

# RISK ASSESSMENT STANDARDS AND METHODOLOGIES FOR DIVERSE STAKEHOLDERS IN UKRAINE:

NEXT STEPS IN IMPLEMENTING INTERNATIONAL STANDARDS  
TO ENSURE THE SAFETY OF VICTIMS OF VIOLENCE AGAINST WOMEN  
AND DOMESTIC VIOLENCE



**Analytical Report**

# **Risk assessment standards and methodologies for diverse stakeholders in Ukraine:**

Next steps in implementing international standards to ensure the safety of victims of violence against women and domestic violence

Analytical Report

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The opinions expressed in this work are the responsibility of the authors and do not necessarily reflect the official policy of the Council of Europe

## I. Executive summary

The legal framework for combating domestic violence in Ukraine remains relatively new and is still evolving. Relevant stakeholders throughout the system have new competencies and standards to apply in a novel domain. The performance of risk assessments constitutes only one element in this emerging field.

Risk assessments are a fundamental tool in enabling States to ensure their due diligence obligations in preventing and punishing human rights violations related to violence against women. Risk assessments enable diverse stakeholders to evaluate the risks of imminent danger and lethality in individual cases of domestic violence, in order to take operational steps to prevent additional violence from occurring. Risk assessments place victim safety at the centre of procedures. As domestic violence disproportionately affects women and girls, risk assessments contribute to the protection of their basic human rights to life, physical integrity, private and family life and a fair trial, among other rights, free from discrimination.

At present, a risk assessment tool is in use by police, and risk assessment and other tools are being prepared for social work staff, mobile teams, shelters and educators. No domestic violence risk assessment tools have yet been developed for prosecutors, judges, probation officers and corrections. Significantly, urgent injunctions and restrictive measures remain declarative; no police operational measures are contemplated to ensure their enforcement.

While Ukraine has made significant strides in advancing the legal framework, it has yet to ensure a consistent victim-centred, human rights-based approach in line with the requirements of the Council of Europe (CoE) Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), CEDAW and the jurisprudence of the European Court of Human Rights (ECtHR). Furthermore, several legal and operational gaps result in limited, if any, actual protection for victims. Inter-agency coordination and cooperation in addressing individual cases remains weak and largely unstructured.

The aim of this report is thus to provide practical and policy suggestions tailored to the current situation in Ukraine, to support the development and strengthening of the use of risk assessments throughout the criminal justice chain, civil and administrative proceedings, and for social workers, mobile response teams, shelters and education professionals. It contains a series of recommendations for advancing the use of domestic violence risk assessments among an increased number of stakeholders, namely: judges, prosecutors, probation officers, mobile teams/social workers, shelters and educators. It also contains checklists for use by the above-listed actors, and provides sample forms to be used as a reference.

## II. Table of contents

III. Abbreviations	6
IV. Introduction	7
PART I	9
V. Risk assessments: International standards and the national legal framework	9
A. The due diligence standard and ECtHR jurisprudence	9
B. The Istanbul Convention	10
C. Risk assessment standards	11
1. A victim-centred, gender-sensitive, intersectional approach	12
2. Continuous assessments and inter-agency coordination	13
3. Risk assessment methodologies	14
4. Assessing risk to children	16
D. Risk assessments in Ukraine	17
VI. Stakeholders risk assessment methodologies	19
A. Police risk assessments	19
1. Risk assessment questionnaire	19
2. Evaluation of the risk: procedure	21
3. Preventive measures and monitoring an urgent injunction	23
4. Ongoing risk assessments	24
5. Inter-agency cooperation	25
B. Judicial risk assessments	26
1. Standardised risk assessment criteria for judges	26
2. Courtroom safety	28
3. Procedural protections for children and vulnerable witnesses	31
4. Judicial stereotyping	33
5. Pre-trial detention and conditional sentencing	37
6. General jurisdiction judges and administrative offences	38
C. Risk assessments for prosecutors	38
1. Gathering information and risk assessment criteria	39
2. Considerations regarding prosecution	42
3. Arrest, pre-trial detention and bail conditions	45
4. Children as indirect victims	46
D. Risk assessments for probation officers	47
1. Development of a domestic violence-specific form	49
2. Engagement with the perpetrator	50
3. Proposals to the court	51



4. Engaging with the victim	51
E. State Criminal Enforcement Service	51
1. Victim notification scheme upon perpetrator release	51
2. Monitoring/restricting communications	53
F. Risk assessments for social workers and mobile teams	54
1. Risk assessment indicators	55
2. Multi-agency risk assessment conference (MARAC)	56
3. Staff safety	58
G. The role of local executive authorities	59
H. Risk assessments for shelters	59
1. Victim security	60
2. Staff security	61
I. Education professionals	61
PART II	63
VII. The application of international standards to the law and practice on domestic and gender-based violence in Ukraine	63
A. Criminalisation of all forms of violence against women	63
B. <i>Ex officio</i> prosecution and investigations	65
C. Protection and emergency barring orders	68
1. International standards	68
2. Protection orders in Ukraine	70
VIII. Conclusion	71
PART III	72
Annex A - Recommendations for police	72
Annex B - Safety planning for victims	73
Annex C - Probation Department risk assessment form	75
Annex D - Recommended legislative amendments	76
Annex E- Recommendations for the judiciary	78
Annex F - Checklist: Police arrival at the scene	79
Annex G - Checklist for prosecutors	81
Annex H - Risk assessment criteria for judges	82
Annex I - Sample form for judicial risk assessments	83
Annex J - Sample risk assessment form for social service providers and shelters	84
Annex K - Cycle of violence	86
Annex L - Best practice tips for probation officers	89
Annex M - Checklist for judges in pre-trial detention determinations	90
Annex N - Checklist for prosecution risk assessments	91

Annex O - Risk assessment methodologies	93
Annex P - Establishing inter-agency coordination mechanisms	97
Annex Q - Staff safety checklists for social workers	98
Annex R - Safety lists for victims attending court hearings	99
Annex S - Legal safety checklists for victims	100
Annex T - Safety tips and checklists for children	101
Annex U - Indicators for identify child victims in the education sector	103
Annex V - Recommended legislative amendments	106

### III. Abbreviations

CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CoE	Council of Europe
DA	Danger Assessment
DASH	Domestic Abuse, Stalking, Harassment and Honour based violence Assessment Tool
DV	Domestic violence
DVRAG	Domestic Violence Risk Appraisal Guide
DVSI	Domestic Violence Screening Inventory
EBO	Emergency barring order
ECHR	European Convention of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EIGE	European Institute for Gender Equality
FGM	Female genital mutilation
HELP	European Programme for Human Rights Education for Legal Professionals
IPV	Intimate partner violence
MARAC	Multi-agency risk assessment conference
ODARA	Ontario Domestic Assault Risk Assessment
PTSD	Post-traumatic stress disorder
SARA	Spousal Assault Risk Assessment
TBI	Traumatic brain injury
VAW	Violence against women

## IV. Introduction

On 7 November 2011, Ukraine signed the Istanbul Convention, Article 51 of which requires the performance of risk assessments. Although it has not yet ratified the Convention,<sup>1</sup> Ukraine has recently made significant strides to combat domestic violence.<sup>2</sup> Hundreds of local mobile teams around the country have been established as first responders and service providers. Ukraine has adopted numerous criminal and civil legislative and normative changes, including the establishment of protection measures. In 2017, it adopted the Law on Preventing and Combating Domestic Violence (Domestic Violence Law), as well as the Law on Amending the Criminal Code and Criminal Procedure to implement provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention). Other normative advances include the Cabinet of Ministers Resolution No. 658 on the Procedure for liaison between entities implementing measures in the field of preventing and combating domestic violence and gender-based violence (Resolution No. 658), and a Joint Order No. 369/180 of the Ministry of Social Policy and the Ministry of Internal Affairs on the procedure for conducting risk assessments of committing domestic violence. Given that these legal changes are recent, their application in practice is not yet widespread or wholly consistent.

The focus of this report is on introducing and improving risk assessment standards and practices related to cases of domestic violence. The analysis is based on a desk review, and a series of interviews with stakeholders conducted on 18-19 August 2019. Additional developments in the legal and normative framework are ongoing. An inter-agency working group is currently in the process of developing a risk assessment form for mobile team responders to domestic violence and for shelters. At the same time, a Unified State Register of Cases of Domestic Violence and Gender-Based Violence is being created, which will eventually allow for rapid information sharing between stakeholders.<sup>3</sup> The Register has the potential to include up-to-date information on risk assessments and protection orders (both urgent injunctions and restrictive measures).

Risk assessments constitute one step in a series of procedures to be performed by several agencies and organisations working in close cooperation to ensure victim protection. It thus remains difficult to approach the topic of risk assessments in an isolated manner, in particular where the legislation and practice pertaining to systemic response prior to and after the risk assessment do not conform to international standards. Consequently, this report assesses several critical issues pertaining to the current practice on domestic violence response, victim protection, access to justice and inter-agency communication and cooperation.

This report points to gaps and issues of concern, rather than to the recent positive developments, of which there are many. Part I focuses on the application of risk assessment standards for each group of stakeholders. Part II focuses on other gaps in the domestic violence response system and legal framework that pose additional obstacles to victim safety and the protection of their rights. Part III contains a series of

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<sup>1</sup> In November 2016, the Ukrainian Parliament considered but failed to ratify the Istanbul Convention.

<sup>2</sup> Although the definitions for each are distinct, this paper uses the terms domestic violence (DV) and intimate partner violence (IPV) interchangeably, given that the focus of risk assessments to date in Ukraine remain on domestic violence cases, and that a majority of such cases will involve intimate partner violence. Use of feminine pronouns for victims and masculine pronouns for perpetrators reflects the fact that statistically women constitute the large majority of victims of domestic violence and men the majority of perpetrators.

<sup>3</sup> Procedure of liaison between entities implementing measures in the field of preventing and combating domestic violence and gender-based violence, Cabinet of Ministers, Resolution No. 658, 2018, para 30.

annexes that include checklists for diverse stakeholders as well as recommended legislative and normative amendments to bring the legal framework into conformance with international standards.

Risk assessments can and should be employed in cases involving other forms of violence against women, and several countries have adopted specialised protection orders and services for other types of violence, including for stalking, female genital mutilation (FGM) and forced and child marriage.<sup>4</sup> Adaptations of risk assessment processes may also be necessary when working with marginalised populations, such as ethnic minorities, migrant populations, women with disabilities and LGBTIQ women. In order to be effective, responders should account for differences in culture, ethnicity, language, ability and other factors when conducting risk assessments.

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<sup>4</sup> For example, Denmark created specialised temporary restraining orders for stalking, and the U.K. established FGM and forced marriage protection orders. A specific risk assessment tool, the Domestic Abuse, Stalking, Harassment and Honour based violence Assessment Tool (DASH) has been developed to address these other forms of violence against women.

# PART I

## V. Risk assessments: International standards and national legal framework

### A. The due diligence standard and ECtHR jurisprudence

A State's duty to protect victims of violence against women derives from the due diligence obligations set forth under Article 1 of the European Convention of Human Rights (ECHR),<sup>5</sup> and under Article 5 of the Istanbul Convention, among other international instruments. The due diligence standard requires States to **prevent, investigate, punish** and provide **reparations** for human rights violations, including all forms of gender-based violence.<sup>6</sup>

The ECtHR has established positive obligations for States to protect citizens from human rights violations committed by non-State actors, including in the private sphere. Specifically, Articles 2 and 3, protecting the right to life and the prohibition on ill treatment, respectively, enjoin "the State to take appropriate steps to safeguard the lives of those within its jurisdiction," and "to take **preventive operational measures** to protect an individual whose life is at risk from the criminal acts of another individual".<sup>7</sup> (Emphasis added). It has specifically held that:

A positive obligation will arise where it has been 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.<sup>8</sup> (Emphasis added).

The ECtHR has developed a two-pronged standard for assessing whether States have met their positive obligations under Articles 2 and 3: a) whether the authorities knew or ought to have known of the violence to which the victim had been subjected and "the risk of further violence;"<sup>9</sup> and, b) "if so, whether all reasonable measures had been taken to protect her and to punish the perpetrator".<sup>10</sup> In this regard, risk assessments constitute a practical tool for determining "the existence of a real and immediate risk".

In the *Case of B. v. Moldova*, the Court found that "the authorities did not make an analysis of whether the seriousness and number of attacks which the first applicant had suffered on the part of V.B. [the perpetrator] and the seriousness of the first allegation of rape had required to pursue the criminal investigation".<sup>11</sup> The Court further noted the failure of the State to take into consideration the subsequent incidents and the ongoing episodes of violence. It found that "the domestic courts should have taken into

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<sup>5</sup> *Opuz v. Turkey*, Application No. 33401/02, 2009, (finding that the State's failure to protect against and adequately investigate domestic violence may constitute a violation of Articles 2, 3, 8 and 14 of the European Convention on Human Rights, (the right to life, prohibition of torture, the right to respect for private and family life and the prohibition on discrimination, respectively).

<sup>6</sup> See also, CEDAW General Recommendation 28.

<sup>7</sup> *Case of Branko Tomašić and Others v. Croatia*, Application No. 46598/06, 2009, paras 49, 50; see also, *Mudric v. The Republic of Moldova*, Application No. 74839/10, 2013, para 40.

<sup>8</sup> *Case of Branko Tomašić and Others v. Croatia*, Application No. 46598/06, 2009, para 51.

<sup>9</sup> *Case of B. v. The Republic of Moldova*, Application No. 61382/09, 2013, para 51.

<sup>10</sup> *Ibid.*, para 51.

<sup>11</sup> *Ibid.*, para 54.



consideration the factual developments which had taken place after the [relevant decision] had been adopted, namely the two additional attacks by V.B."<sup>12</sup> Based on the finding that the authorities had failed to assess the **evolving risks**, the Court held that Moldova had violated Article 3 of the Convention.

The need for a protective order and other safety measures must thus be assessed on a periodic basis, the frequency of which depends upon the level of the risk. It is important to remember that there are several situations that can raise the level of risk to victims, such as separation or divorce, a court hearing and child contact, among others.

## B. The Istanbul Convention

Although Ukraine has not yet ratified the Istanbul Convention, it remains the most comprehensive legally binding international instrument to date setting forth standards to prevent and combat violence against women and domestic violence. At the same time, it codifies standards that have been articulated by the ECtHR, to which Ukraine also remains bound. Both the standards contained in the Istanbul Convention, including CoE guidance on its implementation, and the relevant jurisprudence of the ECtHR are set forth herein.

Article 51 of the Istanbul Convention covers the requirement to conduct risk assessments.<sup>13</sup> It states in full:

1. Parties shall take the necessary legislative or other measures to ensure that an assessment of **the lethality risk, the seriousness of the situation and the risk of repeated violence** is carried out by all relevant authorities in order to manage the risk and if necessary to provide co-ordinated safety and support.

2. Parties shall take the necessary legislative or other measures to ensure that the assessment referred to in paragraph 1 duly takes into account, **at all stages of the investigation and application of protective measures**, the fact that perpetrators of acts of violence covered by the scope of this Convention possess or have access to firearms. (Emphasis added).

In this regard, the Explanatory Report to the Istanbul Convention further details States' obligations to engage actors beyond police in the conducting of risk assessments, and to establish an individualised safety plan. It requires that States:

ensure that **all relevant authorities**, not limited to the police, **effectively assess and devise a plan to manage the safety risks a particular victim faces on a case-by-case basis**, according to **standardised procedure and in cooperation and co-ordination** with each other.<sup>14</sup> (Emphasis added).

It further underscores the critical importance of multi-agency collaboration:

The purpose of this provision is to ensure that an effective **multi-agency network of professionals** is set up to protect high-risk victims. The risk assessment must therefore be carried out with a view to **managing the**

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<sup>12</sup> Ibid., para 56.

<sup>13</sup> See also, CEDAW General Recommendation No. 35, para 40(b), stating that protection mechanisms "should include immediate risk assessment and protection, comprising a wide range of effective measures and, where appropriate, the issuance and monitoring of eviction, protection, restraining or emergency barring orders against alleged perpetrators, including adequate sanctions for non-compliance".

<sup>14</sup> Explanatory Report, para 260.

**identified risk by devising a safety plan** for the victim in question in order to provide co-ordinated safety and support if necessary.<sup>15</sup> (Emphasis added).

Thus, authorities are not only required to assess the risk in a given case, but also to develop an adequate and individualised safety plan for the victim in order to "manage the risk". On-going assessments of risk are to be undertaken at every stage of the criminal justice process by the relevant authorities.

### C. Risk assessment tools

The aim of using risk assessment tools is to evaluate the lethality and seriousness of domestic violence, in order to prevent further violence, and to manage the risk. As described by the Council of Europe:

The aim of risk assessment is to outline the threat of violence, to estimate the seriousness of the threat, and to foresee possible consequences. The main goal for risk assessment at the individual level is to prevent, not just predict, a possible act of violence. Based on the results, measures can and should be taken to minimise the risk of violence. Using systematic and professional risk assessment tools can help the police to uncover lethal and extremely dangerous behaviour.<sup>16</sup>

Risk management strategies involve four key components:

- i. monitoring
- ii. supervision
- iii. protection of the victim/safety planning
- iv. offender treatment.<sup>17</sup>

At the same time, risk assessments foster accountability by increasing both the transparency and consistency of decisions made within the criminal justice and social protection systems pertaining to violence against women. Risk assessment protocols function not only as a life-saving tool, but also as a means of ensuring the efficient and effective use of limited resources by distinguishing between levels of risk.

When the police come into contact with a victim exposed to domestic violence, their **primary task is to ensure victim safety**. It is important to note that "securing safety and protection is not the responsibility of the victim; it is the obligation of the state and its agencies".<sup>18</sup> In order to prevent additional violence from occurring, stakeholders (police, social workers, etc.) must assist in the development of a **safety plan**.<sup>19</sup> (See Annex B for a checklist on safety planning for domestic violence victims; see Annex T for tips and a checklist for safety planning for children). Thus, as a follow-up to the risk assessment, and depending upon the level of risk, stakeholders can engage in a series of measures in cooperation with the victim and/or her children to ensure their safety.

Stakeholders provide a critical source of information to victims regarding their rights,

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<sup>15</sup> Explanatory Report, para 261.

<sup>16</sup> CoE, Preventing and Combating Domestic Violence against Women: A learning resource for training law enforcement and justice officers, 2016, p. 40.

<sup>17</sup> CoE, *Enhancing the professional capacity of the Bulgarian police to deal with cases of domestic violence and violence against women*, 2016, p. 43.

<sup>18</sup> CoE, *Effective Multi-agency Cooperation for Preventing and Combating Domestic Violence*, 2015, p. 46.

<sup>19</sup> See, CoE, *Enhancing the professional capacity of the Bulgarian police to deal with cases of domestic violence and violence against women*, 2016, p. 44.

and can refer them to a range of service providers for victims in all cases, no matter the risk. In non-urgent situations, stakeholders can advise victims on practical safety measures that they can implement themselves, such as removal of the nameplate on the door, inserting a peephole in the door, installing safety locks, using different routes to and from work and locking car doors when driving, among others. This assistance is to be provided in addition to more comprehensive measures such as protection orders or relocation to a shelter. (Specific safety planning measures for victims based on an individualised risk assessment are detailed in Annex B; specific safety planning tips for children are set forth in Annex T.)

Risk assessment tools can be used in civil matters when determining child custody and access, and to help set the conditions of civil or criminal restraining/protective orders. Additionally, they are used by victim advocates, police, probation and parole officers in developing safety plans with victims, which includes providing the victim with information, related to their safety that they can then apply to protect themselves. Finally, in situations of intimate partner homicide, they can be used in fatality reviews to assess any gaps in services and communication that led to the death of a victim.

Risk assessments are also used in offender management and at all stages within the criminal justice system. For example, they are used at the pre-trial stage by police and prosecutors to assess the accused's likelihood of re-offending and to make recommendations for detention and release. They are also used at the pre-sentencing and pre-release stages, in order to assist judges in deciding whether to grant diversion or discharge. At the pre-sentencing stage, risk assessments can be used by the court in setting conditions for sentencing and supervision, and to determine the appropriate treatment for offenders. They can be used to determine appropriate in-court protection measures. At the correctional intake stage, risk assessments can be used to develop treatment plans and to determine the suitability for various conditions. Finally, at the pre-release stage, risk assessments can be used when making parole decisions, setting conditions for release and developing treatments plans.

### **1. A victim-centred, gender-sensitive, intersectional approach**

Risk assessments must be conducted using a victim-centred approach. This means prioritising the safety, privacy, confidentiality and well-being of the victim(s) throughout the assessment process. It should be noted that: "Safety is not just a question of protecting the woman from the risk of re-assault. Safety is a question of being free of living a life with good physical and mental health and having the opportunity to make choices and not fear for one's life."<sup>20</sup>

Applying a victim-centred approach often requires capacity-building trainings for front-line actors, in order to ensure that they recognise that victims are not responsible for the crimes committed against them, and that they understand the impact of victim trauma and how it affects victims' behaviour. A victim-centred approach also ensures responders employ the same level of sensitivity and professionalism to all victims, irrespective of their age, gender, sexual orientation, socio-economic status, sexual behaviour, substance abuse, mental and physical challenges and language ability. Finally, it requires guaranteeing victims' procedural rights, including their input into the criminal justice response and keeping them informed at every step in the process.

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<sup>20</sup> CoE, *Improving the effectiveness of law-enforcement and justice officers in combating violence against women and domestic violence*, 2016, p. 45.

The risk assessment should be conducted in close cooperation with the victim. It is also important to assess the safety of and need for protection measures for children involved in domestic violence cases, as both direct and indirect victims, at all stages of investigations and judicial proceedings, and afterwards.

Violence against women, including intimate partner violence, is a gendered phenomenon, which should be considered in the undertaking of risk assessments. As noted by the European Institute for Gender Equality (EIGE): “Understanding the gendered dynamics of intimate partner violence generally, and coercive control specifically, will help police (and other agencies involved) to respond more effectively and prevent intimate partner violence and homicide.”<sup>21</sup> It specifically recommends that risk management be “built on an understanding of how gender and women’s inequality shape women’s and children’s experiences of intimate partner violence, and of how gender affects victims’ options and perpetrators’ behaviours, to inform effective risk management strategies”.<sup>22</sup>

In addition to gender, other factors, such as race, disability, age, religion, immigration status, ethnicity and sexual orientation, have an impact on how the victim experiences violence as well as any response interventions. For example, children, female migrants and asylum seekers, victims in conflict-affected areas, Roma and disabled women may face increased risk to and disproportionately negative consequences of abuse. Limited knowledge of their rights, limited language skills and prejudice and stereotypes may impede their receipt of support and services. An intersectional approach ensures that risk assessments and risk management strategies take these factors into consideration to ensure effective protection for *all* women. It also requires that risk assessment forms and procedures are adapted to the specific abilities and communication capacities of specific groups, including simplified questions for children and interpreters for migrants or the hearing impaired.

## **2. Continuous assessments and inter-agency coordination**

Risk assessments are to be performed by a range of stakeholders due in part to the understanding that victims may share different pieces of information pertaining to risk with different actors for a variety of reasons. The effective management and containment of dangerous offenders also requires inter-connected practices among agencies, which promotes accountability.<sup>23</sup> This should encompass: active monitoring, appropriate court-ordered services and swift and certain consequences for re-assault or violations of court orders.

The assessment of risk and identification of safety measures should be conducted continuously: from the first meeting with the victim, during the application of protection measures all the way to a possible conviction and sentence, as well as in connection with the perpetrator’s release from prison. As an ongoing process, risk

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<sup>21</sup> EIGE, Risk assessment and risk management by police, available at: <https://eige.europa.eu/gender-based-violence/risk-assessment-risk-management/areas-improvement>.

<sup>22</sup> Ibid.

<sup>23</sup> The United Nations Essential Guidelines on Essential Services Package for Women and Girls Subject to Violence sets forth standards for agency accountability for coordination in Module 5, Chapter 3.2.

assessments take into account changes in the victim's and perpetrator's circumstances. For example, the level of danger identified by the police as a first responder might have changed as the case nears trial.

As noted above, risk assessments should also be performed in relation to civil proceedings, including separation, divorce and custody, and even to determine whether and to what extent protection is necessary after all legal proceedings have terminated.

Risk assessments also require inter-agency cooperation and coordination. As explained by the CoE, "assessing risk not only involves the police: effective and coordinated multi-agency work is needed to avoid misinterpretation of factors and underestimation of risk".<sup>24</sup>

### **3. Risk assessment methodologies**

The Istanbul Convention leaves the risk assessment methodology to the discretion of States. There are several validated risk assessment methodologies based on, *inter alia*, using a structured clinical judgment approach and an actuarial approach. These methodologies were developed in Canada and the United States, but have been employed in numerous other countries. The most well-known assessments using a structured clinical approach include: the Ontario Domestic Assault Risk Assessment (ODARA), the Spousal Assault Risk Assessment Guide (SARA) and the Domestic Violence Screening Inventory (DVSI). Two commonly used actuarial risk assessment tools are the Ontario Domestic Assault Risk Assessment (ODARA) and the Domestic Violence Risk Appraisal Guide (DVRAG). Those that focus solely on lethality assessments include the Danger Assessment (DA) and DV-MOSAIC. A description of these tools can be found in Annex O.

