etc.

Besides, the Law and the Decree provide for a list of persons who have access to the Registry:

- employees of the authorized departments of the Ministry of Social Policy;
- employees of authorized structural units of the Council of Ministers of the Autonomous Republic of Crimea, oblast, Kyiv and Sevastopol city state administrations;
- deputy chairmen (coordinators) on equal rights and opportunities for women and men, prevention and counteraction to gender-based violence of local state administrations and rural, settlement, city, rayon in cities (if established) councils;
- authorized persons of district, district in Kyiv and Sevastopol state administrations,
- employees of authorized units of National Police bodies;
- Child Services Officers (in cases of violence involving children or children being abused);
- authorized employees of social service centers for families, children, and youth;
- judges.³³¹

It is this provision that has received the most criticism, as being contrary to international standards and not guaranteeing confidentiality. Kateryna Levchenko points out that the list of people who have access to the register is very wide, and may particularly affect residents of small towns and villages. “Let's face it: everyone in the small towns knows about each other. And a certain victim, who in general is ashamed of what she has told about herself and the abuser, will become further the object of undue attention.”³³² Another problem is the threat of discrimination against persons whose information is on the register, such as the refusal of employment.³³³ Also, as human rights defenders have pointed out, the creation of the Register does not meet the purpose set out in Article 11 of the Istanbul Convention, because it refers to the collection of statistics, not personal data. This can have the opposite effect of not reporting the violence to the victim in order not to disclose

³³⁰ “Постанова Кабінету Міністрів Про затвердження Порядку формування, ведення та доступу до Єдиного державного реєстру випадків домашнього насильства та насильства за ознакою статі 20.03.2019 № 234, Відомості Верховної Ради України”, accessed 2019 October 21, <https://zakon.rada.gov.ua/laws/show/234-2019-%D0%BF>

³³¹ Закон України Про запобігання та протидію домашньому насильству № 2229-VIII”, Відомості Верховної ради України, accessed 2019 September 01, <https://zakon.rada.gov.ua/laws/show/2229-19>

³³² Ірина Вертосу, “Катерина Левченко: “У законі про домашнє насильство слід дбати про потерпілу людину””, ZMINA, accessed 2019 October 15, https://censor.net.ua/ua/news/3054665/reystyr_vypadkiv_domashnogo_nasylstva_superechyt_mijnarodnym_standartam_upovno_vajena_z_gendernyh_pytan

³³³ Володимир Пивоваров та Анастасія Ілліна, “Кримінологічний аналіз законодавства про запобігання та протидію домашньому насильству”, *Порівняльно-аналітичне право* №1, (2018):282.

their information.³³⁴ This issue is particularly problematic in cases of sexual violence committed within the family, and the victim may not report a case of violence because of feelings of shame and fear.

In the Concept on the State Social Program for Preventing and Combating Domestic and Sexual Violence for the Period up to 2021 states that in the period from 2019 to 2021 Ukraine is obliged to: “Ensure that the necessary data on domestic and gender-based violence are collected and research is conducted on the forms of violence faced by children and vulnerable women and men (disabled, elderly, internally displaced, combatants, youth, marginalized groups, homeless, drug addicts, victims of human trafficking).” It is necessary, to achieve a qualitative collection, processing, and analysis of data on domestic violence.³³⁵

Article 11, paragraph 3, of the Convention, requires the transfer of "collected information" to an independent monitoring "expert group" established under Article 66 (Expert Group on Violence against Women and Domestic Violence, GREVIO).³³⁶ Among the functions of GREVIO are receiving reports on activities taken by States which have ratified the Convention as the primary monitoring tool, and making visits to the Member States as a voluntary monitoring tool.³³⁷ As stated in the Explanatory Report to the Istanbul Convention, such a monitoring mechanism will allow to identify examples and also hinder the harmonization of laws and measures adopted by state parties to the Convention.³³⁸

Unfortunately, since Ukraine has not yet ratified the Istanbul Convention, it cannot transmit the collected data to the group of experts, which could have a much worse impact on the mechanism of protection against domestic violence. It is of particular importance for Ukraine to ratify the Istanbul Convention, because it would give a possibility to become a part of the monitoring mechanism prescribed by the Istanbul Convention. The GREVIO Committee will have a possibility to collect information from society and governmental bodies and it will strengthen the influence on the formulation of the state policy on the protection of persons from domestic violence and will provide public control over its implementation.