While States do vary in their application of risk assessment methodologies, most are based on the above-listed tools. These all include several risk factors that have been verified as indicators of risk. As stated by the CoE: "A risk factor is a characteristic at any level (individual, relational, community or societal) whose presence increases the possibility of violence to occur or re-occur. Its absence does not exclude the risk but makes it is less likely."<sup>25</sup>

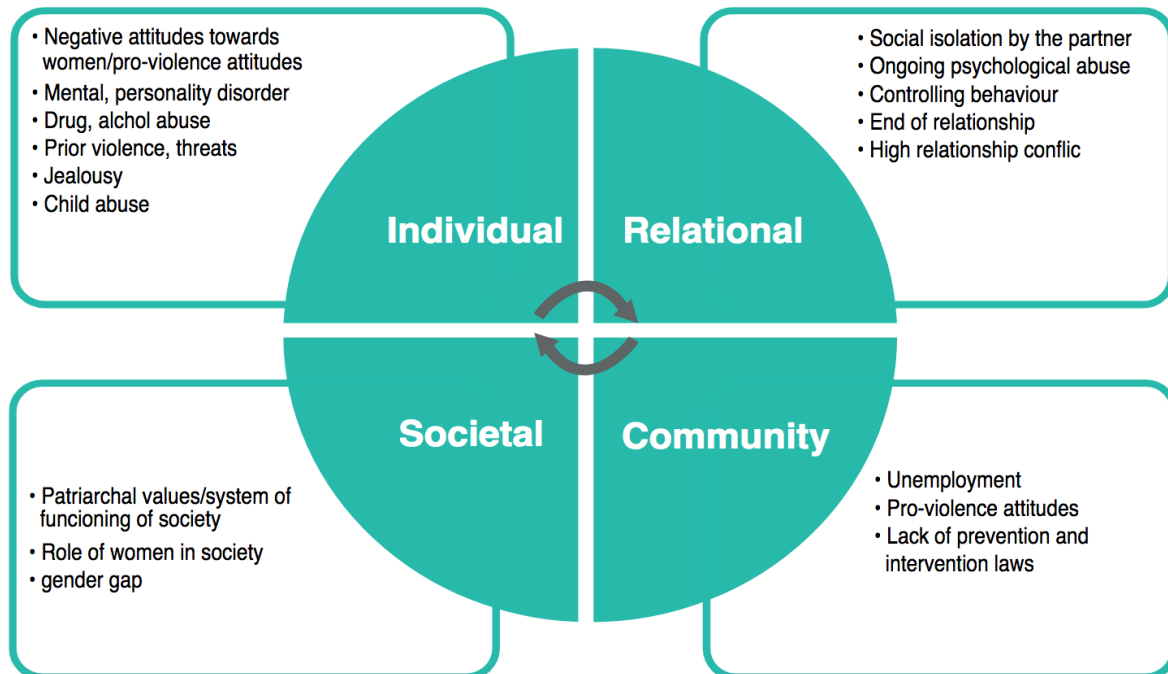
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<sup>24</sup> CoE, *Improving the effectiveness of law-enforcement and justice officers in combating violence against women and domestic violence*, 2016, p. 42.

<sup>25</sup> CoE, *Enhancing the professional capacity of the Bulgarian Police to deal with cases of domestic violence and violence against women*, 2016, p. 39.

## Risk factors for domestic violence and its recidivism according to the socio-ecological framework

Excerpted from: CoE, Enhancing the professional capacity of the Bulgarian police to deal with cases of domestic violence and violence against women, 2016, p. 39.



The proposed methodologies and checklists in this report utilise the key risk factors common to the above-mentioned methodologies. It is recommended that first responders specially focus on the following risk factors:

- violence;
- threats;
- escalation;
- violation of protection orders;
- alcohol and/or substance abuse;
- psychological problems; and,
- access to weapons.<sup>26</sup>

Emergency barring order (EBO) or protection order violations, referred to in Ukraine as emergency injunctions and restrictive measures respectively should constitute a heightened risk factor, requiring increased measures of protection as well as criminal sanctions.<sup>27</sup>

Victim-focused risk factors include:

- The victim's concern about future violence by the accused;
- Victims who have a biological child with a different partner;
- Victims who have been assaulted by the accused while pregnant;
- Barriers for the victim in accessing support.

<sup>26</sup> CoE, *Preventing and Combating Domestic Violence against Women: A learning resource for training law enforcement and justice officers*, 2016, p. 40.

<sup>27</sup> CoE, *Emergency Barring Orders in Situations of Domestic Violence: Article 52 of the Istanbul Convention*, 2017, p. 21.



The majority of risk assessment tools used in criminal justice settings contain two types of risk factors: static and dynamic. Static risk factors are risk factors that are fixed and unchangeable, such as demographic factors (e.g., age, gender), childhood history and criminal history. Dynamic risk factors fluctuate over time and reflect internal states or temporary circumstances of the individual, such as beliefs and cognitions, and feelings of hostility. Dynamic risk factors are factors that can change and these changes may be associated with changes in risk level.

Victim consultation constitutes an important approach that has been integrated as best practice into the use of diverse methodologies. Victims are able to provide information pertinent to dynamic factors, such as the perpetrator's personality, mental health and violent behaviour. As described by the CoE: "The victim knows the perpetrator best and, at the point of reaching out for help, she has likely already tried various strategies to minimise risk. It is essential to understand which strategies have worked for the victim, and which strategies need to be developed or improved."<sup>28</sup>

The combination of structured risk assessments and victims' assessments of their own risk has been found to lead to more accurate results. Depending solely on victims' assessments, however, is not recommended, as victims may over- or underestimate the risk, and/or they may be hesitant to share information for fear for their safety, to protect the perpetrator, or because they do not want to become involved in the criminal justice system.<sup>29</sup>

#### **4. Assessing risk to children**

Children's experiences of domestic violence include being exposed in the home, directly or indirectly, to violent or threatening behaviour, including humiliation, intimidation and controlling actions. Direct and indirect violence against children result in negative outcomes such as an increased risk of psychological, social, emotional and behavioural problems, as well as risk of lethality. Furthermore, strong correlation exists between domestic abuse and child abuse, with approximately half of all domestic violence situations involving direct child abuse. According to UNICEF Ukraine, the latest data shows that violence against children also remains largely underreported in the country. Moreover, some forms of domestic violence against children are accepted as a social norm.<sup>30</sup>

It is critical to view children and young people as victims of domestic violence in their own right. As noted by EIGE, children's experiences of violence are different "by virtue of their stage of development, their different relationship to the perpetrator and their level of dependence on adult caregivers".<sup>31</sup> The risks for children should not be assumed to be the same as the risks for the victim. A tailored approach to addressing the risk to children is thus advised.

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<sup>28</sup> CoE, *Effective Multi-agency Cooperation for Preventing and Combating Domestic Violence*, 2015, p. 46.

<sup>29</sup> Department of Justice Canada, *Intimate Partner Violence Risk Assessment Tools: A Review*, p. 14, available at: [https://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/rr12\\_8/rr12\\_8.pdf](https://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/rr12_8/rr12_8.pdf).

<sup>30</sup> UNICEF Ukraine research on domestic and gender-based violence, 2018, available at: <https://www.unicef.org/ukraine/press-releases/underreported-violence-against-children-ukraine-requires-joint-action>. According to 2018 UNICEF's report, 42% of parents believe that emotional violence against a child is acceptable for educational purposes. The share of those, who permit use of physical force against a child as a disciplinary measure, is 14%.

<sup>31</sup> EIGE, Risk assessment and risk management by police, available at: <https://eige.europa.eu/gender-based-violence/risk-assessment-risk-management/principle-5-considering-childrens-experiences-intimate-partner-violence>.

Yet, as EIGE further described, “children are rarely given opportunities to express their own views, and professionals may be reluctant to involve them in decisions that affect them”.<sup>32</sup> It recommends including the perspectives of children affected by intimate partner violence as a priority both in the direct work of the police with victims and perpetrators and in the wider intervention system and cooperation with other agencies. In particular, children and young people should be supported to participate in assessment and decision-making processes in a sensitive and appropriate manner in line with children’s rights standards.

Article 26 of the Istanbul Convention provides in full:

1. Parties shall take the necessary legislative or other measures to ensure that in the provision of protection and support services to victims, due account is taken of the rights and needs of child witnesses of all forms of violence covered by the scope of this Convention.
2. Measures taken pursuant to this article shall include age-appropriate psychosocial counselling for child witnesses of all forms of violence covered by the scope of this Convention and shall give due regard to the best interests of the child.

The adoption of a specialised risk assessment tool with and for children experiencing exposed to domestic violence should be considered. Collaboration with child protection specialists and children’s rights organisations could guide a tailored protocol for children. Specific risk assessment tools have already been developed for children, including the Bernardo’s model in Northern Ireland and the Safe and Together Model, developed in the United States. These could be used as a model. (See Annex O for brief descriptions of risk assessment methodologies).

In line with Article 26(2), cited above, cases involving children should also be referred to specialist child protection services as appropriate and where available within a multi-agency framework. It is important to keep in mind that applying a gender-sensitive approach when addressing the risk to children requires that the focus not be placed on the mother’s capacity to parent and protect, but rather on the perpetrator’s abusive behaviour. Otherwise, it puts the onus of the child protection procedure on the mother’s ability to protect and not on the perpetrator taking responsibility for his abusive behaviour.<sup>33</sup>

In sum, risk assessments should routinely and robustly take into account the impact of abuse on children and inform risk management strategies that address their individual safety needs.

#### **D. Risk assessments in Ukraine: the legal framework**

The police in Ukraine have recently adopted a risk assessment form, and risk assessments are being developed for mobile teams and shelters by an inter-agency working group. Risk assessments have thus been incorporated into the legislative and normative framework. The Domestic Violence Law defines risk assessment as the "evaluation of the chance of continuation or repeated committing of domestic violence,

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<sup>32</sup> Ibid.

<sup>33</sup> Bernardo’s Northern Ireland, Assessing the Risk to Children of Domestic Violence, available at: [https://b.barnardos.org.uk/pp\\_no\\_7\\_assessing\\_the\\_risks\\_to\\_children\\_from\\_domestic\\_violence.pdf](https://b.barnardos.org.uk/pp_no_7_assessing_the_risks_to_children_from_domestic_violence.pdf).

grave or particularly grievous consequences or death of the victim".<sup>34</sup> Article 10 of the Domestic Violence Law refers to the competency of the police, judges and others in implementing risk assessments. Article 10(1)(2) references helping victims "with due regard to the risk assessment according to the procedure established by the central executive authority".<sup>35</sup>

Article 10(2) makes reference to police performance of risk assessments as part of their duties of response. Article 25(4) provides for an urgent injunction to be imposed "based on the victim's request, or upon the initiative of an official of the competent unit of the National Police of Ukraine based on the relevant risk assessment". In this regard, police should perform a risk assessment, even if the protection order is issued based solely on the victim's request. Indeed, it should be conducted for all victims.<sup>36</sup> The information provided through the risk assessment can then be used to guide safety planning, to provide possible in-court protection should the victim seek a restrictive measure and to confiscate firearms.<sup>37</sup>

With respect to judicial risk assessments, Article 26(3) requires that: "A decision on imposition of a restrictive injunction shall be based upon a- risk assessment." Subsection (5) of the same Article also requires judges to base any decision to extend a restrictive measure for up to six months, on the "relevant risk assessment". Article 1(1)(10) further indicates that perpetrator programmes are to be based on risk assessments. The court is to undertake a risk assessment for this purpose, and can take into consideration risk assessments by other entities.

Article 15(1)(2) also refers to risk assessments as an issue falling within the scope of coordination activities between stakeholders. In this regard, one of the key purposes of developing comprehensive and harmonised risk assessment methodologies across sectors is to ensure that victim safety remains a central focus of inter-agency coordination. This will require the use of a common framework and language in inter-agency communications between the relevant actors related to risk.

The Ministries of Social Policy and Internal Affairs established a joint Order on Procedure for domestic violence risk assessment (Joint Order on Risk Assessment Procedure) in 2019. Section II(2) of the Order on Risk Assessment Procedure provides that following the completion of the risk assessment, in addition to determining the level of danger, the police officer will also "take other measures to stop such violence, preventing any continued or repeated violence, or assisting the victim". Such "other measures" might include preventive registration of the perpetrator, or his referral to a perpetrator programme, pursuant to Article 24(1) of the Domestic Violence Law. Although the Joint Order on Risk Assessment Procedure does not explicitly require a "safety plan" as foreseen by the Istanbul Convention, it does contemplate additional measures to be taken by the responding police officer to ensure victim safety, which should be interpreted to cover the creation of a safety plan and referral for services.

In 2018, the Ministry of Education and Science jointly with the Ministry of Youth and

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<sup>34</sup> Article 1(1)(9), Law on Preventing and Combating Domestic Violence.

<sup>35</sup> Helping victims should be interpreted as making referrals for services and developing a safety plan.

<sup>36</sup> Joint Order No. 369/180 of the Ministry of Social Policy and the Ministry of Internal Affairs on the procedure for conducting risk assessments of committing domestic violence.

<sup>37</sup> See, CoE, Improving the effectiveness of law-enforcement and justice officers in combating violence against women and domestic violence, 2016, p. 42, indicating that the "risk assessment should systematically take into account the possession or access to firearms by perpetrators of acts of violence covered in the [Istanbul] Convention".

Sports developed methodological recommendations pertaining to their obligations under the Domestic Violence Law.<sup>38</sup>

Risk assessments have not yet been developed for all actors within the criminal justice chain, namely for: prosecutors, judges, probation officers and penitentiary staff. Social workers and shelter staff should also perform routine risk assessments. Educators also have an important role to play in risk assessments.

## **VI. Stakeholder risk assessment methodologies**

This section covers the applicable standards and best practices for conducting risk assessments across the relevant sectors in Ukraine, namely: police, judiciary, prosecution, probation, social services, shelters and education. It also makes references to current normative provisions and practices for each sector, identifying any gaps that should be addressed. As highlighted throughout, effective protection requires inter-agency cooperation and coordination across sectors. Annex P contains a list of recommended steps for fostering inter-agency cooperation operationally.

### **A. Police risk assessments**

Given their security and protection mandate and their 24/7 operability, police are often the most common first responders in domestic violence cases. Conducting a risk assessment will constitute only one of their duties in responding to violence incidents. They will also need to collect evidence, assist the victim(s) and possibly issue a protection order and arrest the perpetrator. (See Annex F for a checklist for police arrival at a scene involving domestic violence).

#### **1. Police risk assessment questionnaire**

A police risk assessment form was established in Ukraine in 2019. The questionnaire is short, comprised of 27 questions, and covers most of the critical indicators related to lethality and the risk of future violence. A police representative indicated that use of the form has been positive to date, although risk assessments are not yet conducted in response to all reported domestic violence incidents, as required by law.

The current police risk assessment form contains the following questions. The first six questions are to be rated more heavily than the latter 21.

1. Has the perpetrator ever threatened to use and/or used weapons or other items that could endanger the life and health of the victim and/or her children?
2. Has the perpetrator threatened to kill the victim and/or her children?
3. Does the victim believe that the perpetrator could kill her and/or her children?
4. Has the perpetrator ever strangled the victim, or pushed her throat, or tried to?
5. Has the perpetrator previously used physical violence that had the consequences of causing a moderate and/or severe degree of bodily harm?
6. Has an urgent injunction been imposed to the perpetrator during the last year?

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<sup>38</sup> Letter, Ministry of Education and Science, No.1/11-5480 "Methodological recommendations on prevention and combatting violence".

7. Does the perpetrator have weapons and/or can one easily be obtained and used?
8. Is the perpetrator inclined to strong and/or constant jealousy and controls most of the daily life of the victim?
9. Has the perpetrator expressed the intention to and/or tried to commit suicide?
10. Was the perpetrator intimidating, persecuting or threatening the victim and/or her children?
11. Has the perpetrator committed assaults on the victim and/or her children outside the home environment?
12. Did the perpetrator keep the victim and/or her children against her will in a particular place or otherwise restrict freedom, including freedom of communication?
13. Has the perpetrator's behaviour influenced the safety of the victim and/or the safety of her children?
14. Does the perpetrator have an alcohol addiction or abuse alcohol?
15. Does the perpetrator have a drug addiction or abuse substance?
16. Has the perpetrator ever threatened to kill, kill or deliberately harm domestic and/or other animals?
17. Did the perpetrator commit physical and/or sexual abuse of the injured person when she was pregnant or with a newborn baby/infant?
18. Does the perpetrator have financial problems?
19. Is the victim and/or her child economically dependent on the perpetrator?
20. Were there any cases after marriage or living together when the perpetrator left the family for a long time (no less than 10 days) without reason or explanation?
21. Does the injured person have children/children of another marriage that the perpetrator knows and/or has recently learned?
22. Is the family of the victim under social care?
23. Did the court issue the perpetrator a restrictive measure?
24. In the event of the issuance of a restrictive measure or urgent injunction against the perpetrator, did he violate any of the terms of such an order?
25. Is the victim aware of any conviction against the perpetrator for murder, bodily harm, rape and/or other crimes against sexual freedom and sexual integrity?
26. Did the perpetrator banish the victim and /or her children from their place of residence and/or threatened to commit such acts?
27. Is there something else that makes the victim worry about her safety?

These questions reflect the key indicators used by most countries when conducting risk assessments. However, additional questions are recommended, as well as changing the placement of some of the factors. Given their strong indication of increased risk of violence, a few indicators should be added to the first section to ensure that they are given the appropriate weight. Specifically, questions should also be added related to whether the victim is attempting to leave the relationship, and as to the existence of any judicial proceedings related to protection orders, divorce or child custody, as these tend to give rise to increased threats. It is also recommended that question #24 be moved to be included among the first category of questions, given its indication of potential risk. Finally, question #11 should be widened in scope to cover any violent offence committed by perpetrator outside of the home, not just against the victim.

One of the most critical indicators of risk is the escalation or intensification of the violence. This question should be added to the list, and it should appear among the first questions in light of its significance as an indicator of additional violence. The question could read:

- Has there been an increase, intensification of and/or repetition of violent incidents or threats recently?

Notably, the form does not contain a question about the commission of sexual violence, only as to whether it had been committed while the victim was pregnant or had a newborn. A question could be added,

- Has the perpetrator committed sexual violence against the victim and/or her children?

Other questions that could be added to the form include:

- Has the perpetrator engaged in provocative and/or disregarding behaviour towards authorities, police officers, or other persons representing police services or justice bodies, as well as towards the victim in the presence of the above-mentioned persons?
- Has the perpetrator had previous conflicts with the law, in particular involving the use of violence?
- Did the perpetrator cause damage at the place of residence, or damage to property?

With respect to the question concerning prior or other conflicts with the law, these do not necessarily have to relate to domestic violence or other forms of physical assault.<sup>39</sup>

A separate risk assessment form should be filled out for each victim. Notably, Article 1(1)(2) of the Domestic Violence Law considers children who are direct and indirect victims of violence as victims, requiring the police to fill out a separate form. The Istanbul Convention considers that children who are indirect victims of violence (witnesses) are also in need of protection. Article 56(2) reads: "A child victim and child witness of violence against women and domestic violence shall be afforded, where appropriate, special protection measures taking into account the best interests of the child."

Ideally, a separate risk assessment form could be developed for children in order to ensure child-friendly language in the formulation of questions, as well as a distinct set of questions pertaining to the relationship of the perpetrator to the child.

## **2. Evaluation of the risk: procedure**

The Joint Order on Risk Assessment Procedure establishes a two-tiered assessment process, in which the first six questions are weighted more heavily than the second. The risk assessment form provides an additional space for the officer to indicate unforeseen and relevant factors that were taken into considering in evaluating the risk. The responding officer can answer "Yes", "No" or "No answer / Unknown" to each of the questions on the form. The level of risk is currently evaluated as follows, pursuant to Section II(6) of the Joint Order:

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<sup>39</sup> See Annex A for a full list of recommended risk assessment questions for the police, and proposed amendments to the Joint Order on Risk Assessment Procedure).



- Two “yes” answers to questions 1 to 6 and “yes” to any number of questions 7 to 27, or if the police officer of the police considers that the person faces a situation that may cause her death or other grave consequences, is to be assessed as a **high level** of risk.
- The answer “yes” to one question from 1 to 6 and to at least seven questions from 7 to 27; or, “no” to all questions from 1 to 6, but not less than 14 positive answers to questions 7 to 27 and the risks of domestic violence are assessed as the **medium level** of risk.
- The answer “yes” for one question from 1 to 6 and for up to six questions from the number 7 to 27; or, no more than thirteen positive answers to questions number 7 to 27 of the form of risk assessment for domestic violence is assessed as a **low level** of risk.
- If all the questions are answered without a response / unknown, the police officer at his discretion can assess the situation as having a high level of danger.

The form specifically indicates in Section II(5) and (6) that the officer can at his/her discretion identify as high-risk situations in which the form indicates a lower risk, or in situations in which the answer “unknown” or “no answer” is given, based on his/her assessment of the situation. The Order does not foresee the officer's discretion in establishing a low or medium risk level where the form indicates otherwise. Section II(6) should be amended to allow a finding of increased risk in low and medium risk situations as well (not just for high-risk situations). The form should also explicitly indicate that police officers have the discretion to raise the level of risk from that indicated on the form, but do not have the discretion to lower the level of risk from that indicated by the form.

Significantly, under Section II(7), the police officer has the discretion to issue an urgent injunction in medium- and low-risk situations, but must issue the urgent injunction in high-risk situations. For the purpose of the issuance of an EBO, the term “immediate risk” refers to the risk of any violence, and not a risk of lethal violence or serious injury.<sup>40</sup> Furthermore, there is “no requirement for the danger to be high or for a pre-existing history of abuse: the EBO needs to protect persons at risk before harm is done”.<sup>41</sup> Thus, an urgent injunction might be necessary in low- and medium-risk situations as well, and as related to a wider scope of possible measures, including: the confiscation of weapons, banning the perpetrator from the victim's workplace and school and childcare facilities.

In this regard, pursuant to Article 25(2) of the Domestic Violence Law, the urgent injunction contemplates only three possible measures: i) the obligation to leave the house/place of stay of the victim; ii) prohibition to enter and stay in the house / place of stay of the victim; and iii) prohibition of any contact with the victim. The urgent injunction should also contemplate the confiscation of any weapons. While Article 10(7) of the Domestic Violence Law authorises the police to revoke licenses to own and carry a weapon, as well as to confiscate it and ammunition according to “the procedure envisaged by law,” Articles 25 and 26 should explicitly provide for their confiscation in the context of the issuance of an urgent injunction or a restrictive measure. Confiscation should be mandatory for high-risk cases and discretionary for low- and medium-risk situations.

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<sup>40</sup> CoE, *Emergency Barring Orders in Situations of Domestic Violence: Article 52 of the Istanbul Convention*, 2017, p. 14.

<sup>41</sup> CoE, *Emergency Barring Orders in Situations of Domestic Violence: Article 52 of the Istanbul Convention*, 2017, *Ibid.* p. 19.

### 3. Preventive measures and monitoring an urgent injunction

The purpose of identifying the level of risk is to determine the appropriate operational measures in a given case to ensure victim safety. At present, **the police employ no measures to protect victims, rendering the issuance of both types of protection orders largely declarative and with little practical effect.** Rather, the police indicated that they wait until the victim informs them as to whether there has been a breach of the order, and thus respond only retroactively, not preventively.

Police should use the risk assessment form to assist the victim in developing an individualised safety plan and to select the required operational measures to ensure her safety.<sup>42</sup> (See Annex B for a checklist on developing individualised safety plans). Police should also "ensure the safety of and need for protection measures for children involved in domestic violence cases at all stages of investigation and judicial proceedings".<sup>43</sup>

The protocol should thus be amended to indicate which protective measures should be employed by law enforcement depending upon the level of risk. For example, in Spain, the police are required to undertake the following actions pursuant to the level of identified risk:

Level 1 (low risk):

- Provide the victim permanent contact telephone numbers (24 hours) with the nearest police bodies;
- Sporadic telephone contacts with the victim;
- Informing the aggressor that the victim has police support for her protection;
- Recommendations on self-protection and ways to avoid incidents;
- Provide accurate information on the mobile remote assistance service.

Level 2 (medium risk): Application of the mandatory measures for Level 1 plus:

- Regular monitoring at the home, workplace and entrances and exits of schools;
- Accompany the victims in as many proceedings, either judicial, administrative or for assistance, as is required;
- Train the victim in self-protection measures;
- Seek to provide the victim with a mobile terminal (remote assistance service).

Level 3 (high risk): Application of the mandatory measures applied for Level 1 and 2 plus:

- Continuous surveillance of the victim during the urgent levels of threat until the circumstances of the offender are no longer considered an imminent threat;
- Encouraging the victim to move to a support centre or to the home of a relative if she has not done so yet, at least during the first days and especially if the offender has not been arrested;
- Sporadic control of the aggressor's movements.

The Joint Order on Risk Assessment Procedure should incorporate a similar series of

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<sup>42</sup> CoE, *Enhancing the professional capacity of the Bulgarian police to deal with cases of domestic violence and violence against women*, 2016, p. 44, citing Explanatory report, paras. 260-263.

<sup>43</sup> See, CoE, *Preventing and Combating Domestic Violence against Women: A learning resource for training law enforcement and justice officers*, 2016, p. 50.

operational measures to be undertaken by police officers upon the issuance of an urgent injunction pursuant to the level of risk. Currently, the Joint Order only foresees the issuance of an urgent injunction, the implementation of which is not monitored. Similar operational measures must be identified and undertaken upon the issuance of a restrictive measure.

#### **4. On-going risk assessments**

Risk assessments must be updated on an on-going basis, in particular during each phase of the criminal justice process, but also for cases in which no criminal charges or civil complaints have been filed.

Identifying the level of risk is necessary for determining how often the assessment must be updated. The higher the level of risk, the more frequent the monitoring and re-evaluation is necessary. A distinct set of indicators should be used to monitor changes in the level of risk. Another form should thus be established for the purpose of monitoring any changes to the level of risk. This form would contain a different set of indicators pertaining to both the perpetrator and the victim:

- the perpetrator has no possibility to harm the victim; he is in prison or a closed centre of a different nature, left the country, or because of his state of health is physically unable to use violence;
- the perpetrator left the victim; he does not persecute the victim, has changed his place of residence far from the victim, abides by the preventive measures issued by a court, together with electronic supervision measures (wearing appropriate bracelet);
- from the moment of the initiative of proceedings, the perpetrator has behaved in a calm, controlled manner; he accepts the situation; he does not show willingness to take revenge on the victim or persons from her social environment;
- the perpetrator demonstrates full of respect towards the law, police officers, or other persons representing police services or justice bodies; his social situation, financial and professional situation is stable; the perpetrator shows remorse, has pangs of conscience, voluntarily takes part in classes or corrective therapy;
- the victim may count on support from her social environment in terms of safety;
- the victim has changed her place of residence, which remains unknown to the perpetrator;
- the situation proceeds without event since the last risk evaluation;
- the perpetrator ran away, is in hiding or is in an unknown place;
- the perpetrator shows envy and/or obsessive behaviour towards the victim;
- the perpetrator has previously attempted suicide and/or demonstrates suicidal tendencies, mental illnesses, psychological problems, addiction to alcohol, drugs or other psychoactive substances;
- the victim does not abide by the agreed-upon safety principles, (e.g., prohibition to contact the perpetrator), electronic supervision, shows the desire to withdraw complaints, changed her statements, wants to withdraw from the preventive measures;
- the victim is in a relationship that the perpetrator does not accept and/or really wants to force the victim to break this relationship;

- the victim has mental problems, psychiatric problems and/or is addicted to alcohol, drugs or other psychoactive substances; in the socio-familial environment of the victim there is a person related to the perpetrator who constitutes a real threat to her mental integrity.

The proposed additional form should also contain a space for officers to note additional indicators not listed as factors for determining the risk.

In Spain, which contemplates four categories of risk — very high, high, medium and low — police are required to reassess the risk according to the following guidelines:

- extremely high = 72 hours;
- high = 7 days;
- average = 30 days;
- low = 60 days.

The police in Ukraine should establish temporal frameworks for updating risk assessments, depending upon the level of risk, as well as a protocol containing criteria for re-assessment.

## **5. Inter-agency cooperation**

One of the primary purposes of a risk assessment is the communication of the level of risk to other intervening agencies, as the police are only one of several actors in the intervention chain, which includes the justice sector, local executive authorities as well as shelters and service providers. Improving communication and cooperation between authorities and other actors who encounter victims is essential in order to provide the necessary help and support, to avoid re-victimisation, and to guide collaborative risk management.

The planned Unified State Register is currently not operational. Resolution No. 658 provides for the communication of information between stakeholders related to urgent injunctions by telephone or email within one day in the interim.<sup>44</sup> Similarly, paragraph 11 of the Joint Order No. 369/180 states: “After conducting a risk assessment, the police officer of the authorised police unit shall attach the domestic violence risk assessment form to the materials collected about this act of violence”. Order No. 369/180 should be amended to require the risk assessment form to be communicated to a range of stakeholders (e.g., social workers, shelters, prosecutors and judicial actors), as relevant to the individual case via the Unified State Register.

An interim strategy must thus be developed for communicating the content of risk assessments, along with urgent injunctions and restrictive measures, in addition to other critical information, across the criminal justice chain (police, prosecutors, the judiciary, probation and penitentiary), as well as between law enforcement and other stakeholders, such as social service providers, NGOs and shelters. Given the advances in information and communication technology (ICT), this should not be difficult. Potential concerns relate to confidentiality and the assurance of data protection standards. For example, prior to its establishment of an electronic registry, Spain established a temporary communication system via fax.

A list of overall recommendations for the police can be found in Annex A.

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<sup>44</sup> Paragraph 12 of Resolution No. 658 only contemplates registering collected information into logs, not its communication.

## B. Judicial risk assessments

Judges play a crucial role in the justice system's response to domestic and gender-based violence. Judges are key in ensuring victim safety, holding the perpetrator accountable and preventing the re-victimisation of violence survivors in the process. They are generally the final authority in civil and criminal matters, and their decisions can significantly impact the lives of the parties to any case and their family members. In addition to adjudication, judges must also establish courtroom policies and procedures with a view to creating a safe environment for victims, thereby preventing re-traumatisation and improving their access to justice. Police and prosecutorial response can be rendered meaningless if the judicial response fails to conform to international standards. Judges are also instrumental in signalling to victims, perpetrators and society as a whole, that the justice system takes domestic violence seriously.

The judicial sector in Ukraine faces a few important gaps with respect to risk assessments and victim security inside and outside of the courtroom. Judges have no specified protocol for conducting standardised risk assessments in domestic violence cases, although the level of risk must be assessed *de facto* in any decision to issue a restrictive measure. No specific measures are foreseen to ensure victims' safety and security in the courtroom and to prevent re-traumatisation. Finally, no regulation governs the role of judges of general jurisdiction in the issuance of restrictive measures, despite their role in addressing administrative offences in domestic and gender-based violence cases. (See Annex E for a list of recommendations for the judiciary).

### 1. Standardised risk assessment criteria for judges

The requirement to base the imposition of a restrictive measure on a risk assessment determination is set forth in Article 26(3) of the Domestic Violence Law. A standardised risk assessment process should be incorporated into the judicial sector in order to ensure to the extent possible the uniform application of standards to all cases. (See Annex H for a proposed risk assessment form for judges, and Annex I for a sample form from a court in the U.S.) There is currently no official form, protocol or guidance for judges in determining the level of the risk in individual cases.

A recent judicial training programme developed by La Strada contained recommended questions to be considered in assessing the risk faced by a domestic violence victim, drawn from U.S. practice. These could be used as a reference in the development of a protocol or guide for judges. The questions include:

1. Does the perpetrator have access to a firearm, or is there a weapon in the home?
2. Has the perpetrator ever used a weapon against the victim or threatened her with a weapon?
3. Has the perpetrator ever tried to strangle or drown the victim?
4. Has the perpetrator ever threatened or attempted to kill the victim?
5. Has the frequency or severity of physical violence increased over the past year?
6. Has the perpetrator forced the victim to have sex?
7. Does the perpetrator attempt to control most of the activities of the victim?
8. Does the perpetrator show constant or violent jealousy?
9. Has the perpetrator ever attempted suicide or displayed suicidal tendencies?
10. Does the victim believe that the perpetrator will repeat the attack or attempt to kill her? (Note: "No" does not indicate low risk, but "Yes" has a very high value.)

11. Is there a pending court restrictive measure, criminal or civil case pending against the perpetrator?<sup>45</sup>

To these questions, others should be added to ensure harmonisation with the current police risk assessment form and with international standards. These include:

1. Has the perpetrator violated an urgent injunction or restrictive measure? More than once?
2. Does the perpetrator have a drug, alcohol or other psychoactive substance dependency problem?
3. Does the perpetrator have employment and/or financial problems?
4. Has the victim attempted to separate from or divorce the perpetrator?

Judges have discretion to consider additional factors not listed in the questions. Indeed, judicial discretion is an important element for judges dealing with domestic violence, as it "enables the application of what are often general legal instruments to the subtle nuances of individual cases".<sup>46</sup> At the same time, however, judicial discretion "can be—and often is—affected by stereotyping which may undermine victim safety and perpetrator accountability". Guidelines, protocols and judicial trainings can contribute to the uniform application of the law, in particular where not all judges are sensitised to the specific dynamics at play in what are complex cases.<sup>47</sup>

In addition to performing their own assessments, judges should also have access, *pro forma*, to the risk assessments performed by the police and prosecution. Not only are police risk assessments admissible evidence in both criminal and civil proceedings, they should be consulted prior to any hearing in order to determine the need for any in-court protection measures. It should not be up to the victim to produce copies of the risk assessment for the judge. Rather, an interim communication system must be put into place prior to the operationalization of the Unified State Register.

Although no provision in the Domestic Violence Law requires the judges to provide reasoning and a list of factors that were considered as part of the risk assessment, a reasoned judicial decision constitutes an international rule of law standard. Furthermore, Article 370(4) of the Criminal Procedure Code and Article 263(1) of the Civil Procedure Code require reasoned decisions. Stakeholders reported instances in which a decision on the issuance of restrictive measures contained no reasoning or explanation of the factors considered in making the determination. Documenting all risk information provided during the hearing serves to increase court transparency and efficiency, and can inform intervention in the event of future threats of violence. The factors assessed by judges may need to be re-evaluated by corrections staff and probation officers in subsequent stages of proceedings. Judicial protocols or guidelines should explicitly require judges to enumerate the risk factors considered in the decision to issue a restrictive order. The failure to provide reasoning in judgments has been a factor in the ECtHR's findings of violations of the ECHR in domestic violence cases.<sup>48</sup>

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<sup>45</sup> Minnesota Supreme Court, Gender Equality Committee (Equality and Justice Committee), Procedural Manual for Judicial Staff, (2009).

<sup>46</sup> See, CoE, *Preventing and Combating Domestic Violence against Women: A learning resource for training law enforcement and justice officers*, 2016, p. 68.

<sup>47</sup> The CoE offers diverse online courses addressing violence against women and domestic violence in multiple languages through its European Programme for Human Rights Education for Legal Professionals (HELP) programme. They are available at: <http://help.elearning.ext.coe.int/>.

<sup>48</sup> See, *Balșan v. Romania*, Application No. 49645/09, 2017, paras 80-81, further finding that the authorities "deprived the national legal framework of its purpose".



Depending on the nature and the length of the case, and the level of the risk, judges may need to update the risk assessment information during the proceedings. In this regard, it is important to note that recourse to the justice system, as well as any attempts by the victim to leave or expose the situation, pose an increased risk to the victim. Like the proposed police form, judicial guidelines or protocols should standardise the requirement to reassess risks to the victim, in particular during criminal or civil proceedings related to domestic and gender-based violence. Risk assessments should also be undertaken in other cases involving domestic violence, and not only limited to proceedings related to the issuance of a restrictive measure. Civil and criminal proceedings may be lengthy, requiring reassessments of the risk.

Although the risk assessment tool does not substitute for exercise of discretion by a judge, criminal courts may substantially benefit from utilising police or probation risk assessments. Courts that have risk information prior to formal charging are better able to make informed decisions as to whether to release the defendant.

## **2. Courtroom safety**

In addition to decisions regarding the issuance of a restriction measure, judges should also ensure the victim's safety within the courtroom and on court premises. Article 56(1) of the Istanbul Convention requires States to take "the necessary legislative or other measures to protect the rights and interests of victims, including their special needs as witnesses, at all stages of investigations and judicial proceedings". Specifically, Article 56(1)(c)-(i) requires:

- c. informing them, under the conditions provided for by internal law, of their rights and the services at their disposal and the follow-up given to their complaint, the charges, the general progress of the investigation or proceedings, and their role therein, as well as the outcome of their case;
- d. enabling victims, in a manner consistent with the procedural rules of internal law, to be heard, to supply evidence and have their views, needs and concerns presented, directly or through an intermediary, and considered;
- e. providing victims with appropriate support services so that their rights and interests are duly presented and taken into account;
- f. ensuring that measures may be adopted to protect the privacy and the image of the victim;
- g. ensuring that contact between victims and perpetrators within court and law enforcement agency premises is avoided where possible;
- h. providing victims with independent and competent interpreters when victims are parties to proceedings or when they are supplying evidence;
- i. enabling victims to testify, according to the rules provided by internal law, in the courtroom without being present or at least without the presence of the alleged perpetrator, notably through the use of appropriate communication technologies, where available.

Ensuring in-court protection to victims of domestic violence would also bring Ukraine into conformance with the 2012 EU Directive on victims of crime,<sup>49</sup> which ensures

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<sup>49</sup> 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.

victims' protection from intimidation, retaliation and further harm by the accused or suspect, and from harm during criminal investigations and court proceedings. In particular, Articles 18 and 19 of the Directive require States to "establish the necessary conditions to enable avoidance of contact between victims and their family members, where necessary, and the offender within premises where criminal proceedings are conducted, unless the criminal proceedings require such contact". Such protections are also afforded by CEDAW and the jurisprudence of the ECtHR.<sup>50</sup> In the *Y. v. Slovenia* case, for example, the Court stated:

As regards the conflicts between the interests of the defence and those of witnesses in criminal proceedings, the Court has already held on several occasions that criminal proceedings should be organised in such a way as not to unjustifiably imperil the life, liberty or security of witnesses, and in particular those of victims called upon to testify, or their interests coming generally within the ambit of Article 8 of the Convention. Thus, the interests of the defence are to be balanced against those of witnesses or victims called upon to testify.<sup>51</sup>

In weighing the balance of these interests the ECtHR referred to the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,<sup>52</sup> the EU Council Framework Decision on the standing of victims in criminal proceedings,<sup>53</sup> which was replaced by the Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime,<sup>54</sup> and the Istanbul Convention. It observed that these standards provided:

protection from intimidation and repeat victimisation, enabling victims to be heard and to have their views, needs and concerns presented and duly considered, and enabling them, if permitted by applicable domestic law, to testify in the absence of the alleged perpetrator.<sup>55</sup>

In Ukraine, courtrooms are open to the public, and the hallways are very narrow, requiring the victim's confrontation with the perpetrator before, after and during proceedings. In many cases, stakeholders observed, this contact results in the re-traumatisation of victims. Stakeholders cited one incident in which the perpetrator physically attacked the victim in the courtroom. At present, no court manager is available to arrange necessary in-court protection measures. The position of a court manager exists on paper only. The only available staff to ensure in-court protection for victims are the judge and his/her secretary. The current situation constitutes an on-going violation of Article 56(1)(g) of the Istanbul Convention, as well as ECtHR jurisprudence.

A few possibilities do exist for fostering victim safety in proceedings. The first is to conduct **distance hearings**, in which the victim participates from another courtroom **via video conferencing**, as required by Article 56(1)(i) of the Istanbul Convention. This low-cost option enables a hearing with both parties present while limiting the physical

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<sup>50</sup> See, e.g., *Y. v. Slovenia*, Application No. 41107/10, 2015, para 104.

<sup>51</sup> *Y. v. Slovenia*, Application No. 41107/10, 2015, para 103.

<sup>52</sup> United Nations General Assembly Resolution 40/34 of 29 November 1985.

<sup>53</sup> EU Council Framework Decision on the standing of victims in criminal proceedings of 15 March 2001 on the standing of victims in criminal proceedings.

<sup>54</sup> Directive 2012/29/EU of the European Parliament and of the EU 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.

<sup>55</sup> *Y. v. Slovenia*, Application No. 41107/10, 2015, para 104.

and emotional threat posed to the victim on court premises and upon entering and leaving the building. Currently, the use of video-conferencing is only offered at the request of the victim's lawyer. An amendment could be made to the Domestic Violence Law and Civil Procedure Code,<sup>56</sup> enabling the court to provide this option routinely in cases involving domestic violence, depending upon the level of assessed risk.

In cases involving high risk, the court could request a **police escort** for the victim, an option employed by other countries in high-risk cases. The police escort should wait with the victim in the court and accompany her to the exit or to her home or shelter. Courts security could also assist in accompanying the victim, ensuring her safety while in court and providing security-related information to victims. A third option, also used in other jurisdictions, such as Spain, is to **hear the victim and the perpetrator separately** as a matter of course, so that the victim is not required to confront the perpetrator for the purpose of the issuance of a protection order.

Placing **screens** in the courtroom is an option used routinely in many countries as an in-court protection measure. In conformance with Article 56(1)(e), many jurisdictions also offer the possibility for the victim to be **accompanied by a support person**. This might be an advocate, a service often offered by NGOs or shelter staff, or a close friend or family member. The person should accompany the victims everywhere, even to the restroom, at a minimum waiting outside. Other options include: **separate waiting areas**, the use of *in camera* hearings, and using **statements (audio-visual)** given during the preliminary phase of the procedure as evidence in lieu of the victim's direct in-court testimony.

Victims of violence against women and domestic violence are also entitled to protection to their right to privacy, which can take the form of barring the media from the courtroom, and closing all or parts of the proceedings to the public.

The following in-court safety precautions, derived from U.S. practice, were recommended for consideration by judges in the recent judicial training organised by La Strada in Ukraine:

#### Safety before the hearing

- A separate entry should be provided for victim to which perpetrator does not have access;
- Arrange checkpoints to preclude entry with a weapon;
- Protection should be provided for the victim on her way to and from the courtroom; if not in all cases, ensure that this condition is fulfilled at least in cases of the highest threat;
- Inform the judicial protection service about possible behaviour, when arrest is necessary for violating an urgent injunction or restriction measure, and ensure all parties are informed;
- The parties should remain separated from each other before the hearing, preferably in different places;
- The victim should be allowed to have a support person accompany her in the courtroom;

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<sup>56</sup> The possibility of testimony via video conferencing is only foreseen in the Criminal Procedure Code, and is thus not foreseen for civil or administrative offences.

- At the time of issuing the restrictive measure, provide the defendant and/or attorneys information on what security measures are to be applied.

#### Safety during the hearing

- Seating should be arranged so that the victim and perpetrator are separated from each other in the courtroom; a court security service could be seated between parties during the hearing;
- Seat victim and perpetrator in such a way as to prevent the defendant's visual contact with the victim, in order to remove any opportunity to intimidate and look at the victim;
- Take control of courtroom behaviour; prohibit tactics such as irrelevant cross-examination, interrupting the victim's testimony, accusations unrelated to the case, pleas to return, asking whether the victim still loves the perpetrator, and disclosure the victim's personal information;
- Do not allow the perpetrator to request the victim's address;
- Explain to the victim that she/he needs to look at a judge while testifying;
- Inform the parties that prescribed penalties will be imposed for the violation of restrictive measures and urgent injunctions, whether such violations occur inside or outside the courtroom.

#### Safety after the hearing

- It is important that the victim leaves the court first;
- The perpetrator and family and friends should wait at least 15 minutes after the hearing is completed prior to departure;
- Monitor the perpetrator and let him know when he can leave the court.

In sum, the creation of a judicial guide might be extremely helpful given the recent passage of the pertinent laws, orders and the use of risk assessment forms. The proposed guide could include other important issues such as victims' rights during legal proceedings (a right to information in a language she understands, to legal aid, etc.),<sup>57</sup> and the relevant criteria for assessing risk and adjudicating domestic violence cases as established by the ECtHR and the Istanbul Convention. (See Annexes R and S for checklists that can be provided to victims prior to, during and after attending a court hearing).

### **3. Procedural protection for vulnerable witnesses**

As stated above, Article 56(1) of the Istanbul Convention requires States to take "the necessary legislative or other measures to protect the rights and interests of victims, including their special needs as witnesses, at all stages of investigations and judicial proceedings". Specifically, Article 56(1)(d) requires:

enabling victims, in a manner consistent with the procedural rules of internal law, to be heard, to supply evidence and have their views, needs and concerns presented, directly or through an intermediary, and considered.

It is interesting to note that some countries have developed special rules of criminal procedure for vulnerable witnesses. In 2019, Scotland passed the Vulnerable Witnesses

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<sup>57</sup> Victims of gender-based and domestic violence have the right to free legal aid in Ukraine. Article 14(13), Law on Free Legal Aid, 2011.

(Criminal Evidence) (Scotland) Act, which provides for "the use of special measures for the purpose of taking the evidence of child witnesses and other vulnerable witnesses in criminal proceedings".<sup>58</sup> It applies to all child and vulnerable victims of assault, sexual violence, homicide and attempted assault and homicide, among other crimes (including human trafficking and FGM). It requires the evidence of vulnerable witnesses covered by the Act to be taken *prior to the hearing*, unless an exception applies.<sup>59</sup> It specifically foresees the use of special in-court protection measures such as a support person or a pre-recorded statement. Ukraine may want to consider developing specialised legislation or amending the current criminal procedure code to foresee similar special measures for the taking of evidence of vulnerable witnesses.

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<sup>58</sup> See, Preamble, Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019, available at: <http://www.legislation.gov.uk/asp/2019/8/enacted?fbclid=IwAR17cLAKRr11URGfhxutsPP76hwiUCuaQS7Qqjdui-mjAiD6Wcg87eWGmhg>.

<sup>59</sup> Article 1(3), Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019.

### **Safety (special preventive measures) for child-friendly justice before, during and after judicial proceedings**

*Excerpted from: Guidelines of the Committee of Ministers of the Council of Europe for child-friendly justice, pp. 22-31.*

In all judicial and non-judicial proceedings or other interventions, children should be protected from harm, including intimidation, reprisals and secondary victimisation.

Professionals working with and for children should, where necessary, be subject to regular vetting, according to national law and without prejudice to the independence of the judiciary, to ensure their suitability to work with children.

Special precautionary measures should apply to children when the alleged perpetrator is a parent, a member of the family or a primary caregiver.

Interview methods, such as video or audio-recording or pre-trial hearings in camera, should be used and considered as admissible evidence.

Court sessions involving children should be adapted to the child's pace and attention span: regular breaks should be planned and hearings should not last too long. To facilitate the participation of children to their full cognitive capacity and to support their emotional stability, disruption and distractions during court sessions should be kept to a minimum.

As far as appropriate and possible, interviewing and waiting rooms should be arranged for children in a child-friendly environment.

Interviews of and the gathering of statements from children should, as far as possible, be carried out by trained professionals. Every effort should be made for children to give evidence in the most favourable settings and under the most suitable conditions, having regard to their age, maturity and level of understanding and any communication difficulties they may have.

Audio-visual statements from children who are victims or witnesses should be encouraged, while respecting the right of other parties to contest the content of such statements.

Direct contact, confrontation or interaction between a child victim or witness with alleged perpetrators should, as far as possible, be avoided unless at the request of the child victim.

Children should have the opportunity to give evidence in criminal cases without the presence of the alleged perpetrator.

#### **4. Judicial stereotyping**

Increased awareness is needed among judges in Ukraine, through trainings, of the need to employ a gender-sensitive, victim-centred approach in domestic violence cases, as failing to do so can result in the re-traumatisation of the victim, and a violation of the victim's right to an impartial tribunal and an effective remedy.

Judges engage in stereotyping in one of two ways. They may apply, enforce and perpetuate stereotypes in their decision-making by substituting stereotypes for law and facts in evidence. They can also facilitate the perpetuation of stereotypes by failing

to challenge stereotyping, for example by lower courts or the parties to legal proceedings. The impact of judicial stereotyping on the right to a fair trial can be wide-ranging. For example, it might:

- distort judges' perceptions of what occurred in a particular situation of violence or the issues to be determined at trial
- influence judges' understanding of the nature of the criminal offence
- affect judges' vision of who is a victim of gender-based violence
- influence judges' perceptions of the culpability of the accused
- influence judges' views about the credibility of witnesses
- lead judges to permit irrelevant or highly prejudicial evidence to be admitted to court and/or affect the weight judges' attach to certain evidence
- impede access to legal rights and protections
- influence the directions that judges give to juries
- cause judges to misinterpret or misapply laws
- shape the ultimate legal result.<sup>60</sup>

Stereotypes can be based on discriminatory social or cultural norms regarding the importance of women's sexual purity and the primacy of their roles as mothers. Traditional masculinities (e.g., entitlement to control women and inability to control their own sexual urges) can also have important bearing on cases involving domestic and sexual violence. Judicial bias can also be adduced from disproportionately low sentencing for gender-based crimes, and from a sentence that does not reflect the gravity of the crime.

Moreover, judges are in a position to identify prior violations of victims' rights based on gendered and other stereotypes, and can exercise discretion when evaluating evidence produced by discriminatory investigations. For example, women might be abused or ignored in police stations, and police and investigators may fail to exercise due diligence in investigating crimes that disproportionately affect women. Gender-based violence prosecutions that rely heavily or exclusively on the testimony of the victim may reveal a lack of due diligence in the investigation. Bias by investigators can result in discriminatory investigations, including in the lines of questioning and the type of evidence gathered.

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<sup>60</sup> See, OHCHR, *Eliminating judicial stereotyping: Equal access to justice for women in gender-based violence cases*, 2014, pp. 20, 22.

## Examples of victim blaming

*Excerpted from: Council of Europe, Emergency Barring Orders in Situations of Domestic Violence: Article 52 of the Istanbul Convention, 2017, pp. 16-17.*

She is reporting because she wants revenge or wants to get custody of the kids.

It is only a family dispute. It is only domestic.

It is her fault.

What did she do that the situation turned out so badly?

He has never hit her, so it is not really abuse.

Why did she wait so long to leave him? Why doesn't she just leave?

It must be stress at work /alcohol abuse.

It is just her who is blaming him -others say he is nice man./ I know he is a nice man.

I would have acted differently.

She did not resist.

It cannot happen to me or to my family members.

She deserved the violence.

Gender stereotyping often leads to victim-blaming, which in turn may result in secondary victimisation, where the victim is re-traumatised by the very professionals and institutions responsible for assisting her.<sup>61</sup> In Ukraine, stakeholders indicated that due to a lack of understanding or misconceptions regarding the nature and cycle of domestic violence, judges often consider incidents as a conflict between two equal parties, thus denying the victim the rights and protections established pursuant to national and international law. Judges also reportedly close domestic violence cases involving administrative offences as trivial. (See Annex K on the cycle of violence.)

In addition to the re-victimisation of victims of violence against women, judicial stereotypes can further result in a violation of the right to an impartial tribunal and an effective remedy. It has been the subject of cases involving violence against women before the CEDAW Committee and the ECtHR.