³³⁴ Ірина Вертосу, “Катерина Левченко: “У законі про домашнє насильство слід дбати про потерпілу людину””, ZMINA, accessed 2019 October 15, https://censor.net.ua/ua/news/3054665/reyestr_vypadkiv_domashnogo_nasylstva_superechyt_mijnarodnym_standartam_upovno_vajena_z_gendernyh_pytan

³³⁵ “Про схвалення Концепції Державної соціальної програми запобігання та протидії домашньому насильству та насильству за ознакою статі на період до 2021 року”, Міністерство соціальної політики України, accessed 2019 October 20, <https://www.msp.gov.ua/projects/321/?PrintVersion>

³³⁶ “Council of Europe Convention on preventing and combating violence against women and domestic violence”, accessed 2019 August 01, Preamble, para 16 <https://rm.coe.int/168046031c>

³³⁷ Ibid., art. 68.

³³⁸ “Explanatory report of Council of Europe Convention on preventing and combating violence against women and domestic violence”, Council of Europe, accessed on 2019 September 04, <https://rm.coe.int/16800d383a>.

CONCLUSIONS

1. The European Court to Human Rights recognized in its judgment that failure by the state to take measures to protect a person against domestic violence, depending on circumstances, could be a violation of the right to life, right to private life or prohibition of inhuman or degrading treatment provided in the ECHR.
2. The European Union does not have a specific law to protect children from domestic violence, it is the competence of member states to regulate such a problem. However, as the EU recognized the protection of the rights of the child as one of the objectives it has adopted a set of legal tools, which are directed to enhance the child's rights protection. One directive establishes several rights for children as victims of crime, including domestic violence, and the other aims at implementing the provisions of the Lanzarote Convention and contains provisions on the protection of children from sexual abuse and exploitation. Furthermore, 23 member states of the European Union adopted a law that fully prohibited corporal punishment.
3. In Ukraine there is still a high level of domestic violence, moreover, domestic violence is tolerated in society, and much of the violence against children remains hidden. Ukraine was one of the countries that drafted and signed the Istanbul Convention but did not ratify it. One of the reasons is the misunderstanding of the problem of domestic violence by society. The Istanbul Convention needs to be signed to take a comprehensive approach in combating this phenomenon and to join the GREVIO monitoring mechanism that will monitor Ukraine's fulfillment of its obligations.
4. Ukraine has significantly changed and improved the legal framework for combating and protecting from domestic violence, and new laws extend its effect to children. Under the new legislation, the state has undertaken a duty to prevent and combat this phenomenon. Domestic violence is now considered as a crime and as an administrative offense, also legislation imposes penalties for sexual abuse of children by members of their families.
5. However, the results show that the legislation and practice of its implementation in Ukraine do not take into account the particular vulnerability of children and the nature of domestic violence. There is the reason to doubt that information about the victim of violence will not be protected by confidentiality rules, as the addresses of shelters where children may stay without parents are open, and the information provided to the state call center does not ensure the victim's anonymity. Furthermore, the legal tool of special protection of children in difficult life-circumstances does not take into account the specificity of reporting and detection of domestic violence against the child.

6. The Criminal Procedure Code lacks the possibility of opening an investigation of domestic violence crime by relevant authorities without a report of the victim. Crimes of domestic violence and some crimes of sexual violence could be investigated only after the statement of the victim. Such a provision significantly reduces the level of protection for the victim, especially the child, because of his or her age or because of fear he/she will not be able to report the violence. Moreover, such a provision of the legislation does not express the public danger of crimes committed against children in the family.
7. The European Court of Human Rights has established certain principles to justify the “necessity in the democratic society” of separation of children: relevant and sufficient reasons for taken measures; the fair decision-making process; identification of best interests of the child. Case law analysis has shown that national courts do not always follow the principle of best interests of the child and other principles in their practice and do not investigate all the circumstances of the case in the cases when the child should be separated from the family.
8. For domestic violence as an administrative offense, the Ukrainian courts impose a fine as a sanction, without considering the financial situation and other circumstances, such as the ability to correct a person and the risk of re-victimization of the victim.
9. Ukraine has established a State Register of cases of domestic violence and gender-based violence in which each reported domestic violence case should be registered. However, such Register is much criticized because of personal data collection and wide list of persons who have access to it. Therefore, it does not meet the requirements of an effective data collection system.