In the case *Karen Tayag Vertido v. The Philippines*,<sup>62</sup> the CEDAW Committee determined that the Philippines had failed to comply with its obligation to ensure Ms. Tayag Vertido's right to an effective remedy due, in part, to judicial stereotyping. In that case, the Committee assessed "the level of gender sensitivity applied in the judicial handling" of the case.<sup>63</sup> It found that in the national court's assessment of the credibility of the victim's version of events, the decision:

<sup>61</sup> See, CoE, Emergency Barring Orders in Situations of Domestic Violence: Article 52 of the Istanbul Convention, 2017, pp. 15, 16, defining victim-blaming as: "a devaluing act that occurs when the victim(s) of a crime or an accident is held responsible – in whole or in part—for the crimes that have been committed against them. This blame can appear in the form of negative social responses from legal, medical, and mental health professionals, as well as from the media and immediate family members and other acquaintances".

<sup>62</sup> CEDAW/C/46/D/18/2008, 2010.

<sup>63</sup> CEDAW/C/46/D/18/2008, 2010, para 8.4.



was influenced by a number of stereotypes, the author in this situation not having followed what was expected from a rational and 'ideal victim' or what the judge considered to be the rational and ideal response of a woman in a rape situation.

In the *V.K. v. Bulgaria* case, the CEDAW Committee stressed that "stereotyping affects women's right to a fair trial and that the judiciary must be careful not to create inflexible standards based on preconceived notions of what constitutes domestic or gender-based violence".<sup>64</sup> In this regard it found that:

the rationale behind the one-month period within which a victim needs to apply for a protection order is to provide for urgent court interventions rather than to police the cohabitation of partners, lacks gender sensitivity in that it reflects the preconceived notion that domestic violence is to a large extent a private matter falling within the private sphere, which, in principle, should not be subject to State control.<sup>65</sup>

It also found that the decision was based on a discriminatory, stereotypical understanding of what constitutes domestic violence, and that the civil court decision on the divorce contained "traditional stereotypes of women's roles in marriage".<sup>66</sup> Lastly, the Committee recognised that the victim was left without State protection and experienced "re-victimisation through the gender-based stereotypes relied upon in the court decisions".<sup>67</sup>

Judges should also proactively manage the proceedings so as to prevent re-traumatisation. They have the discretion to adjust court procedures to the particular capacity and needs of victims and witnesses. Examples include:

- Adjusting questioning so as to eliminate unnecessary, intrusive, repetitive or embarrassing questions
- Allowing for frequent breaks during the testimony
- Altering the courtroom settings to make them less formal
- Having a support person present in the court sit next to the witness.

The application of contempt measures by the court and the availability of a complaint mechanism are also important in addressing threatening behaviour.

In this regard, Article 15(1) of the Istanbul Convention requires States to:

provide or strengthen appropriate training for the relevant professionals dealing with victims or perpetrators of all acts of violence covered by the scope of this Convention, on the prevention and detection of such violence, equality between women and men, the needs and rights of victims, as well as on how to prevent secondary victimisation.

In order to prevent such stereotypes, international standards require training and gender sensitisation of judges, prosecutors and lawyers.<sup>68</sup>

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<sup>64</sup> CEDAW/C/49/D/20/2008, 2010, para 9.11.

<sup>65</sup> CEDAW/C/49/D/20/2008, para 9.12.

<sup>66</sup> CEDAW/C/49/D/20/2008, para 9.12.

<sup>67</sup> CEDAW/C/49/D/20/2008, para 9.14.

<sup>68</sup> See, i.e., Article 15, Istanbul Convention and CEDAW General Recommendation No. 33.

## 5. Pre-trial detention and conditional sentencing

Judges, often with input from the prosecution and Probation Department, must also make determinations on pre-trial release and conditional sentencing in cases involving violence against women. These determinations should be based on updated risk assessment findings, which judges can perform, or alternatively request from the police, the prosecution, and for conditional sentencing, from probation officers.

In cases of high or even medium risk, judges should consider the pre-trial detention of the perpetrator pursuant to Article 176(1)(5) of the Criminal Procedure Code. The grounds for pre-trial detention could be considered under Article 177(1)(3) and (5), referring to exerting unlawful influence on a victim or witness, and continuing to commit the criminal offence, respectively. Legislators should consider adding another ground or modifying the existing grounds in the list in Article 177(1) to refer specifically to the risks to the safety of victims/witnesses.

In domestic violence cases, additional issues should be considered, beyond the list set forth in Article 177(1). These include:

- the seriousness and violence of the offence;
- the use of weapons;
- lethality of the defendant;
- the defendant's criminal record and history of violence;
- the defendant's history of non-compliance with court orders and outstanding warrants;
- threats of death, injury, retaliation, and suicide;
- the victim's fears; and,
- access to the victim.

Notably, with the passage of the Domestic Violence Law, one circumstance was added to the list for consideration in pre-trial restraint set forth in Article 178, namely, subsection (12). It reads: "the risk of continuation or recurrence of unlawful conduct, including the risk of lethality created by the suspect, the accused, including in connection with his access to the weapon". Reference to "the risk of lethality" implies the need for a risk assessment to be conducted. However, judges should consider the risk of additional violence, not only the risk of homicide, in making such a determination. The language of this provision should be modified to require judges to also consider non-lethal violence as grounds for pre-trial detention.

Article 76(2) of the Criminal Code enables the judge to specifically consider the imposition of a protection order (pursuant to Article 91<sup>1</sup>) when ordering the conditional release of the convicted perpetrator on probation. It is important to note, however, that in current practice, the police engage in no measures to ensure the implementation of protection orders, and electronic monitoring is not yet foreseen in Ukraine. Consequently, in cases of high or moderate risk to the victim of additional violence, judges should not order the perpetrator's conditional release. Under no circumstances should judges order perpetrators to apologise to the victim in domestic violence cases, as foreseen in Article 76(3)(1) of the Criminal Code.

## 6. General jurisdiction judges and administrative offences

In practice, most incidents involving domestic violence are addressed as an administrative offence by judges of general jurisdiction. The Domestic Violence Law foresees an amendment to the Code of Administrative Offences creating a specific offence for domestic violence.<sup>69</sup> The new Article 173-2 of the Code of Administrative Offences makes committing an act of domestic violence, violating an injunction and failure by the perpetrator to register an address as an administrative offence. This provision is problematic for several reasons, which are described in more detail here, and in sections below.<sup>70</sup>

The Domestic Violence Law also amends the Administrative Offences Code to enable judges of general jurisdiction to refer perpetrators to specialised perpetrator treatment programmes.<sup>71</sup> However, in a significant gap in the law, neither the Domestic Violence Law, nor the Administrative Offences Code, foresee the possibility of general jurisdiction judges to issue restrictive measures. The legal framework should facilitate to the greatest extent possible victims' access to protection, not create additional burdens on the victim to seek protection. The Domestic Violence Law<sup>72</sup> and the Code of Administrative Offences should be amended to provide for the issuance of restrictive measures by judges of general jurisdiction.

Judges of general jurisdiction should have access to risk assessments produced by police and other criminal justice bodies, they should engage in conducting risk assessments, and should ensure the necessary in-court and out-of-court protection measures for victims in line with those recommended for civil and criminal judges, above. It makes little sense to provide judges of general jurisdiction with competence over domestic violence cases without providing them with the full array of tools to address the issues that arise in the context of these cases, and most significantly the tools necessary to protect the physical and mental well-being of victims.

### C. Risk assessments for prosecutors

Although the main role of prosecutors is to deal with the criminal aspects of a domestic violence case, it is important for prosecutors to understand the dynamics of domestic violence and its impact not only on the victim's life, but also on the legal proceedings. (See Annex K on the cycle of violence). Particular attention needs to be paid to the safety and support of the victim throughout legal proceedings in order to ensure their effectiveness. It is imperative for prosecutors to assess the impact of any measure to be taken on the victim's safety, and to ensure that the risk of further violence is not increased as a result of the intervention. (See Annex G for a checklist on the recommended actions and considerations for prosecutors).

At present, prosecutors do not currently conduct risk assessments. Domestic violence is not yet commonly prosecuted as a crime pursuant to Article 126<sup>1</sup> of the Criminal Code,

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<sup>69</sup> Section IX, Article 3(1) of the Domestic Violence Law foresees the addition of Article 173<sup>2</sup> to the Code of Administrative Offences.

<sup>70</sup> First, Article 173<sup>2</sup> establishes a parallel framework for addressing domestic violence, creating ambiguity as to when and whether offences should be addressed as a crime or as an administrative offence. Secondly, violations of urgent injunctions should be criminalized. Finally, the provision foresees fines, among other sanctions, which are not an effective deterrent.

<sup>71</sup> Section IX, Article 3(1) of the Domestic Violence Law foresees the addition of Article 39<sup>1</sup> to the Code of Administrative Offences.

<sup>72</sup> Article 26(10) of the Domestic Violence Law foresees only the application of restrictive measures in the case of criminal proceedings.

although the number of cases since its criminalisation in 2019 is growing. Moreover, there is no specialised unit dedicated to working with victims of gender-based violence. Change in practice is recommended with respect to all three characteristics in order to bring the practice in Ukraine into harmony with international standards and the practice in other countries in Council of Europe member States. Nearby Georgia, for example, has criminalised all forms of violence against women,<sup>73</sup> and has established specialised police and prosecution units, both of which conduct risk assessments.<sup>74</sup>

## **1. Gathering information and risk assessment criteria**

For prosecutors, risk assessments can provide valuable background information to the case. It is important for the prosecutor to know whether the police or other agency has conducted a systematic risk assessment, as the fear of retaliation and further violence will have implications for prosecutors. In some countries, risk assessments are conducted by the police and are forwarded to the prosecution.<sup>75</sup> Prosecutors should request from the police a copy of the risk assessment for each case as a matter of routine until the Unified State Register is functional.

Prosecutors should obtain the following types of information pertaining to risk:

- Police reports on the current offence
- Additional information obtained from officers/investigators
- Emergency calls, past police reports involving the same perpetrator
- Prior arrests and convictions of the same perpetrator
- Input from a victim advocate, if the victim has given the advocate permission
- Petitions for restriction measures and any supporting documents
- Prior pre-sentence investigation reports
- Any probation status and/or compliance reports.

As a general matter, the prosecutor should collaborate closely with other law enforcement agents and service providers, in order to discuss issues related to the dangers and risks of further violence to the victim and to get a complete picture of the situation. In this regard, Article 51 of the Istanbul Convention places responsibility for assessing and managing the risk of violence on not only law enforcement, but also in cooperation with all relevant authorities.

Prosecution risk assessments are based on the same criteria as the others. Prosecutors should gather the following information:

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<sup>73</sup> For example, as of May 2017, Article 133<sup>2</sup> of the Criminal Code of Georgia prohibits female genital mutilation on any grounds. This means that female circumcision, infibulation partially or fully, or coercion of a woman to undergo FGM under religious, ethnic, national or other traditions, or other reasons except when it is necessary for a woman's life or health is punishable. The criminal liability for stalking was introduced in the Criminal Code of Georgia under Article 151<sup>1</sup>.

<sup>74</sup> Ministry of Internal Affairs of Georgia established the Human Rights Protection Department within its structure to strengthen response to violence against women and domestic violence pursuant to a ministerial order on 12 January 2018. It aims to ensure timely response and effective investigation into domestic violence, violence against women, including sexual violence, crimes committed on the grounds of discrimination, hate crimes, human trafficking and crimes committed by and/or towards minors. Also, according to Article 451 of the Imprisonment Code of Georgia, the prison administration shall immediately inform the Ministry of Internal Affairs before the perpetrator who committed violence/domestic violence against women is released

<sup>75</sup> This might be the recommended first step in Ukraine, in order to focus training efforts on police as frontline actors.

### **Prior victimisation**

- Type, severity and frequency of assault
- Date of most recent assault
- Severity of the incident: strangulation, burning, permanent physical damage, head injuries, weapons involved, sexual aggression and coercion, drugging, poisoning, confinement
- Serious injury in prior assaults
- History and nature of past violence towards this victim
- A pattern of ongoing intimidation, coercion and violence
- Identify any patterns of violence perpetration and whom it is against
- The severity of the violence
- Identity of the injured person and cause of the injuries
- Identify which persons are afraid and what they are afraid of (include non-physical fears such as losing children, home, job, etc.)
- Assault of the victim during pregnancy or shortly after giving birth
- Current or past orders for protection
- Previous domestic violence charges dismissed, previous domestic violence contacts with police or prosecutor's office

### **Perpetrator's drug and alcohol problems**

- Alcohol or drug use

### **Perpetrator's obsessive/possessive behaviour and excessive jealousy**

- Jealous or controlling behaviours
- Intimidation of victim if she seeks help
- Nature of controlling behaviour: threats of future injury or death (the more specific the threat, the greater the risk), threats to use a weapon, threats of child abduction or denial of visitation rights, threats made openly and in presence of others
- Type of threats or coercion used to dissuade the victim from participating in the prosecution, if any

### **Perpetrator's mental health history (i.e. suicidal ideations, plans, threats and past attempts)**

- Threats of homicide or suicide
- Evidence of depression
- Evidence of paranoid thinking
- History of mental health or emotional problems

### **Perpetrator's threats to kill the victim or her children**

- Type of threat to harm victim or children
- Victim fears that the perpetrator will take the children in retaliation for cooperation with prosecutors
- Children witness the offence or other violence or threats

### **Perpetrator's use of violence in settings outside the home**

- Prior criminal history, and whether there are other pending charges
- History and nature of past violence towards others (i.e. history of violence in prior relationships)

### **Evidence of escalating violence or intimidation**

- Stalking behaviour
- Use of weapon
- Sexual abuse
- Animal abuse
- Property damage or threats of future property damage
- Hostage-taking
- Victim's increased vulnerability due to age, disability, pregnancy

### **Perpetrator's possession of, access to, familiarity with and degree of fascination with guns**

- Access to firearms/availability of weapons

### **Perpetrator's proclivity to respect court rules**

- Record of violation of court orders
- Record of failure to follow pre-trial release or probation rules
- Previous participation in a perpetrator treatment programme

### **The status of the relationship**

- Victim and perpetrator separated or estranged
- Victim in the process of fleeing
- Status of any family or other type of court case
- Imminent break-up, separation or divorce initiated by victim; imminent change in child custody and/or imminent change in victim's residence

Once the risk assessment tool for prosecutors is adopted, it should primarily be used to foster dialogue with the victim, rather than as a checklist or a collection of discrete data. It will assist the prosecutor in understanding the larger context and pattern in which the violent incidents took place. As UNODC recommends:

Engaging a victim in a discussion of these risks and dangers improves the information available to prosecutors, not just by learning the simple facts that certain events or behaviours took place, but by filling in the larger context and pattern in which this particular incident occurred. Prosecutors should analyse the risk using all available information and make decisions based upon a totality of the circumstances.<sup>76</sup>

The risk assessment will enable the prosecutor to mitigate the risk of violence, to ensure that the victim feels safe, and to capture the nature of the crime as it relates to coercive control. Engaging with the victim will also reveal other types of fears and risks faced by the victim, such as: homelessness, poverty, criminal charges, loss of children or family support. Prosecutors should solicit this information in a private setting, and not in open

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<sup>76</sup> UNODC, Handbook on effective prosecution responses to violence against women and girls, 2014, p. 54.

court in front of the alleged perpetrator. This is likely to improve the accuracy of the information provided, as well as an opportunity to give information and resources to the victim.

Given the varying nature of domestic abuse, victims will move in and out of risk categories. Prosecutors (as well as police and judges) should be conscious of this at all stages of criminal proceedings. Some complainants may be at a particularly heightened risk following a report to the police, confirmation of a charging decision or when there has been a discontinuance of proceedings or an acquittal of the suspect. Prosecutors should always ensure they have the most up to date risk assessments from the police to inform victim management decisions. Additional risk assessments can be requested to be conducted by the police, as in some jurisdictions, or can be conducted by the prosecution. Subsequent risk assessments may reveal a change in the complainant's circumstances, or that the perpetrator's offending may have increased in severity or frequency; or, in some cases, the abuse and risk may have ceased.

Although prosecutors are not necessarily involved in the issuance of urgent injunctions or restrictive measures, they must be aware if such an order has been issued, and if it has been violated. Breaches of urgent injunctions should be criminalised.<sup>77</sup> Prosecutors should be empowered to seek restrictive measures, including requests to provide the victim with cell phones or personal protection by the police. At any time, the prosecutor should be able to request the preventative custody of the perpetrator. As noted above, "risk assessments should always be accompanied with a plan to manage the safety risks a particular victim faces on a case-by-case basis, according to standardised procedures and in cooperation and co-ordination with all relevant actors".<sup>78</sup>

Even if the perpetrator has been arrested and detained, prosecutors should continue to ask the victim whether the defendant has contacted her from jail and whether these contacts were attempts to dissuade the victim from participating in prosecution or testifying. Perpetrators often exercise power and control through phone calls to manipulate the victim, and even the victim's children, in attempts to gain compliance. Although perpetrators are legally prohibited from making calls from jail in Ukraine, the practice continues to occur.

## **2. Considerations regarding prosecution**

Prosecutors should consider the timing of the filing of charges, balancing victim safety and a thorough investigation. Quickly filing charges may prevent future abuse and prevent the defendant from re-establishing a relationship with the victim. When a case is not charged, the victim should be notified and a record of the uncharged incident report should be kept for future prosecutions.

Prosecutors should carefully review the evidence for other charges, including attempt charges and aggravated circumstances. Including other charges may advance prosecutorial goals, provide a complete picture of the defendant and bolster any plea negotiations.<sup>79</sup> Additional charges that may be commonly supported by the evidence include: assault, battery, burglary, robbery, theft, false imprisonment, stalking, criminal threats, kidnapping, and child endangerment. Prosecutors should also consider joining

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<sup>77</sup> Article 390<sup>1</sup> of the Criminal Code criminalises the breach of a restrictive measure.

<sup>78</sup> CoE, Emergency Barring Orders in Situations of Domestic Violence: Article 52 of the Istanbul Convention, 2017, p. 53.

<sup>79</sup> Some countries, such as Georgia, have developed internal prosecution policies precluding plea agreements in cases involving gender-based violence.

cases, which can help establish the severity of the abuse as well as the continuous nature of the crime.

The victim's failure to appear in court is not uncommon in domestic violence cases. This may be due to threats, duress, and fear of re-victimisation by law enforcement authorities, the lack of familial support, economic dependence or reconciliation. Moreover, these crimes are often committed in private, often with no other witnesses. Whatever the reason, law enforcement officials face the challenge of building a case without relying on victims' statements. Prosecutorial discretion is imperative in effectively addressing failure to appear issues. Prosecutors should undergo training on the cycle of violence and its potential impact on prosecution. (See Annex K on the cycle of violence).

Proceeding without the victim's testimony requires law enforcement to be creative and proactive in identifying other sources of evidence. In this regard, prosecutors exercise oversight of the investigations and can guide investigators in building the case. For example, expert evidence can help to explain the impact of trauma on memory and delays by the victim in disclosure. Experts can also be used to support evidence of psychological or emotional violence. Prosecutors can further draw on evidence gathered by first responders, who should document every relevant comment or reaction that might have significance as to what happened. For example, if the perpetrator says: "She deserved to be hit! You should have seen the way she provoked me!" these remarks may later be used along with other pieces of evidence at the trial, including if the victim refuses to make a statement. Such spontaneous statements may also be used as corroborating evidence if the victim's credibility is questioned. Spontaneous comments made by other witnesses at the scene should also be recorded.



## EVIDENTIARY CHECKLIST

- Excerpted from Council of Europe, *Training Manual for Judges and Prosecutors on Ensuring Women's Access to Justice*, p. 79.
- Statements of police officers, from the scene or regarding other interactions with the victim or accused.
- Risk assessment forms.
- Statements of neighbours or other witness accounts (for example, friends, children, teachers, co-workers, staff of women's crisis centres and shelters, etc.)
- Recordings of emergency calls/ police dispatch calls.
- CCTV recordings (note that such recordings are especially useful in cases of stalking or harassment).
- Photographs or videos of the injury and scene (including photographs of property damage).
- Medical history/reports (including history of emergency treatment as well as reports that show a history of abuse, such as dental records; examinations by specialists).
- Forensic medical certificate from the incident.
- History of previous incidents (e.g., criminal record of the perpetrator; past exclusion/protective orders; administrative penalties).
- Previous reports on domestic violence that were not pursued.
- Communication from the perpetrator to the victim, especially those that can be used as evidence of threats (notes, letters, emails, SMS messages, Facebook/WhatsApp posts, etc.)
- Bad character evidence about the perpetrator.
- Expert testimony or witnesses, especially to explain the impact of violence on the victim, common behaviours and reactions of rape victim, concepts such as the cycle of violence or battered women's syndrome, etc.

Moreover, identifying witnesses to provide evidence should not be limited to eye-witnesses only. A broader range of persons may provide information related to the facts of the case. For example, neighbours may have information on noises they have heard during domestic conflicts, relatives or the trusted persons of the victims may be able to describe incidents that the victim had previously shared with them. Teachers and school administrative staff may provide information regarding children and their attendance at school or other possible behavioural indications of violence in the home.

It is good practice for prosecutors to ensure that there is a clear and comprehensive victim statement in the case file that can be used as evidence if the witness does not testify in court. The victim statement can be used to protect the victim from unnecessary and repetitive questioning about the incident, especially those involving sexual violence, during each phase of the justice process. The victim's statement can be written or recorded on video.<sup>80</sup>

Another important aspect of case preparation is to anticipate and plan for the possible introduction of prejudicial, embarrassing or harmful evidence by the defence, in particular, evidence that may be damaging to the witness but which is not relevant or

<sup>80</sup> Article 224(5) of the Code of Criminal Procedure permits the introduction of evidence that was photographed, or recorded via audio or video during an interrogation.

has no value in the case (for example, evidence of past sexual conduct, reputation, of substance abuse, etc.) Very often intrusive questioning in cases of violence against women is used in order to present evidence based on gendered and other stereotypes and assumptions about women's behaviour, dress and private life. Prosecutors must be ready to object to, and shield victims/witnesses from, negative character evidence that may be prejudicial and unrelated to the incident being prosecuted. As described above, judges should also manage the proceedings and intervene if the attention shifts toward questioning the victim's character and credibility, rather than establishing the guilt or innocence of the accused. Indeed, a case based on evidence that does not rely on solely the statements of the victim is less vulnerable to challenges concerning her credibility.

### **3. Arrest, pre-trial detention and bail conditions**

Because involvement in the criminal justice system may be extremely dangerous for some victims, in decisions relating to arrest, pre-trial detention and bail, the prosecutors' role is crucial in ensuring their protection. While protection measures are usually applied before the trial, they should continue as long as they remain necessary.

Prosecutors generally have a role at pre-trial hearings (initial appearance, bail hearings, arraignment) to represent the government's and the victim's views concerning the conditions of release of the suspect. Prosecutors should carefully review all of the options, including whether to seek pre-trial detention or, in the event of release, under what conditions. In reviewing the options, prosecutors should assess the risk of future violence, conferring with the victim to seek her input.

Prosecutors should also gather information as to whether the suspect has violated any previously ordered conditions of release or other court orders concerning the victim, (i.e., protection orders).<sup>81</sup> If there is a pattern of reoffending, then the prosecutor might consider requesting pre-trial detention. At the initial appearance, the prosecutor should determine whether a mental health evaluation of the suspect is appropriate. **Conditions of pre-release should prioritise the safety of the victim and her family.**

The right to bail must be balanced against the victim's right to life, and physical and mental health. Prosecutors should have guidelines on when to oppose bail in cases of violence against women. Specifically, bail should be opposed in cases in which there is a risk of further violence pursuant to a risk assessment determination. This risk assessment should be conducted in cooperation with other agencies, including those that are providing support and assistance to the victim, police and probation officers, etc., in order to ensure that all of the necessary information has been obtained prior to the bail hearing.

Article 178(1)(12) of the Criminal Procedural Code was added with the passage of the Domestic Violence Law to include the following consideration: "the risk of continuation or recurrence of unlawful conduct, including the risk of lethality created by the suspect, the accused, including in connection with his access to a weapon". Thus, an updated risk assessment must be conducted for determination of pre-trial release. As noted above, determination on pre-trial detention should also consider non-lethal violence as grounds for denying bail.

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<sup>81</sup> This is a factor to be considered under Article 178(1)(9) of the Criminal Procedure Code: "observance of suspected, accused conditions of the applied preventive measures, if they were applied to him earlier".

When advocating for bail conditions, the prosecutor should consider the following factors: the seriousness and violence of the offence; the use of weapons; lethality of the defendant; the defendant's criminal record and history of violence; the defendant's history of non-compliance with court orders and outstanding warrants; threats of death, injury, retaliation, and suicide; the victim's fears; and, access to the victim. In particular, prosecutors should take all steps possible to have firearms removed by the court as soon as perpetrators are arrested.

Prosecutors have the obligation to provide the court with all relevant information regarding victim safety to aid in the court's determination. Prosecutors (and probation officers at the order of the court) should provide the following information to the court in the context of a pre-trial release hearing:

- Whether there is a history of violence
- Whether the victim fears further violence and the basis for that fear
- The victim's opinion on the likelihood that the accused will obey a term of release, particular a no-contact order
- Whether the accused has a history of alcohol or drug problems, or mental illness
- Whether the accused has a history of breaches of judicial orders
- The details of all previous domestic violence charges and convictions
- Evidence that the accused possesses firearms, weapons (such as a licence, registration).

Prosecutors should notify the victim if and when the defendant is released, give the victim a copy of the order outlining the conditions of release and information as to who to contact if the defendant breaches any of the conditions.

#### **4. Children as indirect victims**

Prosecutors should ensure that where the complainant has children, or if there are children regularly in contact with the complainant (for example, another family member), that they or the police conduct a risk assessment of them. Safety of the complainant, children and other dependants or family members should be considered throughout a prosecution case.

The identification of child victims is addressed in Article 10 of the Domestic Violence Law. It states:

Identification of child victims of violence, taking and considering statements and reports of violence committed against children, arrangements for the provision of social protection to such children shall be carried out in accordance with the procedure approved by the Cabinet of Ministers.

The Domestic Violence Law recognises children as both direct and indirect victims of violence. In too many cases, children who might not have previously been targeted by the violence are kidnapped or murdered by the perpetrator in response to the victim's attempts to leave. This is an important consideration for the Juvenile Justice Department of the Prosecutor General's Office, which will commence working with children as victims, not just as perpetrators, in 2020. However, this policy will apply only to children who are direct victims of crimes against minors, which are qualified as aggravating circumstances. There is thus a gap with respect to the protection of indirect child victims.

Although Article 1 of the Domestic Violence Law qualifies as victims children suffering indirect violence, in practice, neither the police, social workers, nor prosecution authorities address the needs of these children as victims. In this regard, Article 22(2) of the Istanbul Convention requires States Parties to "provide or arrange for specialist women's support services to all women victims of violence and their children". Similarly, with respect to child witnesses, Article 26(2) provides that witness protection measures "shall include age-appropriate psychosocial counselling for child witnesses of all forms of violence covered by the scope of this Convention and shall give due regard to the best interests of the child".

The Juvenile Justice Department of the Prosecutor General's Office can engage proactively to ensure the protection of children's rights and safety in the context of domestic violence proceedings. First, they can instruct investigators to address child's rights and risks to their safety as an integral part of investigations. Prosecutors can also request that the judge restrict custody and visitation rights, depending on the risk. Article 31 of the Istanbul Convention states:

1. Parties shall take the necessary legislative or other measures to ensure that, in the determination of custody and visitation rights of children, incidents of violence covered by the scope of this Convention are taken into account.
2. Parties shall take the necessary legislative or other measures to ensure that the exercise of any visitation or custody rights does not jeopardise the rights and safety of the victim or children.

#### **D. Risk assessments for probation officers**

The Probation Department is a relatively new structure located under the auspices of the Ministry of Justice. While the majority of the stakeholders addressed in this report focus on the victim, probation officers focus on the risks of recidivism of the perpetrator. The Probation Department conducts perpetrator-focused needs and risk assessments at three stages in the criminal justice process, pre-trial, post-trial and on early release from prison. With respect to risk, it assesses the risks of a repeat offence and the level of danger to society. It then provides input on pre-trial release and as to whether to apply a conditional sentence. It performs pre-trial release assessments only upon a request from the judge.

The Probation Department can exercise its competence in criminal cases and select other cases.<sup>82</sup> This applies to criminal cases, as well as administrative offences involving

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<sup>82</sup> The Probation Department exercises competence over the following category of persons:

- Defendants on whom the probation authority prepares a pre-trial report;
- Persons sentenced to imprisonment in the form of deprivation of the right to occupy certain positions or engage in certain activities, public works, correctional works;
- Persons to whom a sentence of restriction of imprisonment or imprisonment for a limited period is replaced by a sentence in the form of community service or correctional labor;
- Persons released from probation;
- Pregnant women and women who have children under the age of three are released from serving sentences;
- Persons sentenced to restraint of liberty who are sent to serve correctional facilities;
- Persons serving a sentence of imprisonment or imprisonment for a limited period of time, subject to measures to prepare them for release.

In administrative cases, the probation clients will be persons for whom the court has applied administrative punishment in the form of community service and correctional labor.

a perpetrator who re-offends within a year of having been sanctioned for a prior administrative offence.<sup>83</sup>

The Probation Department already engages in sophisticated risk assessments using both static and dynamic factors, entitled *Assessment of the Risk of Repeat Criminal Offence*. However, the form does not address the specific indicators related to domestic or other forms of violence against women. Significantly, unlike offenders on probation for violent crimes involving strangers, domestic violence perpetrators present a significant risk of further harm to the victim. Domestic violence offenders thus pose a unique challenge.

Domestic violence offenders generally have a high rate of recidivism. Studies have estimated the repetition of violence to be in the range of 40 to 80 percent of cases.<sup>84</sup> However, there is also a population of low-risk domestic violence offenders who either have a single police-involved incident or who reduce offending very quickly. Some lower-risk offenders do desist from engaging in further violent behaviour fairly quickly. Generally, these lower-risk offenders appear to have a higher stake in conformity, meaning they are generally employed, have pro-social relationships and are positively engaged in their community. These factors have been associated with a lower likelihood of re-offending. These lower-risk offenders should be treated using generally acceptable lower levels of supervision and treatment, and not be mixed with high-risk offenders in perpetrator treatment programmes. Understanding the risk of future harm and offender-specific needs is essential for probation departments to craft a supervision and case plan that will optimise success in cases involving domestic violence.

Probation officers will, in the course of their work, obtain information useful for those conducting perpetrator programmes, which the perpetrator may be ordered to attend. Probation officers can assist in distinguishing between high and lower risk domestic violence offenders, in order to ensure they are assigned to appropriate treatment programs. Conversely, the perpetrator's attendance in a programme and any behavioural shifts that occur as a result should be monitored by the probation officer in a given case.

The supervision of perpetrators of domestic violence presents many challenges because of the unique aspects of these cases, such as, the risk of re-offending, the risk of harm, the ongoing relationship of the offender with the victim and the offender's access to the victim. The effective supervision of a perpetrator is critical if the Probation Department is to meet its responsibility to reduce the likelihood of re-offending while at the same time ensuring the victim's safety. Domestic violence is harmful behaviour and can result in the death of the victim. Moreover, domestic violence is about power and control. It is selective, controlled and intentional. It is not about loss of control, therefore anger management programmes are not appropriate. Perpetrators use the perceived "behaviour" of victims as a trigger for the abuse, using anger and violence deliberately to impose control over victim.

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<sup>83</sup> See, Section IX, Article 3(1), Domestic Violence Law, amending Article 173-2 of the Code of Administrative Offences.

<sup>84</sup> See, e.g., Washington State Institute for Public Policy, *Recidivism Trends of Domestic Violence Offenders in Washington State*, 2013, available at: [https://www.wsipp.wa.gov/ReportFile/1541/Wsipp\\_Recidivism-Trends-of-Domestic-Violence-Offenders-in-Washington-State\\_Full-Report.pdf](https://www.wsipp.wa.gov/ReportFile/1541/Wsipp_Recidivism-Trends-of-Domestic-Violence-Offenders-in-Washington-State_Full-Report.pdf).

## **1. Development of a domestic violence-specific form for probation officers**

Given the existence of a comprehensive risk assessment form, it is recommended that a separate and shorter domestic violence-specific form be added to Section II of the current form on Risk of Harm to Life and Health for use only in cases involving domestic violence. (See Annex C for a proposed domestic violence risk assessment form for probation officer.) This separate form should be used when domestic violence is the subject of the criminal proceedings, including when it is an element of another crime. It should also be used in cases in which domestic violence arises in the facts of such cases to the knowledge of the probation officer.

In addition to conducting its own risk assessments, the Probation Department should receive copies of prior risk assessments for each case as a matter of routine from the police, prosecution, judiciary, social workers and perpetrator programmes. Probation Department staff noted that the current information-sharing process between agencies remains very slow (often taking weeks), necessitating an interim process until the Unified State Register is in place. In this regard, it is important to note that the Probation Department has 10 days to perform a pre-trial assessment and 30 days to perform a post-sentencing assessment.

Probation departments use a range of methodologies for conducting risk assessments for domestic violence cases. Based on a review of the literature, it is recommended to pair the existing general risk assessment tool with an offense specific tool. In this way, the general tool would be used to predict the risk of re-offending and the offense-specific needs assessment could be used for the purpose of pre-treatment assessment to help guide placement in appropriate interventions. Creation of a separate needs and risk assessment tool for domestic violence cases would unnecessarily complicate processes for the recently-established Probation Department.

Although the focus of probation officers' work is with the perpetrator, the probation officer has the competence to speak to a wide range of actors, including family members, employers and social workers—all of whom interact with the perpetrator. Thus, probation officers will have an opportunity to engage directly with the victim(s) in domestic violence cases. In addition to providing probation officers with significant insight, these contacts will enable probation officers to know if violent incidents have continued or if protection orders have been violated.

In this regard, another significant gap in the legislation in Ukraine enables perpetrators to commit three administrative offences prior to having been considered as violating probation.<sup>85</sup> Given that domestic violence offences are often addressed as administrative offences and not crimes, this exposes the victim to multiple additional acts of violence prior to the imposition of consequences to the perpetrator. The violation of urgent injunctions and restrictive measures should constitute a criminal offence, and domestic violence should be qualified as a crime in all instances to ensure effective deterrence.

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<sup>85</sup> See, Part II, Article 28 of Criminal Code, which states "If the convicted person does not perform the duties assigned to him or systematically commits offenses that entail administrative penalties and indicate his unwillingness to take the path of correction, the court shall send the convicted person to serve the sentence". The term "systematic" has been interpreted to mean three or more times. See, Item 10 of the Resolution of the Plenum of the Supreme Court of Ukraine "On the Practice of Appointment of Criminal Punishment by the Courts" October 24, 2003, No. 7.

## 2. Engagement with the perpetrator

In discussing the offence, issues related to the victim, social/ personal circumstances and the proposal to the court with the offender, the probation officer will have knowledge of the risk factors for domestic violence in line with the risk assessment forms. The probation officer should focus on all the risk factors, but note in particular the offender's attitude towards the victim, the level of awareness of the impact of the crime upon the victim, the degree of remorse and the victim's perception of risk (if available). The presence of risk factors that are predictive of further offending and the need to manage such risks should be shared with the offender.

Where domestic violence is the core offence, the purpose of supervision is to enforce the conditions of the court order. For pre-trial release, the report should outline the risk factors for domestic violence and a risk management plan that takes account of victim safety. The probation officer will agree on the risk management plan with the perpetrator based on the risk factors identified. Supervision arrangements based primarily on the level of risk should be clarified with the offender. The frequency of planned contact and level of supervision should be linked to the level or risk and clearly indicated in the file. The objectives should prioritise two linked but separate issues, reducing the risk re-offending by the offender and enhancing the safety of the victim(s). Careful consideration must be given to cases in which the offender is living with the victim, or wishes to stay in the same household as the victim in the future.

Supervision plan objectives must be shared with the perpetrator, with the consequences clearly spelt out. Objectives should specify changes looked for in the perpetrator's behaviour, attitude or circumstances. They should be framed using words that describe how the offender will think, act or live differently. Effective risk management of the perpetrator requires ongoing inter-agency cooperation. The probation officer should also outline the limits to confidentiality. These limits include threats of harm to self or others, and disclosures relating to child protection matters.

Perpetrators may present with drug/alcohol problems. These problems are not to be considered as an excuse or justification for domestic violence. Where a perpetrator exhibits indications of increased alcohol/drug abuse, this should be included as an indicator of increased risk of re-offending in the risk assessment.<sup>86</sup>

The victim's perspective must be kept to the fore by the probation officer throughout supervision. Given the dual focus on victim safety and the prevention of re-offending, questions remain as to whether probation officers should inform police in the event of becoming aware of additional incidents involving violence. Failure to inform the police enables the perpetrator to continue to engage in an offence that constitutes a breach of probation. The Ukrainian legislation should be amended in order to close this potentially deadly loophole in the legislative framework.<sup>87</sup>

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<sup>86</sup> See, e.g., Washington State Institute for Public Policy, *Recidivism Trends of Domestic Violence Offenders in Washington State*, 2013, available at: [https://www.wsipp.wa.gov/ReportFile/1541/Wsipp\\_Recidivism-Trends-of-Domestic-Violence-Offenders-in-Washington-State\\_Full-Report.pdf](https://www.wsipp.wa.gov/ReportFile/1541/Wsipp_Recidivism-Trends-of-Domestic-Violence-Offenders-in-Washington-State_Full-Report.pdf).

<sup>87</sup> See Annex D for a list of recommended legislative amendments.



### **3. Proposals to the court**

The safety of the victim as well as the assessment and management of risk needs to be key considerations in the conclusion/proposal of the report to the court. Offenders will be at varying levels of motivation to address their re-offending, from outright denial to acceptance of the need for behavioural change. Where offenders are deemed at a medium or a high risk of re-offending and are in outright denial, they should not be considered suitable for pre-trial release or release on probation.

Where perpetrators are assessed as being at risk of re-offending, but acknowledge their offending and have a sufficient degree of motivation to engage in a treatment programme, consideration should be given to referral to a perpetrator programme, where available. The purpose of the referral is to assess suitability for the perpetrator programme as a pre-condition for release.<sup>88</sup> Where there is a high risk of further acts of domestic violence, release should only be considered if there is motivation to change and evidence of suitability for an approved domestic violence programme. The conclusion in the report will outline the risk factors for domestic violence and the proposal to court will outline a risk management plan that takes account of victim safety.

### **4. Engaging with the victim**

The probation officer should contact the prosecution and/or police in order to determine if it is safe for the victim to be interviewed. Having established that it is safe to do so, the victim can be contacted by phone or by letter, inviting the victim to meet with the probation officer at a venue of her choosing. Where contact is made with the victim, the probation officer should inform the perpetrator that it is Probation Department practice to establish contact with the victim and, together with the police, social services and CSOs to offer ongoing support and assistance to all victims of domestic violence.

Probation officers should provide information on and make secure referrals to support services in the locality, if the victim agrees. It is not sufficient to simply provide information to the victim about support services in the locality. Probation officers can make supportive telephone calls to service providers and accompany the victim to the location of the service provider.

## **E. State Criminal Enforcement Service**

### **1. Victim notification scheme upon perpetrator release**

In order to ensure their safety, victims must be notified upon the release of the perpetrator from detention. Article 56(1)(b) of the Istanbul Convention provides:

1. Parties shall take the necessary legislative or other measures to protect the rights and interests of victims, including their special needs as witnesses, at all stages of investigations and judicial proceedings, in particular by:
  - b. ensuring that victims are informed, at least in cases where the victims and the family might be in danger, when the perpetrator escapes or is released temporarily or definitively.

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<sup>88</sup> See, CoE, *Domestic and sexual violence perpetrator programmes: Article 16 of the Istanbul Convention*, 2015.



Informing the victim of the perpetrator's release was at issue in the ECtHR case *Branko Tomašić and Others v. Croatia*, in which the Court further observed that no adequate risk assessment had been conducted upon the perpetrator's release from prison.<sup>89</sup> In that case, the applicants' son-in-law (M.M.) threatened on multiple occasions to kill their daughter (M.T.) and M.T. and M.M.'s child (V.T.), including blowing up the latter with a bomb on his first birthday. The perpetrator (M.M.) had made these threats in front of both police and the staff of the social welfare centre. M.T. lodged a criminal complaint against him, and M.M. was convicted for the multiple threats and sentenced to five months in prison. A psychiatric evaluation recommended that he receive ongoing psychiatric treatment, in and out of prison. Upon his release, M.M. shot and killed M.T., V.T. and himself. There was no record of M.M.'s psychiatric treatment during his prison term.

The applicants filed a complaint under Article 2, claiming, *inter alia*, that "the State had failed to comply with their positive obligations in order to prevent the deaths of M.T. and V.T."<sup>90</sup> In its judgement, the Court reiterated that Article 2:

enjoins the State to take appropriate steps to safeguard the lives of those within its jurisdiction. This involves a primary duty on the State to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions.<sup>91</sup>

With respect to the standard—whether 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 failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk—the Court found that "the domestic authorities were aware that the threats made against the lives of M.T. and V.T. were serious and that all reasonable steps should have been taken in order to protect them from those threats".<sup>92</sup> The Court thus examined "whether the relevant authorities took all steps reasonable in the circumstances of the present case to protect the lives of M.T. and V.T."<sup>93</sup>

In finding a substantive breach of Article 2, the Court first noted that despite M.M.'s multiple threats concerning a bomb, the authorities never searched his home or vehicle for a bomb or other weapons. The Court further noted that no adequate risk assessment was conducted upon the perpetrator's release from prison. It found this "failure particularly striking given that his threats had been taken seriously by the courts and that the prior psychiatric report expressly stated that there was a strong likelihood that he might repeat the same or similar offences".<sup>94</sup> Taken together with other factors, the Court concluded that there was a substantive violation of Article 2 as the domestic authorities failed to take "all reasonable steps in the circumstances of the . . . case" to protect the lives of M.T. and V.T.

The victim's right to be notified should be incorporated into the Law on Preventing and Combating Domestic Violence, regulations applicable to the Penitentiary Service, and

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<sup>89</sup> See, *Branko Tomašić and Others v. Croatia*, Application No. 46598/06, 2009.

<sup>90</sup> *Ibid.*, para 29.

<sup>91</sup> *Ibid.*, para 49.

<sup>92</sup> *Ibid.*, paras 51, 53.

<sup>93</sup> *Ibid.*, para 53.

<sup>94</sup> *Branko Tomašić and Others v. Croatia*, Application No. 46598/06, 2009, para 58.

other relevant normative provisions. Victim notification schemes exist in the U.K., U.S., Australia and in diverse countries in Europe.<sup>95</sup>

In Ukraine, the State Criminal Enforcement Service oversees prisons. Currently no one also informs the victim upon the release of the perpetrator after serving a sentence. Persons sentenced under Article 173<sup>2</sup> of the Code of Administrative Offenses are sent to remand prison. Similarly, no one informs the victim upon the release of the perpetrator. Either the Penitentiary Service and/or the Probation Department should be legally mandated to inform the victim of domestic violence and other forms of violence against women upon the release of the perpetrator from custody.

Notifications to the victim should include the date and time of release from both pre-trial detention and prison, as well as the specific conditions of release. A copy of the conditions should be provided to the victim upon request.

## **2. Monitoring/restricting communications**

Monitoring inmate communications limits the ability of a defendant to make threats for the purposes of intimidating the victim, to prevent her from participating in the court process and from seeking aid from service agencies, or for the purpose of retaliating against the victim for calling the police. Defendants should be denied telephone access to the victim. Correctional staff should warn the defendant that contacting the victim directly, by telephone or mail or through a third party, could potentially lead to further criminal liability. Communication-monitoring procedures should be put into place (requiring personal identification numbers or voice recognition to use jail telephones, recording phone conversations, scanning mail for threats or prohibited parties, etc.) to deter attempts to communicate threats. Staff should also document any threats to the victim made in the presence of prison staff.

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<sup>95</sup> See, e.g., the Victim Notification Scheme in Scotland, which notifies victims upon the perpetrator's release and eligibility for parole, and provides for the victim to make representations to the parole board. Available at: <https://www.mygov.scot/after-the-verdict/victim-notification-schemes/>.

### **Checklist for probation officer interviews with victims**

In interviewing the victim the following practices and procedures should apply:

- Interviews with the victim should take place at a location mutually agreed between the victim and probation officer.
- The perpetrator and victim should be interviewed separately. Victims of domestic violence cannot talk freely when abusers are present.
- The role of the probation officer should be explained to the victim in the first instance.
- The information in the report and the concluding proposals should put forward a course of action that fully takes into account victim's safety, if possible in consultation with the victim. Interviews with victims should always contain a discussion on safety.
- In order to keep the victim safe, information given by the victim should not be directly quoted in the report but rather used to give a better understanding of the perpetrator's offending behaviour. There should be dialogue with the victim about what can and cannot be used in the report and feedback should be given to the victim about what will be said in the report.
- It is important to explain that all information disclosed will be treated sensitively and with respect, but that the probation officer has a duty to share information that raises a child protection concern.
- In the interest of victim safety, the probation officer should share the contents of the risk assessment in the report with the victim in a sensitive and supportive manner.
- In order to keep the victim safe, the probation officer should not tell the offender any information the victim has given.
- The probation officer should assess the risk of retaliation and of continued abuse.
- Where a victim discloses a further assault, the victim should be encouraged to report the matter to the police as it constitutes an offence. Where there is information about imminent danger to the victim the probation officer, in consultation with the senior probation officer and the victim, should liaise with the police.
- The probation officer should not adopt a caseworker role with the victim. Victims of domestic violence need specialised services that can address their need for support, understanding, safety planning, safety and refuge and help for their children.
- Where the victim is not linked into supportive services, she should be actively helped to access a service and be encouraged to maintain close contact with the police.
- It should not be assumed that the problem is resolved because the perpetrator no longer lives in the same place as the victim. A female victim is at greatest risk in the period following separation. The victim's predictions of their safety are often the single best indicators of whether or not they are likely to be re-assaulted.
- It is important to be aware that, on average, a woman will be assaulted by her partner or ex-partner 35 times before reporting it to the authorities.

## F. Risk assessments for social workers and mobile teams<sup>96</sup>

Risk assessment instruments provide social work practitioners with information on the likelihood that perpetrators will re-assault, severely re-assault or kill their intimate partner. Social workers who come into contact with domestic violence survivors utilise risk assessment instruments to assist clients in making safety and self-care decisions, as well as in advocacy and counselling. Social workers who come into contact with perpetrators can also use risk assessments for determining appropriate treatment in perpetrator programmes.

Risk assessment tools facilitate communication between social workers and professionals in other intervention systems as they provide a consistent language regarding risk factors and the measurement of risk.<sup>97</sup> Social workers can thus utilise risk assessments to inform police, prosecutorial, probation and judicial responses. For example, social workers concerned about a client's risk for re-assault or homicide can and should communicate this risk to police, a prosecutor, judge or probation officer using a common language and documentation as a means of evidence. Similarly, the ability to communicate risk to a victim, and to identify specific risk factors in the relationship, can assist in safety planning and other decisions related to self-care.

For that reason, the instruments under development for social workers should be harmonised to the greatest extent possible with the existing assessment practices of other professionals, especially with the criminal justice system, in order to facilitate inter-agency communication on this subject, and ultimately increased protection for the victim.

The Ukrainian context is unique in that social workers might come into contact with victims as first responders as part of a mobile team. Social workers may also come into contact with victims via police or other professional referrals, or in the course of providing other forms of assistance. As first responders, a shorter assessment form may be more practicable. As service providers, a more in-depth inquiry might be necessary, drawing upon social work expertise and reflecting the scope of possible interventions by social workers. In this respect, the protocol and indicators used by social workers should also be closely harmonised with those used by probation authorities, given that they also take a more in-depth approach in working with perpetrators. In this regard, some of the below-listed questions contemplate an interview with the perpetrator and not just the victim, in cases in which work with the perpetrator is possible.

### 1. Risk assessment indicators

The following list of indicators foresees contact with both the victim and the perpetrator. The list of questions can be shortened for the first response context, and to reflect current (as well as recommended) police practices:

- Recent employment problems
- Drug abuse, dependence
- Recent escalation in the violence

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<sup>96</sup> The Ukrainian Ministry of Social Policy, as part of a multi-agency task force, is in the process of developing risk assessment protocols for mobile teams. As no draft protocols were shared, this section is limited to making general observations concerning good practice, and to identifying best practice models for social workers in conducting risk assessments. (See Annex J for a sample risk assessment form for social workers).

<sup>97</sup> CoE, Improving the effectiveness of law-enforcement and justice officers in combating violence against women and domestic violence, 2016, p. 43.

- Fear of re-assault/homicide
- Suicide attempt, threats of suicide
- Condoning and/or minimising violence
- Limiting partner's access to phone, transportation
- Controlling most of partner's daily activities
- Extreme and/or violent jealousy towards victim
- Stalking, threats, destroying partner's property
- Owns a gun, or can get one easily
- Alcohol abuse, dependence
- Psychotic or manic symptoms
- Personality disorder (anger, impulsivity)
- Threats to kill the victim
- Use of a weapon to threaten victim
- Prior violent incident(s)
- Recent separation from partner (up to 1 year)
- Prior non-IPV assault by perpetrator
- Prior conviction/sentence for non-IPV assault
- Avoided arrest for domestic violence
- Prior violation of conditional release
- Violation of restraining order
- Offender has stepchild in the home
- Children under 18 in the home
- Unlawful confinement of victim
- Previous IPV-related restraining order
- Use of weapon in any previous crime
- Under supervision at the time of the violent incident
- Prior unsuccessful IPV treatment
- Threats to harm children
- Past attempt at strangulation
- Past sexual assault of victim
- Past assault against victim while pregnant
- Offender was a victim of, or witness to, family violence.<sup>98</sup>

## **2. Multi-agency risk assessment conference (MARAC)**

Another model of risk assessment practice used by social workers in such countries as Austria, Finland and the U.K. is the multi-agency risk assessment conference (MARAC). A MARAC is a victim-focused information-sharing and risk-management meeting attended by all relevant agencies. The MARAC "does not focus primarily on the risk (posed by the perpetrator) but on the needs and safety of the women".<sup>99</sup> They involve regular meetings or case conferences by the stakeholders to address selected high-risk cases. The aim of MARAC is to facilitate, monitor and evaluate effective information sharing regarding protection measures. In a single meeting, MARAC can combine up-to-date risk information with a timely assessment of a victim's needs, and provide a

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<sup>98</sup> See Annex J for a sample form for social workers.

<sup>99</sup> CoE, Enhancing the professional capacity of the Bulgarian police to deal with cases of domestic violence and violence against women, 2016, p. 45.

direct link to the provision of appropriate services for all those involved in a domestic abuse case: victim, children and perpetrator.