RECOMMENDATIONS

Based on analysis of international legal acts and practices, together with national law and practice I found necessary to make the following recommendations;

1. First of all, it is necessary to ensure changes in the Criminal Procedure Code of Ukraine concerning private prosecution (Art.477). Standards for the protection of victims of domestic violence require that an investigation should be initiated regardless of whether it has been reported by the victim directly or by another person. Therefore, the procedural legislation should make possible that investigations of crimes related to domestic violence against children should be initiated on their own initiative by the investigator or the prosecutor and should not depend on the victim's statement.
2. Secondly, as is known to protect children from domestic violence, the system of prevention is needed. That is why the state should provide mandatory programs for teachers, school psychologists, medical staff, etc., on issues of effective recognition and detection of domestic violence. Also, it is needed to provide information campaigns for children about places and ways to contact in the event of violence.
3. In addition, the courts of Ukraine should take into account the principles developed by the case-law of the European Court of Human Rights on the separation of a child with a family in cases where the child has been the victim of domestic violence.
4. Ukraine should immediately ratify the Istanbul Convention to make it as one of the main instruments to fight with domestic violence and comprehensively address the issue of domestic violence.
5. Furthermore, it is necessary to establish a comprehensive data collection system to monitor a quality of measures taken and results of such measures and statistical information about domestic violence against children.

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ABSTRACT

Master thesis is devoted to study of issue of protection of children from domestic violence starting from the international level to the national level of Ukraine. The main objectives of the thesis were to analyse United Nations Convention on the Rights of the Child, Istanbul and Lanzarote Conventions, ECHR, European Union legislation together with Ukrainian legislation and to identify the main problems of system of protection from domestic violence in Ukraine. Furthermore, to find whether Ukraine complies with the international and European standards.

The research has shown that despite the positive changes that Ukrainian legislation has undergone in recent years, it together with the enforcement measures do not fully comply with international and European standards and should be improved. In particular, the importance of ratifying the Istanbul Convention was emphasized. It was also identified and analyzed the problem of judicial practice in cases of separation of the child with a family and application of fines as penalties for domestic violence. Besides, the study showed that Ukraine does not provide the possibility of triggering investigation *ex parte* and *ex officio* of criminal offence connected with domestic violence.

Key words: domestic violence, the Istanbul Convention, the Lanzarote Convention, child victim, Ukrainian legislation.

SUMMARY

Nowadays, the problem of domestic violence, including against the child is recognized by the international community as a human rights violation. The particular vulnerability of children and necessity of special protection from domestic violence is underlined in the international documents, such as the United Nations Convention on the Rights of the Child, the Istanbul Convention and the Lanzarote Convention. In addition, the European Union and Ukraine during recent years paid a special attention to a problem of domestic violence. That is why the aim of this thesis is to analyse the issue of domestic violence especially when victim of such violence is the child on international, European and national level in order to find whether Ukraine is able to protect effectively children from domestic violence. In order to achieve this aim, the Master Thesis has as its objectives to analyse Ukrainian legislation; to determine main standards in a field of protection of children from domestic violence; to identify the main problems concerning the protection of children and based on it to analyse whether Ukraine complies with the international and European standards; to present the necessity for Ukraine to ratify the Istanbul Convention.

The Master thesis consists of five chapters and each of them is divided into subchapters. The first four chapters are devoted to analysis of issue of protection of children from domestic violence on different levels – the first one introduce the United Nations level, the second one the Council of Europe, the third and fourth levels of European Union and Ukraine respectively. The fifth chapter is dedicated to specific problematic issues of the protection of children from domestic violence identification, opening and investigation of cases of violence; separation of child or deprivation of parental rights; sanctions for offenders who committed domestic violence; monitoring and data collection on violence against children.

The results has shown that Ukraine has taken a significant step to protect children from domestic violence, adopted a number of new laws, and ratified the Lanzarote Convention, and so on. However, it can be concluded that the problem has not been resolved to the end; there is no comprehensive approach to solving the problem. In particular, Ukraine has signed but has not ratified the Istanbul Convention, and there is still a misunderstanding among the society and authorities on the necessity of ratification. There are also some legislative shortcomings, such as the fact that domestic violence crimes, etc., can only be investigated based on a victim's statement, which in some cases is impossible, especially when the victim is the child. Furthermore, imperfection of judicial practice, lack of monitoring, lack of awareness of children about how to protect themselves, have negative impact on the system of protection.

The problem is also the high level of tolerance of domestic violence in society, the perception of the physical punishment of children as necessary for education and upbringing. Therefore, the states should take all possible measures to fight with such a negative phenomenon.

HONESTY DECLARATION

06/12/2019

Vilnius

I, Anastasiia Dmytriv, student of
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Mykolas Romeris University (hereinafter referred to University),

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International Law programme
(*Faculty /Institute, Programme title*)

confirm that the Master thesis titled

“Protection of Children against Domestic Violence”:

1. Is carried out independently and honestly;
2. Was not presented and defended in another educational institution in Lithuania or abroad;
3. Was written in respect of the academic integrity and after becoming acquainted with methodological guidelines for thesis preparation.

I am informed of the fact that student can be expelled from the University for the breach of the fair competition principle, plagiarism, corresponding to the breach of the academic ethics.



(*signature*)

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