The objective of MARAC is to implement specific actions quickly in order to increase safety levels for victims through close and regular collaboration between different institutions working in the area of family violence. Further objectives are to share the responsibilities between the involved agencies and organisations, to become aware of specific endangerments and to understand any differing results of risk assessments. Aims include:

- to share information to increase the safety, health and well-being of victims – adults and their children
- to determine whether the perpetrator poses a significant risk to any particular individual or to the general community
- to identify outstanding aspects of risk assessment in regard to the victim, children or perpetrator that need referral or progress
- to develop a risk management plan that provides professional support to all those at risk and that reduces the risk of harm
- to reduce repeat victimisation
- to improve agency accountability and
- improve support for staff involved in high risk domestic abuse cases.

In Austria, for example, members of the police, the violence protection centre, the court, and the public prosecutor's office meet once a month or bi-monthly. Depending on the case, the list of invited institutions is extended to other organisations (e.g., Youth and Family Office, a women's shelter). About three cases are addressed in each MARAC session. Cases can be raised by each participant, and are reviewed together. The members discuss what each organisation can do to improve the victim's situation and how best to coordinate these measures. In the U.K., police attend MARACs, but not prosecution authorities. Discussions on each case last from 10-15 minutes.

In Austria, a case conference can only proceed with the victim's consent, and if the victim is represented by a victim safety organisation. With due regard to the data protection of victims, within a case conference only categories of danger and coordinated measures for their protection are discussed. Victims and perpetrators do not attend meetings.

At the same time, "safety planning must be done in cooperation with victims, and never with the victim being isolated from the process".<sup>100</sup> The CoE notes, for example:

Best practice shows, that if there is one agency (if possible a specialised organisation providing support for victims of domestic violence) or an advocate assigned to the victim, who represents her in the multi-agency meeting and whom she trusts, the willingness of the victim to disclose and co-operate closely with the multi-agency team increases and the risk of secondary victimisation decreases. This agency or advocate can do the risk assessment interview with the victim prior to the meeting of multi-agency team and then relay the risk factors present. It is important to keep in mind that safety planning should support the victim and improve the quality of her life. It is not a list of her "duties and

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<sup>100</sup> See, CoE, *Effective Multi-agency Cooperation for Preventing and Combating Domestic Violence*, 2015, p. 46.

responsibilities”, it is a summary of options available to her and actions that will be taken by agencies to support her.<sup>101</sup>

In Ukraine, attending organisations will depend upon the location. However, in general, representatives of the following agencies would be present on an as needed basis:

- National Police
- Mobile team members
- Probation authorities
- Centres of social services for family, children and youth
- Territorial centres for social services
- Shelter representative (for victims or children)
- Healthcare worker
- NGOs providing services, assistance to victims
- Education authorities
- Child services
- Prosecution
- Legal aid representatives.

The MARAC model could be an interesting option to explore in Ukraine, to be coordinated by the local executive authorities. Local executive authorities could ensure effective coordination among stakeholders to hold regular meetings and provide a meeting room. Article 19 of Resolution No. 658 assigns deputy chairmen of local executive authorities to serve as coordinators in "preventing and combating domestic and gender-based violence". However, only professional actors, including victim support organisations and shelters, should participate in confidential MARAC sessions. Ideally, a designated representative from each agency would consistently represent the agency at each meeting.

### **3. Staff safety**

Visiting families suffering from domestic violence is potentially dangerous for social workers and it is important that clear guidelines and protocols are in place for staff protection. (Annex Q contains a checklist of considerations for social work staff working on cases of domestic violence.)

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<sup>101</sup> CoE, *Effective Multi-agency Cooperation for Preventing and Combating Domestic Violence*, 2015, p. 47.

## G. The role of local executive authorities

Pursuant to Resolution No. 658, local authorities have a significant role to play in preventing and combating domestic and gender-based violence, including: *inter alia* monitoring (Article 8), coordination (Articles 19, 20, 22) and referrals (Articles 32, 33). While it is totally appropriate for local government officials to engage in violence prevention activities, such as awareness campaigns, they have neither the expertise, nor the necessary professional obligations and training to be involved in individual case management. The assignment of roles in working with victims, perpetrators and family members in the field of domestic violence requires specialised training and the strict application of ethical codes of conduct, such as those that govern police, judges, doctors and social workers, among others. Furthermore, imposing personal responsibility on local government administrators for failures related to a field in which they are wholly unqualified to perform constitutes an unfortunate element of the new policy framework.<sup>102</sup> These provisions within Resolution No. 658 should be revised prior to attempting to provide training or capacity building to such a large cadre of persons around the country.

Significantly, the Centres of Social Services for Family, Children and Youth have assumed the duties foreseen by the Resolution as pertaining to local executive authorities. Although not specified by name within the relevant regulations, they do have training in this field. Yet, they are performing these duties in addition to their social welfare services functions. Furthermore, in some cities, these Centres also engage in first response by serving on mobile teams. While clearly unsustainable, the overburdening of social welfare centres reflects the lack of the allocation of necessary financial and human resources to address domestic violence. The localised funding scheme may further result in uneven protection around the country with regard to these basic human rights protection standards.

Additional concerns regarding the scope of the mandate of the Centres of Social Services for Family, Children and Youth involve its assigned roles to work with both the perpetrator and the victim. Due to safety concerns, services provided to perpetrators should be located at a different facility than that providing victim services. Providing both types of services in one location could jeopardise victims' safety by providing an opportunity for victims to have unwanted contact with perpetrators. Also, having perpetrators on or near shelter grounds could compromise the feeling of a safe environment for victims, even if the victims do not know the batterers.

## H. Risk assessments for shelters

At present, a multi-agency task force is in the process of developing risk assessment forms for domestic violence shelters. Order No. 772/33743, issued on 11 July 2019, addresses referrals, services and shelters for victims of gender-based and domestic violence. This section will thus make only brief observations and recommendations.

Shelter constitutes a critical form of both assistance and protection for victims/survivors of domestic violence. It serves as a protective space where the victim can recover from her experience and rehabilitate. Given possible ongoing threats by perpetrators, secure accommodation also serves as a fundamental means of ensuring victims' right to life

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<sup>102</sup> Article 19 of Resolution No. 658 reads in part: "The coordinator shall be personally responsible for ensuring prompt and effective measures in the field of preventing and combating domestic violence and gender-based violence."



and physical integrity. Indeed, the lack of available shelter can result in the victim's re-victimisation, such as through continued violence or even death.

Shelter for victims of domestic violence should conform to several basic principles:

1. To contribute to the protection of, and assistance for, victims of domestic and gender-based violence in line with international standards.
2. To ensure the safety and security of victims at all times.
3. Residence in shelters and participation in assistance programs shall be voluntary, on the basis of the victim's informed consent.
4. The provision of such shelter and assistance should not be made contingent on the willingness of the victims to give evidence in criminal proceedings.
5. Access to shelter shall be provided equally to all victims/survivors of violence, without discrimination on the grounds of gender, gender identity, age, sexual orientation, religion, national or social origin or other recognised ground.<sup>103</sup>
6. To effectively cooperate with partners, by establishing cooperative agreements, in order to ensure that victims are effectively referred to receive needed assistance across sectors.
7. Confidentiality shall be ensured at all times, and information pertaining to victims shall not be disclosed without their consent.

All domestic violence shelters should have full-time security to ensure the safety of both residents and staff. This may include the presence of private 24-hour security personnel. It may also involve contingency security arrangements with local police, and/or the use of alarms. All private security personnel must be thoroughly vetted.

A formal, written risk assessment for the facility should be undertaken and periodically updated, at least twice yearly. This can be done with the assistance of a security specialist. Shelters should also have a comprehensive fire safety and evacuation plan.

Shelters should establish strict rules governing visits in order to protect the identity and confidentiality of victims and staff, as well as the location of the shelter.

### **1. Victim security**

In addition to a risk assessment being conducted as a part of the screening process, periodic, individualised, written risk assessments should be undertaken for victims.

Information concerning victims should not be shared over the telephone, except with long-standing partners. Such information shall be shared on a "need to know" basis. Victims should be accompanied by shelter staff to potentially sensitive appointments, including to appointments with medical, police or legal personnel.

The shelter manager must ensure that all confidential and personal records and documents related to victims should be kept secure.

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<sup>103</sup> In line with the International Covenant on Civil and Political Rights (ICCPR).

## 2. Staff security

In addition to victim safety, shelters must take active measures to ensure security for staff members who may also face violence from perpetrators. Periodic written risk assessments must be undertaken for shelter staff. Staff risk assessments should be updated whenever working with high-risk clients.

No personal information, including last names, addresses or telephone numbers of staff should be shared with anyone outside of regular shelter staff members; only first names should be provided to victims. The shelter manager should ensure that all confidential and personal records and documents related to staff members and volunteers be kept secure. Shelter staff should be provided with periodic first aid and basic security trainings. The model risk assessment form in Annex K can be considered for use by shelters.

### I. Education professionals

Schools are often the service in closest and longest contact with a child living with domestic violence. Teachers and education professionals can play a vital role with respect to children experiencing direct or indirect domestic violence, by identifying signs of abuse and linking children to referral pathways.<sup>104</sup> Knowing when and how to seek advice from multi-agency professionals should constitute an essential element of effective practice among school staff. It is also important for educators to respond to early signs of abuse, engage in record keeping, and promptly share information with other stakeholders. Conversely, health practitioners, social workers and the police should share risk assessment and child protection information more readily with schools. Schools can also play a role in providing other kinds of help, such as setting up practical arrangements to minimise the risk of child abduction by the offending parent following parental separation.

One example of a cross-sector partnership (schools-police-CSO) is a pilot in the U.K. called Operation Encompass, which entails police notifying a school by 9 am if a child has witnessed or experienced a domestic abuse incident the previous evening. A key adult at school (the Designated Safeguarding Lead or Deputy) is informed of the case and cascades information to teaching staff to allow immediate and ongoing support to be given to the child. The CSO, Operation Encompass, a trauma focused organisation, can explain to the school why a child is absent or has been dropped off at school by someone else. It takes into account the child's past trauma, where applicable, and the child's responses and coping strategies. The initiative is enabling police and schools to work in partnership to mitigate the impact of abuse.<sup>105</sup>

Recently, the Ministry of Education and Science jointly with the Ministry of Youth and Sports of Ukraine developed methodological recommendations for the education field in order to ensure compliance with the domestic violence law.<sup>106</sup> In line with international standards, it requires that educators: i) identify child victims; ii) record them; iii) report the suspected abuse within 24 hours to the police and/or child protection authorities.<sup>107</sup> It also requires the administering of any necessary first aid.

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<sup>104</sup> Psychological harm should not be taken less seriously than physical harm.

<sup>105</sup> Operation Encompass, available at: <https://www.operationencompass.org/>, last accessed 12 June 2020.

<sup>106</sup> Letter, Ministry of Education and Science, No.1/11-5480 "Methodological recommendations on prevention and combatting violence".

<sup>107</sup> See Annex U for a list of indicators for identifying children victims of domestic violence.

Importantly schools need the necessary resources to work with children affected by domestic abuse, such as by ensuring training programmes for teachers and the provision of age-appropriate education about healthy relationships. Some teachers may feel overwhelmed when dealing with issues facing both children and their parents. Pressure on teachers to address problems among children and parents may result in their feeling that they are becoming social workers. Teachers should not assume the role of social workers, as they are not only already over-stretched, but they also lack the necessary training. Rather, the teacher's role is to be a possible effective channel for children to gain access to welfare services outside of school, simply by opening up an early opportunity for them to confide that something is wrong. Schools must also ensure support to staff members who may experience adverse effects due to their efforts to work with children victims of violence, such as emotional exhaustion and frustration at not always being able to help.

At the same time, some teachers and school support staff may themselves be victims of domestically violent relationships and workplace support would be beneficial both for individuals and the school setting as a whole. Domestic violence can also be considered workplace violence in situations in which a parent, spouse or former spouse or former intimate partner or a family member who has a personal relationship with a member of the school community may physically harm, or attempt or threaten to physically harm member(s) of the school. In this regard, when the school becomes aware of a situation of concern, it should inform staff and have recourse to an appropriate crisis response and communication procedure. When an educator is exposed to violence, or the threat of violence, the employer has an obligation to protect the worker and to take preventive action.<sup>108</sup> The current methodological recommendations do not address the impact of domestic violence on the workplace, in line with ILO Convention (No. 190) on Violence and Harassment.

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<sup>108</sup> In line with ILO Violence and Harassment Convention, 2019 (No. 190).

## PART II

### VII. The application of international standards to the law and practice on domestic and gender-based violence in Ukraine

Although it has not yet been ratified by Ukraine, the Istanbul Convention sets forth the applicable standards for CoE member States in the field of combating violence against women and domestic violence. Ukraine has taken steps to bring its legislation and practice in line with the Istanbul Convention, with several gaps that have significant bearing on Ukraine's ability to meet its due diligence requirements under international law. These gaps can also affect the application of risk assessments. This section details the ways in which the current *de jure* and *de facto* situation compromises protection standards, including the effective implementation of risk assessments.

#### A. Criminalisation of all forms of violence against women

Articles 33-39 of the Istanbul Convention require the criminalisation of all forms of violence against women covered therein. In particular, Article 35 requires the criminalisation of physical violence, namely "the intentional conduct of committing acts of physical violence against another person". The Explanatory Report to the Istanbul Convention states in relation to Article 35: "The term 'physical violence' refers to a bodily harm suffered as a result of the application of immediate and unlawful physical force. It encompasses also violence resulting in the death of the victim."<sup>109</sup>

The ECtHR has found that the requirement of a minimum threshold of physical violence to constitute a crime to be in violation of Article 3 of the ECHR.<sup>110</sup> In the case of *Volodina v. Russia*, the ECtHR explicitly rejected Russia's legal framework for addressing domestic violence, which required: i) repeated assaults to trigger a criminal investigation; and, ii) a minimum level of physical injury.<sup>111</sup> In that case, the Court recalled its jurisprudence that:

requiring injuries to be of a certain degree of severity as a condition precedent for initiating a criminal investigation undermines the efficiency of the protective measures in question, because domestic violence may take many forms, some of which do not result in physical injury – such as psychological or economic abuse or controlling or coercive behaviour.<sup>112</sup>

It further noted that requiring "repeated battery" does not afford protection where the incidents are more than twelve months apart and reiterated that "domestic violence can occur even as a result of one single incident".<sup>113</sup>

While recent amendments to the Criminal Code in Ukraine do criminalise the forms of violence set forth in the Istanbul Convention, not all acts of physical violence and other

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<sup>109</sup> Explanatory report, para 188. See also, Recommendation (2002)5 on the protection of women against violence, para 55, providing that Member States should "classify all forms of violence within the family as a criminal offence".

<sup>110</sup> See, *Volodina v. Russia*, Application No. 41261/17, 2019, para 81; *Balşan v. Romania*, Application No. 49645/09, 2017, paras 67, 69, noting that the authorities had dismissed the victim's complaints as not sufficiently severe.

<sup>111</sup> The legislation in question in the *Volodina* case considered assault within the family a criminal offence only if committed twice within twelve months and resulted in minor bodily harm. *Volodina v. Russia*, Application No. 41261/17, 2019, para 81.

<sup>112</sup> *Volodina v. Russia*, Application No. 41261/17, 2019, para 81, citing *T.M. and C.M. v. Moldova*, Application No. 26608/11, § 47, 28 January 2014.

<sup>113</sup> *Volodina v. Russia*, Application No. 41261/17, 2019, para 81.

forms of violence are automatically criminalised. Rather, the Code of Administrative Offences as a legal and practical matter covers many acts domestic violence. Article 173-2 covers:

intentional actions/inactivity of physical, psychological or economic nature (violence that did not cause injuries, threats, insults or stalking, deprivation of accommodation, food, clothing, other property or money to which the victim is entitled under law, etc.) that has caused or could cause damage to the victim's physical or mental health.<sup>114</sup>

Essentially, the Code of Administrative Offences constitutes a parallel legal mechanism, simultaneously covering several acts for which the Istanbul Convention requires criminalisation, in addition to covering physical violence "that has caused...damage to the victim's physical...health". In Ukraine, a criminal case can be brought with a medical certificate indicating a minimum of light physical injury, effectively requiring physical injury to be able to lodge a criminal complaint. This limitation on the use of criminal sanctions violates the Istanbul Convention and the standards articulated by the ECtHR. Furthermore, as noted above, judges of general jurisdiction with competence over administrative offences do not have the competence to issue restrictive measures. These constitute wide gaps in available protection for victims.

More generally in Ukraine, it is only after two documented incidents of violence constituting administrative offences, by use of the risk assessment form, that the third incident would constitute a criminal offence.<sup>115</sup> If the police do not document the incident at all, or if they document as an argument or "conflict" between the parties, then it would not be counted towards the three. In this regard, stakeholders, including a representative of the police, indicated that police do not fill out a risk assessment form for every domestic violence incident. In fact, not all police officers have undergone the necessary training on the use of risk assessments in responding to instances of domestic violence.

Both the applicable legal framework in Ukraine, and its *de facto* application, constitute a violation of the Istanbul Convention, which requires the criminalisation of all forms of violence against women. It is interesting to note in this regard that the ECtHR's description of ill-treatment under Article 3 of the ECHR would not necessarily constitute a criminal offence in Ukraine:

Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. An assessment of whether this minimum has been attained depends on many factors, including the nature and context of the treatment, its duration, and its physical and mental effects, but also the sex of the victim and the relationship between the victim and the author of the treatment. Even in the absence of actual bodily harm or intense physical or mental suffering, treatment which humiliates or debases an individual, showing a lack of respect for or diminishing his or her human dignity, or which arouses feelings of fear, anguish

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<sup>114</sup> Article 173-2, Code on Administrative Offences.

<sup>115</sup> See, Part II, Article 28, Criminal Code, which states "If the convicted person does not perform the duties assigned to him or systematically commits offenses that entail administrative penalties and indicate his unwillingness to take the path of correction, the court shall send the convicted person to serve the sentence". The term "systematic" has been interpreted to mean three or more times. See, Item 10 of the Resolution of the Plenum of the Supreme Court of Ukraine "On the Practice of Appointment of Criminal Punishment by the Courts" October 24, 2003, No. 7.

or inferiority capable of breaking an individual's moral and physical resistance, may be characterised as degrading and also fall within the prohibition set forth in Article 3. It should also be pointed out that it may well suffice that the victim is humiliated in his or her own eyes, even if not in the eyes of others.<sup>116</sup>

Specifically, the ECtHR requires that the national legal framework contain measures that include, "in particular, the criminalisation of acts of violence within the family by providing effective, proportionate and dissuasive sanctions".<sup>117</sup> As a representative of the police explained, the focus of police efforts is on addressing crimes, and "domestic violence is not a crime," referring to its treatment primarily as an administrative offence. As described in more detail below, this gap creates a significant barrier for the effective application of risk assessments and protection for victims.

## **B. *Ex officio* prosecution and investigations**

Article 55(1) of the Istanbul Convention codifies the requirement under the due diligence standard established by the ECtHR to engage in *ex officio* investigations and prosecutions in cases involving domestic violence and violence against women.<sup>118</sup> It states:

Parties shall ensure that investigations into or prosecution of offences established in accordance with Articles 35, 36, 37, 38 and 39 of this Convention shall not be wholly dependent upon a report or complaint filed by a victim if the offence was committed in whole or in part on its territory, and that the proceedings may continue even if the victim withdraws her or his statement or complaint.

The Explanatory Report of the Istanbul Convention indicates that the aim of Article 55 is "to enable criminal investigations and proceedings to be carried out without placing the onus of initiating such proceedings and securing convictions on the victim".<sup>119</sup> It explained:

The fact that many of the offences covered by this Convention are perpetrated by family members, intimate partners or persons in the immediate social environment of the victim and the resulting feelings of shame, fear and helplessness lead to low numbers of reporting and, subsequently, convictions. Therefore, law enforcement authorities should investigate in a proactive way in order to gather evidence such as substantial evidence, testimonies of witnesses, medical expertise, etc., in order to make sure that the proceedings may be carried out even if the victim withdraws her or his statement or complaint at least with regard to serious offences, such as physical violence resulting in death or bodily harm.<sup>120</sup>

The ECtHR has required *ex officio* investigations and prosecutions under the positive obligations found within Article 2 (right to life) and Article 3 (prohibition on torture and ill-treatment) in cases involving domestic violence. In the *Branko Tomašić and Others v. Croatia* case, the Court stated:

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<sup>116</sup> *Volodina v. Russia*, Application No. 41261/17, 2019, para 73.

<sup>117</sup> *Volodina v. Russia*, Application No. 41261/17, 2019, para 78

<sup>118</sup> See, e.g., *Opuz v. Turkey*, Application No. 33401/02, 2009.

<sup>119</sup> Explanatory Report, para 279.

<sup>120</sup> Explanatory Report, para 280.

The essential purpose of such an investigation is to secure the effective implementation of the domestic laws which protect the right to life. The authorities must take the **reasonable steps available to them to secure the evidence concerning the incident**. Any deficiency in the investigation which undermines its ability to establish the cause of death, or identify the person or persons responsible, will risk falling foul of this standard. Whatever mode is employed, **the authorities must act of their own motion** once the matter has come to their attention.<sup>121</sup> (Emphasis added).

Thus, States' positive obligation under Article 2 requires *ex officio* investigations. In the *M.C. v. Bulgaria* case, involving the multiple rape of a 14-year-old girl, the Court held that States also have a positive obligation to investigate under both Articles 3 (prohibition against torture and ill-treatment) and 8 (right to respect for private life) of the Convention.<sup>122</sup>

In the recent *Volodina v. Russia* case, the Court found that a "pre-investigation inquiry" alone was not:

Capable of meeting the requirements for an effective investigation under Article 3. That preliminary stage has too restricted a scope and cannot lead to the trial and punishment of the perpetrator, since the opening of a criminal case and a criminal investigation are prerequisites for bringing charges that may then be examined by a court.<sup>123</sup>

The fact that victims commonly withdraw their complaints has led the ECtHR in the *Opuz v. Turkey* case to require prosecutors to act *ex officio*. It inferred from the practice of other States that "the more serious the offence or the greater the risk of further offences, the more likely that the prosecution should continue in the public interest, even if victims withdraw their complaints".<sup>124</sup> It noted in this regard several characteristics of the case, common to cases of domestic violence. It highlighted that in *the Opuz case*:

There was an escalating violence against the applicant and her mother by H.O. The crimes committed by H.O. were sufficiently serious to warrant preventive measures and there was a continuing threat to the health and safety of the victims. When examining the history of the relationship, it was obvious that the perpetrator had a record of domestic violence and there was therefore a significant risk of further violence.

The Court looked to the practice of other Council of Europe member States to identify factors to take into account in engaging in *ex officio* prosecution. It identified the following factors:

- the seriousness of the offence;
- 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;

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<sup>121</sup> *Branko Tomašić and Others v. Croatia*, Application No. 46598/06, 2009, para 62.

<sup>122</sup> *M.C. v. Bulgaria*, Application No. 39272/98, 2004, paras 150-153.

<sup>123</sup> *Volodina v. Russia*, Application No. 41261/17, 2019, para 95.

<sup>124</sup> *Opuz v. Turkey*, Application No. 33401/02, 2009, para 139.

- 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;
- the current state of the victim's relationship with the defendant and the effect on that relationship of continuing with the prosecution against the victim's wishes;
- the history of the relationship, particularly if there had been any other violence in the past; and,
- the defendant's criminal history, particularly any previous violence.<sup>125</sup>

These factors can be a useful guide for prosecutors as is the Court's approach to the national legislation in force in Turkey, which allowed *ex officio* public prosecution only in cases in which the victim's injuries resulted in a 10-day unfitness to work. It found that:

the legislative framework then in force, particularly the minimum ten days' sickness unfitness requirement, fell short of the requirements inherent in the State's positive obligations to establish and apply effectively a system punishing all forms of domestic violence and providing sufficient safeguards for the victims. The Court thus considers that, bearing in mind the seriousness of the crimes committed by [the perpetrator] in the past, the prosecuting authorities should have been able to pursue the proceedings as a matter of public interest, regardless of the victims' withdrawal of complaints.<sup>126</sup>

Finally, in General Recommendation No. 28, the CEDAW Committee affirmed that:

Where discrimination against women also constitutes an abuse of other human rights, such as the right to life and physical integrity in, for example, cases of domestic and other forms of violence, **States parties are obliged to initiate criminal proceedings**, to bring the perpetrator(s) to trial and to impose appropriate penal sanctions.<sup>127</sup> (Emphasis added).

In Ukraine, most domestic violence cases are addressed as light bodily injury under the Administrative Offences Code. The determination as to whether the case will be handled as an administrative offence or a crime depends upon the medical certificate characterising the level of injury. This practice constitutes a violation of the above-referenced standards set forth by the ECtHR.

At present, prosecutions under the Criminal Code are conducted as private prosecutions, enabling the victim to withdraw the case. Prosecutors are not involved in administrative offences, thus impeding *ex officio* prosecutions for the majority of court cases involving domestic violence. At the same time, Article 22 of the Code of Administrative Offences addresses the "Possibility of Exemption from Administrative Liability in case of Minor Offence". Judges of general jurisdiction often invoke this Article in domestic violence cases, essentially dismissing them.

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<sup>125</sup> *Opuz v. Turkey*, Application No. 33401/02, 2009, para 138.

<sup>126</sup> *Opuz v. Turkey*, Application No. 33401/02, 2009, para 145.

<sup>127</sup> CEDAW, General Recommendation No. 28 on the Core Obligations of State Parties Under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women, CEDAW/C/GC/28, 2010, para 34.



In order to harmonise its practice with the Istanbul Convention, CEDAW and ECtHR jurisprudence, Ukraine should legislate the possibility of *ex officio* prosecutions for domestic violence cases.

## C. Protection and emergency barring orders

### 1. International standards

With regard to the protection element of the State's due diligence obligations, Article 52 of the Istanbul Convention provides for the establishment of emergency barring orders (EBOs):

Parties shall take the necessary legislative or other measures to ensure that the competent authorities are granted the power to order, in situations of immediate danger, a perpetrator of domestic violence to vacate the residence of the victim or person at risk for a sufficient period of time and to prohibit the perpetrator from entering the residence of or contacting the victim or person at risk. Measures taken pursuant to this article shall give priority to the safety of victims or persons at risk.

As aptly described by the Council of Europe, the concept of EBOs requires a "paradigm shift:"

Rather than asking victims to seek a place of safety from violence. It shifts that burden to the perpetrator, who is ordered to leave the residence of the victim or person at risk and not to contact her or him.<sup>128</sup>

Although Article 52 requires the adoption of such measures, it leaves the modalities to the State's discretion. EBOs are not intended to function as a replacement for an array of other measures, such as arrest, detention and prosecution. At the same time, Article 52 must be read in conjunction with Articles 50, 51 and 53, which require immediate response by law enforcement, risk assessments and the availability of longer-term protection.

Article 53 of the Istanbul Convention applies to longer-term protection orders. It states:

1. Parties shall take the necessary legislative or other measures to ensure that appropriate restraining or protection orders are available to victims of all forms of violence covered by the scope of this Convention.
2. Parties shall take the necessary legislative or other measures to ensure that the restraining or protection orders referred to in paragraph 1 are:
  - available for immediate protection and without undue financial or administrative burdens placed on the victim; issued for a specified period or until modified or discharged;
  - where necessary, issued on an *ex parte* basis which has immediate effect;
  - available irrespective of, or in addition to, other legal proceedings;
  - allowed to be introduced in subsequent legal proceedings.
3. Parties shall take the necessary legislative or other measures to ensure that breaches of restraining or protection orders issued pursuant to paragraph 1 shall

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<sup>128</sup> Council of Europe, *Emergency Barring Orders in Situations of Domestic Violence: Article 52 of the Istanbul Convention*, 2017, p. 43.

be subject to effective, proportionate and dissuasive criminal or other legal sanctions.

As further detailed by the Explanatory Report, the purpose of this provision "is to offer a fast legal remedy to protect persons at risk of any of the forms of violence covered by the scope of the Convention".<sup>129</sup> While making clear that protection orders can be provided for under civil, criminal or administrative law, it states that the orders must:

Offer immediate protection and . . . be available without undue financial or administrative burdens placed on the victim. This means that any order should take effect immediately after it has been issued and shall be available without lengthy court proceedings. Any court fees levied against the applicant, most likely the victim, shall not constitute an undue financial burden which would bar the victim from applying. At the same time, any procedures set up to apply for a restraining or protection order shall not present insurmountable difficulties for victims.<sup>130</sup>

Article 53 further "requires Parties to ensure that in certain cases these orders may be issued, where necessary, on an *ex parte* basis with immediate effect. This means a judge or other competent official would have the authority to issue a temporary restraining or protection order based on the request of one party only".<sup>131</sup>

As signalled by CEDAW General Recommendation 35: "Protection measures should avoid imposing an undue financial, bureaucratic or personal burden on women victims/survivors."<sup>132</sup> It is very important to note in this regard that with the exception of the urgent injunction, the financial, procedural and evidentiary burden of ensuring victim safety in Ukraine falls almost entirely upon the victim. Victims must inform police of violations of protection order and must hire a lawyer<sup>133</sup> to file a request for a restrictive measure, bearing the evidentiary burden. Victims must inform police of violations of protection orders, and must hire a lawyer to request a restrictive measure, bearing the entire evidentiary burden. There are often difficult emotional and economic barriers for victims of domestic violence to overcome to take such actions. Furthermore, given the short duration of urgent injunctions and restrictive measures (see below), victims must also bear the burden of frequently reapplying.

## 2. Protection orders in Ukraine

Ukraine has legislation providing for both EBOs, called urgent injunctions, and longer-term protection orders, called restrictive measures.

An "urgent injunction against the perpetrator" is foreseen in Article 24 of the Domestic Violence Law, and is to be issued by the police based on the outcome of the risk assessment form.<sup>134</sup> They can last up to 10 days. Several stakeholders indicated that the police perform risk assessments only for the purpose of issuing an urgent barring order, implying an *ex ante* determination that is subsequently justified by the risk assessment.

The legal framework governing the longer-term restrictive measures raises several issues of concern. As an initial matter, in the English translation, the provision is framed in terms of the "best interests" of the victim, making reference to an inappropriate legal

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<sup>129</sup> Explanatory Report, para 268.

<sup>130</sup> *Ibid.*, para 270.

<sup>131</sup> *Ibid.*, para 272.

<sup>132</sup> CEDAW General Recommendation 35, CEDAW/C/GC/35, para 40(b).

<sup>133</sup> Domestic violence victims are entitled to free secondary legal aid. Article 14(13), Law on Free Legal Aid, 2011.

<sup>134</sup> See, Article 1(16), Law on Preventing and Combating Domestic Violence.

standard.<sup>135</sup> Best-interest determinations are made on behalf of persons who have *no legal capacity*, namely: children, and often persons with severe mental or physical disabilities.<sup>136</sup> The decision on a restrictive order should not be made on behalf of the victim, but rather upon his or her request. The current language of the provision is infantilising and undermines the aim of international standards to foster the agency of the victim in all related proceedings.

Restrictive measures are available from 1 to 6 months, with a possible extension "no longer than 6 months".<sup>137</sup> The length of the restrictive measures from 1 to 6 months is quite short. In other words, comparatively speaking, both types of protective orders in Ukraine provide short temporal protection to victims. The 6-month outer limit will also require the victim to reinitiate proceedings for serious cases, the types of cases in which victims face numerous obstacles to engaging in legal battles, including the effects of economic violence. These procedural barriers as a practical matter place the onus on the victim. Other countries offer longer-term and even permanent protection orders, **based on the actual threat to the victim**. For example, Spain's Organic Act on Integral Protection Measures against Gender Violence (2004) provides that protective measures can be extended as long as they remain necessary.

EBOs and protection orders must be monitored by: police patrols, initiating contact with the victim and electronic monitoring for perpetrators prone to violating an order or for high-risk victims. The Istanbul Convention requires that States "ensure that the existence of a restraining or protection order may be introduced in any other legal proceedings against the same perpetrator. The aim of this provision is to allow for the fact that such an order has been issued against the perpetrator to be known to any other judge presiding over legal proceedings against the same person."<sup>138</sup> The Code of Administrative Offences foresees the imposition of fines for violating an urgent injunction. Fines are viewed as counter-productive as they may be paid for out of the family budget, and are not an effective deterrent.<sup>139</sup>

With regard to the rights of the perpetrator, it should be underscored that his temporary inability to access his/her right to property and private and family life cannot supersede the victim's rights to life, and the right to physical and mental integrity.<sup>140</sup> The priority is to be placed on the victim's safety and that of her children.

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<sup>135</sup> Article 91<sup>1</sup>, Law on Amending the Criminal Code and Criminal Procedure with the purpose of implementation of provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, (Law Amending Criminal Code).

<sup>136</sup> With respect to the latter, the Convention on the Rights of Persons with Disabilities (CRPD) declares substitute decision-making regimes for persons with disabilities discriminatory. Moreover, In the English version, other Articles of this Law use discriminatory and offensive terminology towards persons with disabilities, such as "imbecility," which should be amended. Ukraine ratified the CRPD in 2010.

<sup>137</sup> Article 91<sup>1</sup>(3), Law Amending Criminal Code.

<sup>138</sup> Explanatory Report, para 274.

<sup>139</sup> See, CEDAW General Recommendation No. 35, para 40(b), stating: "Protection measures should avoid imposing an undue financial, bureaucratic or personal burden on women victims/survivors." See also, *Balşan v. Romania*, Application No. 49645/09, 2017, para 66.

<sup>140</sup> See, *Gökce and Yildirum v. Austria*, CEDAW, 12:1:5, 2005, (stating that "the perpetrator's rights cannot supersede women's human rights to life and physical and mental integrity").

## VIII. Conclusion

The purpose of a risk assessment is to ensure the safety of victims of domestic violence by providing a basis and a guide for operational measures to be taken by police and the creation of an individualised safety plan for the victim. Inter-agency communication and cooperation is essential for ensuring the safety and non-retraumatisation of the victim during police and social welfare interventions as well as during legal proceedings.

It is important to note that risk assessment instruments provide probabilities—not certainties—and stakeholders should interpret their findings with caution. Domestic violence survivors make informal assessments of their risk, and are often the best placed to evaluate changes in their situation. For this reason, stakeholders should always take survivor assessments into account, particularly when survivors perceive their risk to be high.

This report draws upon validated risk assessment methodologies used in diverse countries around the world, as well as best practice standards set forth by regional and international intergovernmental organisations. They are presented as models and guides for use by national actors in Ukraine to support on-going advances in its legal and operational framework for combating domestic violence.

## **Annex A**

### **Recommendations for police risk assessments**

- Ensure that risk assessment are conducted for each victim for every incident in practice
- Add the following questions to the risk assessment form:
  - Has the perpetrator engaged in provocative and/or disregarding behaviour towards authorities, police officers, or other persons representing police services or justice bodies, as well as towards the victim in the presence of the above-mentioned persons?
  - Has the perpetrator had previous conflicts with the law, in particular involving the use of violence?
  - Did the perpetrator cause damage at the place of residence, or damage to property?
  - Has there been an increase, intensification of and/or repetition of violent incidents or threats recently?
  - Has or is the victim attempting to leave the relationship?
  - Are there any current judicial proceedings against the perpetrator related to protection orders, divorce or child custody?
  - Has the perpetrator committed a form of sexual violence?
- Expand question #11 on the risk assessment form to encompass any violent offence committed by the perpetrator outside of the home.
- Amend the Joint Order on Risk Assessment Procedure to:
  - Foresee more explicitly the development of a safety plan for domestic violence victims adapted to low-, medium- and high-risk situations
  - Address the safety and protection needs of any children present as direct and indirect victims of the violence, including through the notification of child protection authorities. (See, e.g., Section II(4)).
  - Contemplate a separate interview with the perpetrator to obtain additional information.
  - Clarify that police have the discretion to raise the level of risk for situations in which the form resulted in a low or medium level of risk in Section II(6).
  - Clarify that police discretion can be used to raise the level of risk, but not to lower it.
  - Include a series of operational measures to be undertaken by police officers pursuant to the levels of risk determined by the assessment (low, medium, high), in order to ensure the victim's safety.
  - Develop a specific form or questions for use when interviewing child victims/witnesses
- Draft a second form to be used for periodically reassessing the risk.
- Draft a second protocol (or amend the current Joint Order on Risk Assessment Procedure) to guide police implementation of the reassessment of risk, including time lines for conducting the reassessment, depending upon the level of risk.
- Ensure a clear procedure for communicating risk assessments to other criminal justice actors and service providers.
- Require police to notify victims upon perpetrators being released from remand prisons.

## **Annex B**

### **Safety planning for victims**

Effective safety plans should be:

- **Personalised.** There is no one-size-fits-all safety plan because every situation is different. Every safety plan needs to reflect the specific details of the individual victim and the nature and level of the risk.
- **Supported by the victim's community.** Work through the plan with the victim, who can identify which family members, friends and community resources they feel comfortable in contacting when they feel in danger.
- **Realistic.** A safety plan won't work if it is difficult to follow. The plan needs to address the reality of the situation. In domestic violence situations, safety planning must recognise that some women will continue to cohabit with an abuser, that others might reunite after an arrest or prosecution and that others will continue to raise children together despite the threat or presence of violence.
- **Holistic.** The safety plan should cover every aspect of the victim's life—at home, at school, at work, in transit, online and in social situations.<sup>141</sup>

### **Checklists and tips for victim safety planning:**

#### **Immediate safety needs**

- Determine who to call for help in a violent situation. Note friends', relatives', neighbours', police and hotline numbers.
- Memorise emergency phone numbers or keep them on small cards in a safe place or save in mobile phone.
- If the abuser has a key to the house or apartment, change or add locks on your doors and windows as soon as possible.
- Practice getting out of your home safely. Identify which doors, windows, elevators, or stairs would be best. Avoid rooms with no exits, like a bathroom, and rooms with weapons, like the kitchen.
- Decide and plan where to go upon leaving the home in an emergency situation. Have a packed bag ready and keep it in a secret but accessible place in order to leave quickly.
- Identify a neighbour, family member or friend and ask them to call the police if they hear a disturbance coming from the home. Create a signal for them to call the police—like if a certain light is on or a shade pulled down—or a code word.
- Get medical attention if hurt in any way.
- Speak with a social worker or advocate from the local domestic violence program who can provide information on rights and options.

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<sup>141</sup> Adapted from: UNODC, Handbook on effective prosecution responses to violence against women and girls, 2014, p. 57.

### **Protective orders**

- Make extra copies of the protective order and keep them with you at all times. Also keep copies in a safe place like: your car, at friends' or relatives' homes, at work, and at your children's day care or school.
- Inform family, friends, neighbours, employers, your physician or health care provider, and your children's day care or school that you have a protective order in effect.
- Screen calls. Keep a record of all contact a batterer makes, such as phone calls, text messages, voice mail messages, and emails.
- If moving to another town or state, register the protective order in your new town with the police.
- Call the police if the perpetrator violates the protective order.

### **Safety in public and at work**

- Change the route from and to work frequently.
- Provide an employer with a current picture of the abuser.
- Determine who can help while at work or in the public. Try to find a "safe" person at work. Provide a picture of the abuser if necessary.
- Get an escort to the car, the bus or train.
- Create a plan for what you would do if something happened while in public.
- Have a co-worker screen incoming telephone calls, and document anything harassing.
- Make sure employer has up-to-date emergency information.
- When you are out in public, be aware of your surroundings.

### **Digital safety**

- Use a public computer instead of personal computers, such as one at a local library, a friend's computer or a computer at work may prevent the perpetrator from tracking online activities. Clear the browsing history as frequently as possible.
- Consider getting a new phone if it was provided by the perpetrator.
- Check your cell phone settings to see if it has an optional GPS location service, and try to turn it off if it does.
- Change email passwords to something no one will be able to guess or create a new email account.
- If being stalked, the perpetrator might have placed a GPS Tracking device in the car. Routinely check both inside and outside of the car for any suspicious objects.

## Annex C

### Probation Department risk assessment form

Risk factors	Nature of risk	Yes	No
Past assault of family members	Static		
Past assault of strangers or acquaintances	Static		
Past violations of conditional release or probation	Static		
Recent relationship problems	Dynamic		
Recent employment problems	Dynamic		
Victim of and/or witness to family violence as a child or adolescent	Static/dynamic		
Recent substance abuse/dependence	Dynamic		
Recent suicidal or homicidal ideation / intent	Dynamic		
Recent psychotic and/or manic symptoms	Dynamic		
Personality disorder with anger, impulsivity or behavioural instability	Static/dynamic		
Past physical assault	Static		
Past sexual assault / sexual jealousy	Static/dynamic		
Past use of weapons and/or credible threats of death	Static		
Recent escalation in frequency or severity of assault	Dynamic		
Past violation of urgent injunction / restrictive measures	Static		
Extreme minimisation or denial of spousal assault history	Dynamic		
Attitudes that support or condone spousal assault	Dynamic		
Severe and/or sexual assault (current or most recent offence)	Static		
Use of weapons and/or credible threats of death (current or most recent offences)	Static		
Recent violation of urgent injunction / restrictive measures (current or most recent offences)	Static		



## **Annex D**

### **Recommended legislative amendments relevant to risk assessment standards**

#### **Recommended amendments to the Domestic Violence Law**

- Article 25 should include additional measures to be included within the scope of an urgent injunction:
  - the confiscation of weapons from the perpetrator,
  - the use of an electronic bracelet
  - prohibition of contact with children, including at schools and day-care facilities
  - providing the victim with cell phones,
  - providing personal protection by the police
  - the restitution of property unduly taken from the victim by the perpetrator
  - the temporary prohibition to sell their common property.
- Article 25 should mandate the confiscation of weapons for high-risk cases.
- Article 25(4) should be amended to clarify that a risk assessment should be performed upon the issuance of an urgent injunction upon the victim's request.
- Article 26(1) should provide for the *ex officio* issuance of a restrictive measure, namely as requested by the prosecutor or *sua sponte* by a judge.
- Article 26(2) should foresee the confiscation of weapons within the context of a restrictive measure.
- Amend Section IX, Article 3(1) of the Domestic Violence Law to enable judges of general jurisdiction to issue urgent injunctions and/or restrictive measures on the basis of risk assessments.
- A provision should be added to the Domestic Law to require notification of the victim upon pre-trial and post-conviction release of the perpetrator by the Prosecution Service, Probation Department or Criminal Enforcement Service, as appropriate.

#### **Recommended amendments to the Criminal Code**

- Article 28 of the Criminal Code should be amended to preclude its application to cases involving domestic and gender-based violence
- The Criminal Code should be amended to criminalise the violation of urgent injunctions.

#### **Recommended amendments to the Code of Administrative Offences**

- Amend Article 173-2 of the Code of Administrative Offences to enable judges of general jurisdiction to issue urgent injunctions and/or restrictive measures on the basis of risk assessments

## **Recommended amendments to Order No. 369/180**

- Order No. 369/180 should be amended to require the risk assessment form to be communicated through the Unified State Register, in order to ensure access by social workers, shelters, prosecutors and judicial actors, as relevant to the individual case.
- Order No. 369/180 should be amended to indicate interim communication measures prior to the establishment of the Register.
- Order No. 369/180 should be amended to contemplate specific operational measures to be undertaken by police upon the issuance of an urgent injunction or restrictive measure, depending upon the level of risk.
- Order No. 369/180 should be amended to establish time frames for updating risk assessments, depending upon the level of risk.

## **Annex E**

### **Recommendations for the judiciary**

- Develop a standardised risk assessment form or guideline to be used in the determination of the issuance of restrictive measures and in-court safety and security measures. In particular, the guidelines/protocol should:
  - List the risk factors required for consideration in the issuance of a restrictive order
  - Require the judge to state the factors leading to his/her decision
  - List the time frames in which judges must reassess the risk
- Ensure the timely *pro forma* transmission of copies of police and prosecution risk assessments in cases involving domestic and gender-based violence without relying on the victim
- Ensure training for judges on the application of risk assessment criteria, and gender-sensitive, victim-centred approaches to adjudicating cases of gender-based and domestic violence in line with Article 15(1) of the Istanbul Convention
- Ensure that judges issue reasoned decisions, and in particular the factors considered in risk assessments, in-court and out-of-court protection measures and the issuance of restrictive measures.

## **Annex F**

### **Checklist - Police arrival at the scene**

#### **Arrival at the scene:**

- Introduce themselves and show their identification;
- Assess the situation, get an overview of the situation, ask clarifying questions;
- Check whether any first aid is required and/or whether an is needed; provide first aid if necessary;
- The first responders need to explain why they are there and if necessary to enter the home and check that all is in order;
- Divide the parties;
- Think about your own safety, the safety of the victim and other people who may be present;
- Identify and secure any weapons;
- Separate the people present into different rooms, ask questions out of sight and out of earshot from one another.

#### **Victim:**

- Make the victim aware of her rights and duties, including the right to legal assistance;
- Remember to ask open-ended questions while taking the victim's statement; "Tell me what happened" (physical/mental, previous episodes); NB: this can be the only chance to receive information! Also bear in mind fresh memories (memories are "polluted" under the influence of talking to family, friends, etc.);
- Describe the state of mind, presence of intoxication, injuries. Take photos and/or describe possible injuries;
- Assess confiscation of clothes and other items (for example, clothes, cell phone) for evidence;
- Has the victim changed clothes?
- Check whether there are any legal options for a measure to avert danger (ban on entry/protection order, arrest/taking into custody, dismissal);
- If the victim indicates that she wishes to leave the residence, help her to make contact with family or friends, provide information about protection orders and support services such as shelters (including the possibility of escorting her), etc.;
- Accompany the victim;
- Ask if there are children present;
- If possible, make use of a recording device.

#### **Children:**

- Are there any children present?
- Take children to a safe place;
- Agree on who will talk to the children, introduce yourself, tell them why the police are present, talk to them in a manner that is appropriate for their age;
- It is very seldom that the children are asleep, in approximately 50% of the cases they are not sleeping even if it appears so;
- Note: in cases where the mother is exposed to violence, there is approximately a 50% risk of the children in the family being directly exposed to violence
- As far as possible, try to not use the children as interpreters;
- Wherever possible do not use any force in the presence of the children;
- Remember to ask open-ended questions ("Tell me what happened...");

- Describe the children's state of mind/condition/behaviour;
- Describe or take photos of possible injuries.

**Perpetrator:**

- Make the perpetrator aware of his rights and duties;
- Give the perpetrator the opportunity to outline what has happened from his point of view, write this down, remember to use open-ended questions;
- Assess confiscation of clothes and other items (can they be used as evidence?);
- Describe or take photos of possible injuries;
- Assess whether it is necessary to arrest the perpetrator;
- Describe the perpetrator's state of mind, possible intoxication and injuries.

**Examination of the crime scene/securing and gathering evidence:**

- "Is what you are told consistent with what you see?";
- Secure the crime scene by restricting access and providing support to people present;
- Are there any signs of a fight in the house/apartment? Document and describe any injuries that may have been inflicted, the condition of the house/apartment (even if the house/apartment is clean, negative information is also important), take note of any unusual behaviour of the parties involved or anxiety among the children, note down any spontaneous statements;
- Mess, dirt, broken/damaged items, torn off hair;
- Has the crime scene been cleaned up? Has the victim or her children changed clothes?
- If necessary, check the rubbish bin;
- Any signs of child neglect—describe and document with photos;
- Confiscate evidence, such as:
  - cell phone;
  - diaries, notes, letters –either from the suspect or written by the victim and detailing past acts of abuse and violence;
  - broken household items, indicating violent incidents;
  - prior police reports;
  - other reports or statements from services involved in past incidents of violence;
  - medical journals (used only with the permission of the victim);
  - criminal record, internet, and other forms of electronic evidence.

**Assessments (the police need to make some assessments at the scene):**

- Contact/inform Children's Welfare Services?
- Do you need forensic experts?
- Risk/protection measures?

**Witnesses:**

- Establish if there are any witnesses (record their statements as soon as possible).
- What have they seen/heard?
- Make them aware of their rights and duties.

## **Annex G**

### **Checklist for prosecutors**

- Obtain the most updated risk assessment from police
- Conduct a risk assessment in dialogue with the victim
- Consider risk and safety concerns in determining when to file the charges
- Prosecutions should be conducted *ex officio*
- Notify the victim if no charges will be filed
- Request the judge to order a restrictive measure in cases of high or medium risk
- Request the judge to order in-court protective measures

## **Annex H**

### **Risk assessment criteria for judges in adjudicating cases involving domestic violence**

1. Does the perpetrator have access to a firearm, or does the weapon remain in the home?
2. Has the perpetrator ever used a weapon against the victim or threatened her with a weapon?
3. Has the perpetrator ever threatened or attempted to kill the victim?
4. Has the frequency or severity of physical violence increased over the past year?
5. Did the perpetrator force the victim to have sex or engage in unwanted sexual activity?
6. Does the perpetrator attempt to control most of the activities of the victim?
7. Does the perpetrator show constant or violent jealousy?
8. Has the perpetrator ever attempted suicide or displayed suicidal tendencies?
9. Does the victim believe that the perpetrator will repeat the attack or attempt to kill her?
10. Has a restrictive measure or urgent injunction been imposed on the perpetrator?
11. Has the perpetrator violated an urgent injunction or restrictive measure? More than once?
12. Does the perpetrator have a drug, alcohol or other psychoactive substance dependency problem?
13. Has the perpetrator been convicted of another violent criminal offence?
14. Does the perpetrator have employment and/or financial problems?
15. Has the victim attempted to separate from or divorce the perpetrator?

# Annex I

## Sample form for judicial risk assessments from California, U.S.A

### Bench Guide for Recognizing Dangerousness in Domestic Violence Cases

*By Jacquelyn C. Campbell, PhD, RN, FAAN and*

*Hon. Sharon Chatman, Superior Court of California, County of Santa Clara*

***This tool is a research-based bench guide for use by judicial officers at all stages of judicial proceedings involving allegations of domestic violence and orders of protection in civil and criminal domestic violence cases.***

Research has proven that there are several factors associated with an increased risk of homicides (murders) of women in intimate partner domestic violence relationships. This bench guide is not intended to predict what will happen in any given case; it is an informational tool for your consideration as you review a case and become aware of the extent to which the evidence reveals how many lethality factors (danger of homicide) are present. This bench guide is not a substitute for judicial experience, knowledge, skills, and intuition.<sup>1</sup>

#### Pending/Prior:

- Emergency Protective Order   
  Criminal Protective Order   
  Civil Protective Order  
 Criminal History Check   
  Registered Firearms Check

#### Lethality Factors

*Factors in this column are given more weight in descending order.*

Does the alleged perpetrator own a gun?	Yes	No	Does the alleged perpetrator use any of these illegal drugs: "uppers" or amphetamines, Meth, speed, angel dust, cocaine, "crack," street drugs, or mixers?	Yes	No
Has the physical violence increased in severity or frequency over the past year?	Yes	No	Is the alleged perpetrator an alcoholic or problem drinker?	Yes	No
Has the alleged victim left the alleged perpetrator after they lived together during the past year?	Yes	No	Does the alleged perpetrator try to control most or all of the alleged victim's daily activities? (i.e., tells victim when to see friends or family members or how much money to spend)	Yes	No
Is the alleged perpetrator unemployed?	Yes	No	Is the alleged perpetrator violently and constantly jealous of the alleged victim? (i.e., "If I can't have you, no one can.")	Yes	No
Has the alleged perpetrator ever used or threatened the victim with a lethal weapon?	Yes	No	Has the alleged victim been beaten by the alleged perpetrator while pregnant?	Yes	No
Has the alleged perpetrator ever threatened to kill the victim?	Yes	No	Has the alleged perpetrator ever threatened or tried to commit suicide?	Yes	No
Has the alleged perpetrator avoided being arrested for domestic violence?	Yes	No	Has the alleged perpetrator ever threatened to harm the alleged victim's children?	Yes	No
Does the alleged victim have a child that is not the alleged perpetrator's child?	Yes	No	Does the alleged victim believe that the alleged perpetrator is capable of killing her/him?	Yes	No
Has the alleged perpetrator forced the alleged victim to have sex when the victim did not want to?	Yes	No	Does the alleged perpetrator follow or spy on the alleged victim, leave threatening notes or messages, destroy personal property or make unwanted calls?	Yes	No
Has the alleged perpetrator ever tried to choke/strangle the alleged victim?	Yes	No	Has the alleged victim ever threatened or tried to commit suicide?	Yes	No

**NOTES:**



## Annex J

### Sample risk assessment form for social service providers for intimate partner violence

Has your partner threatened you physically?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Has your partner struck you, pushed you, grabbed you roughly, thrown you, or choked you?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Have you sustained physical injury from your partner?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Does your partner blame you for any injury that you might have sustained from him or her?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Has your partner pressured you into any sexual activity that made you feel uncomfortable or degraded?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Has your partner forced you to have sex?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Has your partner ever raped or attempted to rape you?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Does your partner yell at you or call you names?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Does your partner embarrass you in front of others?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Do you feel belittled regularly by your partner?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Does your relationship otherwise feel conflicted or unstable?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Were you or your partner the victim of, or otherwise experience, any pattern of abuse as a child or young adult?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Does your partner seem to have low self-esteem?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Does your partner have a rigid belief in male/female roles?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Is your partner destructive to your possessions or your physical environment?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Does your partner become aggressive when drunk or using drugs?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Does your partner use drunkenness or drug use as an excuse for behaving in an aggressive manner towards you?	<input type="checkbox"/> Yes	<input type="checkbox"/> No

Does your partner blame you when he or she behaves poorly?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Do you find yourself denying the nature of aggressive incidents after they occur?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Do you have a habit of finding, or looking for, a way to blame yourself for your partner's behaviour?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Does your partner try to limit your relationship with family and friends?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Are you isolated from family and friends?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Are you or disabled?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Do you feel that your partner is overly controlling of your time, attention, actions, words, activities, or whereabouts?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Does your partner sometimes seem obsessed with you or extremely jealous of you?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Does your partner seem, hostile, angry, or furious often?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Has your partner previously been involved with incidents of violence?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Does your partner's aggressive behaviour seem to occur in cycles?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Has your partner ever threatened to hurt himself or herself to punish you?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Is your partner hurtful toward – or ever threaten to hurt – children, pets, or others?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Does your partner make you overly or directly dependent for all money?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Do you worry about what your partner would do if you broke up with him or her?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Have you ever felt stalked by your partner?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Have you previously been in an abusive relationship?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Do you have plans to end this relationship?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Is your partner aware of your plans to end this relationship?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Do you experience physical or mental affects such as anxiety, depression, fatigue, or stomach or other gastrointestinal pain or problems that you feel are might be a result of stress related to your partner's behaviour toward you?	<input type="checkbox"/> Yes	<input type="checkbox"/> No

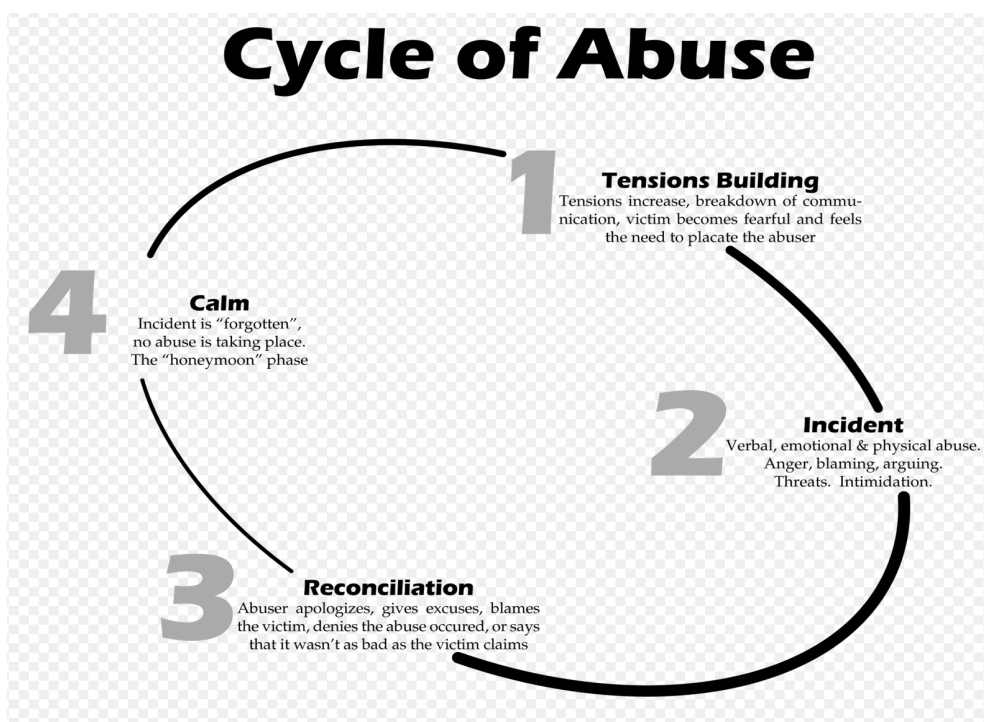
## Annex K Cycle of violence

One very significant characteristic of domestic violence involves the cycle of abuse. The violent behaviour occurs often in three distinct and repetitive stages that vary both in duration and intensity depending on the individuals involved.

Phase one is referred to as the *tension-building stage*, during which the perpetrator engages in minor battering incidents and verbal abuse while the victims, beset by fear and tension, attempts to be as placating and passive as possible in order to stave off more serious violence.

Phase two is the *acute battering incident*. At some point during phase one, the tension between the victim and the perpetrator becomes intolerable and more serious violence ensues.

Phase three is characterised by *extreme contrition and loving behaviour* on the part of the perpetrator. During this period, the perpetrator will often mix pleas for forgiveness and protestations of devotion with promises to refrain from further violence.



For some couples, this period of relative calm may last as long as several months, but in a battering relationship the perpetrator's affection and contrition will eventually fade and phase one of the cycle will start anew. The cyclical nature of violent behaviour helps explain why more women simply do not leave their abusers. The loving behaviour demonstrated by the perpetrator during phase three reinforces whatever hopes these women might have for change and keeps them bound to the relationship.

Some women may even perceive the *battering cycle* as normal, especially if they grew up in a violent household. Or they may simply not wish to acknowledge the reality of their situation. Other women become so hopeless and degraded by the fact that they cannot predict or control the violence that they sink into a state of psychological paralysis and become unable to take any action at all to improve or alter the situation. There is a tendency in victims to feel that any attempt to resist a perpetrator is hopeless.

In addition to the psychological impact, external social and economic factors often make it difficult for some women to extricate themselves from violent relationships. A woman without independent financial resources who wishes to leave her husband often finds it difficult to do so because of a lack of material and social resources. Women who work typically make less money and hold less prestigious jobs than men, and are more responsible for childcare. Thus, in a violent confrontation where the first reaction might be to flee, women realise soon that there may be no place to go. Moreover, the stigma that attaches to a woman who leaves the family unit, with or without her children, undoubtedly further deters moving out. In addition, when they want to leave the relationship, victims are typically unwilling to reach out and confide in their friends, family, or the police, either out of shame and humiliation, fear of reprisal by their husband, or the feeling they will not be believed.

It is important to understand the cycle of violence because one of the biggest challenges to law enforcement in responding to domestic violence cases is the victim's decision to **withdraw her complaint**. The cycle of violence can result in victims calling the police during the acute phase of violence, only to withdraw it during a calm phase, and in light of the many psychological and social barriers that prevent women from leaving. The fact that victims withdraw their complaints has led the European Court of Human Rights (ECtHR) in the *Opuz v. Turkey* case to require prosecutors to act *ex officio*.<sup>142</sup>

There are numerous **barriers** that impede victims from leaving an abusive relationship, both psychological and social and economic reasons. Psychological barriers include the fact that for victims who grew up in violent households, violence is normalised; some victims are in denial; the humiliation and degrading treatment suffered over time can result in psychological paralysis and depression. Social and economic barriers that prevent victims from escaping violent relationships include:

- Limited financial resources
- Limited social support
- Social stigma
- Concern for children
- Nowhere to go
- Fear of reprisal
- Family shame
- Lack of trust in law enforcement

With respect to the latter, it is very important to understand how the criminal justice system can constitute a barrier for women seeking to escape and for those seeking access to protection from further violence and a remedy for the crimes they have suffered. The lack of gender sensitivity, lack of understanding about the nature of

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<sup>142</sup> *Opuz v. Turkey*, Application No. 33401/02 2009.

domestic violence and discriminatory treatment of victims by law enforcement actors can and often result in the secondary victimisation of victims. This re-victimisation can be unintentional. **Secondary victimisation** refers to the re-victimisation of crime victims during their interactions with police officers, criminal justice professionals, medical personnel, psychological staff and victim advocates.

There are certain moments in the criminal justice process, from response to adjudication that can result in re-traumatisation of the victim. These are:

- Interviews and having to go through multiple interviews
- Forensic testing
- Testifying and having to re-testify
- Lack of in-court protection, confrontation with the accused
- Postponements and continuances
- Decisions based on judicial stereotypes.

## Annex L

### Best practice tips for probation officers working with domestic violence perpetrators

**Develop individualised supervision strategies and case plans.** Domestic violence offenders should not be treated as a homogeneous group. Case management plans and supervision strategies should be guided by information gleaned from the risk assessment.

**Know your population.** Research has firmly demonstrated that domestic violence offenders come from all walks of life. Probation officers experienced in working with domestic violence offenders know that this population—despite their specific background or history—is particularly adept at using manipulation techniques.

**Focus supervision time on criminogenic needs.** While it is important to spend supervision time discussing enforcement issues such as compliance with probation conditions, a fair amount of time should be reserved for discussing the offender's progress in obtaining services and what the probationer is getting out of the treatment.

**Communicate with victims.** Victims are often reluctant to report ongoing violent incidents to the police. A victim may, however, talk to a probation officer who makes an effort to stay in regular contact. Having periodic conversations with victims is important both to ensure that the offender is refraining from further abuse and to gauge how the offender is responding to treatment and supervision.

**Swift and certain response to probation violations.** It is critical to respond to new incidents of abuse with the perpetrator even if it did not result in an arrest or criminal charges. Reports to the police should be made only with the consent of the victim, pursuant to Ukrainian law.

**Communicate with treatment providers.** Perpetrator programmes serve as another monitoring tool for probation officers. Communicating regularly with treatment providers can open another window into the offender's world and the information gleaned could assist probation officers focus in addressing specific areas of concern.

**Partner with treatment providers to conduct domestic violence risk assessments.** Probation officers could partner with treatment providers to conduct domestic violence follow-up assessments. Doing so may free up more staff time for direct supervision, capitalise on the expertise of the treatment providers and facilitate the development of stronger collaborative relationships between domestic violence treatment providers and probation staff.

## **Annex M**

### **Check-list for judges in pre-trial detention determinations**

Risk factors related to the current offense and history are identified and documented for use in determining the nature of the threat the defendant presents to the victim and other persons. Possible risk indicators:

- Results of DV-specific risk assessment
- Criminal history and current probation status
- Access to fire arms and their actual or threatened use
- Current and past protection or harassment orders
- Excessive alcohol or drug use and its impact on defendant's actions
- Mental health concerns, impact on defendant's actions
- History of combat deployment, indications of depression, PTSD/TBI<sup>143</sup>

Recommended bail and pre-trial release conditions are related to the:

- Violence and coercion that occurred in this incident
- History of violence and coercion used by the defendant in this and other relationships
- History of arrests and convictions, probation compliance, and protection order violations
- Danger posed by the suspect to the victim and others based on this incident
- Responses to risk questions in the police report or police/prosecution risk assessment
- Victim's safety needs and preferences

Possible recommendations that address risk factors:

- Limited/no contact with the victim or children
- High-risk monitoring/surveillance measures
- Abstinence from drug or alcohol use
- Drug and alcohol assessment/testing
- Mental health/PTSD/TBI assessment

No-contact orders are issued as a condition of release unless the victim requests contact. In these cases:

- the request is evaluated in the context and totality of the circumstances involved, taking into account victim opposition, offender intimidation, victim fear, economic impact, and dangerousness of the offender.
- options that allow contact under limited conditions are considered in cases where the risk factors indicate minimal risk, the victim has requested contact, and there is no evidence of coercion.

Procedures for victims to request changes in conditions of release are explained to victims and are accessible.

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<sup>143</sup> Post-traumatic stress disorder / traumatic brain injury.

## **Annex N**

### **Check-list for prosecution risk assessment**

#### **Prior victimisation**

- Type, severity and frequency of assault
- Date of most recent assault
- Severity of the incident: strangulation, burning, permanent physical damage, head injuries, weapons involved, sexual aggression and coercion, drugging, poisoning, confinement
- Serious injury in prior assaults
- History and nature of past violence towards this victim
- A pattern of ongoing intimidation, coercion and violence
- Who is perpetrating such a pattern, and against whom?
- The severity of the violence
- Who has been injured and how?
- Who is afraid and in what ways? (include non-physical fears such as losing children, home, job, etc.)
- Was the victim assaulted during pregnancy or shortly after giving birth?
- Current or past orders for protection
- Previous domestic violence charges dismissed, previous domestic violence contacts with police or prosecutor's office

#### **Perpetrator's drug and alcohol problems**

- Alcohol or drug use

#### **Perpetrator's obsessive/possessive behaviour and excessive jealousy**

- Jealous or controlling behaviours
- Intimidation of victim if she seeks help
- Nature of controlling behaviour: threats of future injury or death (the more specific the threat, the greater the risk), threats to use a weapon, threats of child abduction or denial of visitation rights, threats made openly and in presence of others
- What kinds of threats or coercion have been used to dissuade the victim from participating in the prosecution?
- Who is most vulnerable to on-going threats and coercion?

#### **Perpetrator's mental health history (i.e. suicidal ideations, plans, threats and past attempts)**

- Threats of homicide or suicide
- Evidence of depression
- Evidence of paranoid thinking
- History of mental health or emotional problems



### **Perpetrator's threats to kill the victim or her children**

- Threat to harm victim or children
- Has the perpetrator harmed the children, in what ways?
- Has the perpetrator threatened to harm the children? In what ways?
- Does the victim fear that the abuser will take the children in retaliation for the cooperation with prosecutors?
- Did the children witness the offence or other violence or threats?

### **Perpetrator's use of violence in settings outside the home**

- Prior criminal history, and whether there are other pending charges
- History and nature of past violence towards others (i.e. history of violence in prior relationships)

### **Evidence of escalating violence or intimidation**

- Stalking behaviour
- Use of weapon
- Sexual abuse
- Animal abuse
- Property damage or threats of future property damage
- Hostage-taking
- Victim's increased vulnerability due to age, disability, pregnancy

### **Perpetrator's possession of, access to, familiarity with and degree of fascination with guns**

- Access to firearms/availability of weapons

### **Perpetrator's proclivity to respect court rules**

- Record of violation of court orders
- Record of failure to follow pre-trial release or probation rules
- Previous participation in a perpetrator treatment programme

### **The status of the relationship**

- Are the victim and perpetrator separated or separating, estranged?
- Is the victim in the process of fleeing?
- What is the status of any family or other type of court case?
- Imminent break-up, separation or divorce initiated by victim; imminent change in child custody and/or imminent change in victim's residence

## **Annex O**

### **Selected risk assessment methodologies**

#### **The Spousal Assault Risk Assessment Guide (SARA)**

The Spousal Assault Risk Assessment Guide (SARA) was developed in Canada at the British Columbia Institute on Family Violence and is used in countries around the world. The SARA is designed to predict both intimate partner violence and lethality. The SARA consists of 20 items that focus on criminal history, psycho-social adjustment, spousal assault history and information on the alleged offence. Information for this tool is collected from a number of sources, including from the accused, the victim, standardised measures of psychological and emotional abuse, and other records such as police reports. The evaluator considers the items and determines whether the accused is at low, medium, or high risk of causing imminent harm to their intimate partner or to another individual.

A shorter 10-item version of SARA was developed for the police in Sweden, called B-SAFER, which is also used in other countries, including Greece, the Czech Republic and Italy. The SARA-S version, used in Italy, consists of a total of 10 risk factors related to the perpetrator plus an additional 5 'vulnerability' factors related to the victim.<sup>144</sup>

The SARA is also used for other purposes, including for determining treatment plans for offenders, intervention strategies and levels of supervision. Because the SARA includes clinical measures, it is recommended that mental health professionals conduct the assessments; however, other professionals can use the tools if they have access to the accused's psychological or psychiatric reports. The SARA has a number of strengths. First, it has been shown to have good validity and the validity of the SARA has been tested more than any other tool. These validation studies have been conducted by individuals that are independent from the developers and with different types of adult male offenders (e.g., offenders in prison and on community supervision orders). Furthermore, its ease of use renders it accessible by a number of different kinds of professionals and because the SARA was developed based on diverse empirical research, it can be used with different kinds of offenders. Finally, it includes a variety of static and dynamic factors related to both general violence and intimate partner violence, which makes it flexible, sensitive to offender change, and useful for treatment planning.

Notably, SARA contemplates the gathering of information from numerous sources, which has practical challenges in the field.

SARA is in use in Denmark, Ireland, Spain, Italy, Austria, Portugal and Slovakia.<sup>145</sup>

BE-SAFER is in use in Italy, Sweden, Greece and the Czech Republic.

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<sup>144</sup> CoE, *Improving the effectiveness of law-enforcement and justice officers in combating violence against women and domestic violence*, 2016, p. 43.

<sup>145</sup> EIGE, *Risk assessment and risk management by police*, available at: <https://eige.europa.eu/gender-based-violence/risk-assessment-risk-management/tools-approaches>.

## **SARA-S**

*Excerpted from:* CoE, Enhancing the professional capacity of the Bulgarian police to deal with cases of domestic violence and violence against women, 2016, p. 42.

The SARA-S version used in Italy consists of a total of ten risk factors related to the perpetrator and five “vulnerability” factors related to the victim.

Risk factors:

- Prior physical or sexual violence;
- Use of threats;
- Escalation of violence;
- Breaching orders;
- Attitudes supporting violence against women;
- Prior criminal records;
- Break-ups in the relationship;
- Financial, work related problems;
- Drug and alcohol abuse;
- Mental health problems.

Vulnerability factors:

- Ambivalent attitude towards the perpetrator;
- Extreme terror towards the perpetrator;
- Lack of services, support;
- Children in common, working in the same place, reduced mobility, social isolation;
- Mental or physical disability.

## **The Domestic Violence Screening Inventory (DVSI)**

The Domestic Violence Screening Inventory (DVSI) was developed in the United States. It is a 12-item risk assessment tool that is designed to assess the likelihood of the occurrence of intimate partner violence. It includes both static and dynamic factors, such as items pertaining to domestic violence, criminal history, current employment, relationship status, treatment history, and information on the current offence. The DVSI provides the evaluator with a risk score that is used to determine the offender’s risk level relative to other offenders. It is used in a number of capacities in the criminal justice system, including at intake, at probation, and for case supervision.

## **The Danger Assessment (DA)**

The Danger Assessment (DA) was developed in the United States and is used throughout the United States and Canada. The DA is a structured clinical assessment tool used to predict domestic violence recidivism, but not in low-risk or medium violence cases. It is used in a number of settings, including for the purposes of victim education and awareness, safety planning and determining the conditions of services. The DA is comprised of two parts. The first is a calendar on which the victim indicates the severity and frequency of instances of domestic violence that she experienced within the last 12 months. The second part is a 20-item checklist of risk factors that are

related to intimate partner homicide. Both sections are completed in collaboration with the victim. The DA works well for victim advocates, social workers or clinicians in various settings, such as women's shelters and hospitals.

The DA is a good tool to use with victims as it allows them to better understand the risk that the relationship may pose to them and what risk management options are available. It may also serve as a useful instrument when information is difficult to obtain or when the offender cannot be interviewed. The accuracy of the DA, however, is not as strong as other tools and it does not provide the evaluator with a means of assessing the risk level posed by the accused.

DA is in use in Germany, Italy, Austria and Portugal.<sup>146</sup>

## **The Ontario Domestic Assault Risk Assessment (ODARA)**

One of the most common actuarial tools used in cases of intimate partner violence is the Ontario Domestic Assault Risk Assessment (ODARA). The ODARA was developed by the Mental Health Centre in Penetanguishene, Ontario and the Ontario Provincial Police. It is used in a number of provinces across Canada and is used in at least one state in the United States (Maine). It is a 13-item actuarial tool that includes the domains of criminal history, number of children, substance abuse and the barriers that victims face in terms of accessing support. The ODARA is used to predict future violence against a spouse, as well as the frequency and severity of the violence. Its focus is on recidivism, not risk management.

This tool is used by police officers, victim services, domestic violence caseworkers, and probation and correctional services in many provinces across Canada. The ODARA works well for criminal justice personnel as they are able to access the needed information and it is relatively shorter than other tools. It has been shown to predict domestic violence recidivism at a comparable level of accuracy as the VRAG (discussed below), but in a more efficient and timely manner, and correlates with the Danger Assessment and the SARA. It is, however only used with male offenders, and it may not be appropriate for use in predicting lethality. Many of the items require gathering information from criminal justice databases, which may be a temporary barrier for its current use by law enforcement in Ukraine, as well as more generally for other stakeholders, such as shelters and NGOs.

ODARA is in use in Germany and Slovakia.<sup>147</sup>

## **The Domestic Violence Risk Appraisal Guide (DVRAG)**

The Domestic Violence Risk Appraisal Guide (DVRAG) was developed in Canada. It is a 14-item risk assessment tool designed to assess the risk of intimate partner violence recidivism among male offenders with a criminal record for intimate partner violence. It is based on the same items as the ODARA, with the addition of the offender's score on the Psychopathy Checklist – Revised (PCL-R).<sup>148</sup> The offender's score is converted into a

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<sup>146</sup> EIGE, Risk assessment and risk management by police, available at: <https://eige.europa.eu/gender-based-violence/risk-assessment-risk-management/tools-approaches>.

<sup>147</sup> EIGE, Risk assessment and risk management by police, available at: <https://eige.europa.eu/gender-based-violence/risk-assessment-risk-management/tools-approaches>.

<sup>148</sup> The Psychopathy Checklist-Revised (PCL-R) is a diagnostic tool used to rate a person's psychopathic or antisocial tendencies. Because psychopaths are often repeat offenders who commit sexual assaults or other violent crimes again and again, the PCL-R is used in the courtroom and in institutions as an indicator of the potential risk posed

percentile score, which is then compared against similar offenders. It is recommended that the DVRAG only be used when the assessor has access to detailed clinical or correctional data of the offender. It is also recommended that the assessor have access to the psychosocial history of the offender, has been trained to use the PCL-R or have access to the offender's PCL-R score. One limitation of the DVRAG is that its predictive accuracy has not yet been evaluated independently.

### **Domestic Abuse, Stalking, Harassment and Honour based violence Assessment Tool (DASH)**

The DASH risk assessment tool was developed a common tool for both police and non-police agencies when identifying and assessing victims of domestic abuse, stalking and harassment and honour based violence.

DASH is in use in Estonia, Ireland, Montenegro, Slovakia and the U.K.

### **Barnardo's Domestic Violence Risk Assessment Model**

This risk assessment model is in use Northern Ireland, and was developed in Ontario, Canada. The methodology targets exposure to male on female violence. The model is used to assess the severity of risk posed by domestic violence within families where children are present. The Risk Assessment Model has nine assessment areas. The nine assessment areas are: nature of the abuse risks to the children posed by the perpetrator risks of lethality perpetrators pattern of assault and coercive behaviours impact of the abuse on the women impact of the abuse on the children impact of the abuse on parenting roles protective factors the outcome of the women's past help-seeking.<sup>149</sup>

#### **Safe and Together**

Developed in the U.S., this child-centred model derives its name from the concept that children are best served when we can work toward keeping them safe and together with the non-offending parent (the adult domestic violence survivor). It provides a framework for partnering with domestic violence survivors and intervening with domestic violence perpetrators in order to enhance the safety and wellbeing of children.<sup>150</sup>

Safe and Together is also currently in use in Scotland, Australia and New Zealand.

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by individuals in psychiatric units or prisoners. The results of the examination have been used as a factor in deciding the length and type of prison sentences and the treatment subjects should or should not receive.

<sup>149</sup> Additional information available at:

[https://b.barnardos.org.uk/pp\\_no\\_7\\_assessing\\_the\\_risks\\_to\\_children\\_from\\_domestic\\_violence.pdf](https://b.barnardos.org.uk/pp_no_7_assessing_the_risks_to_children_from_domestic_violence.pdf)

<sup>150</sup> More information is provided by the Safe and Together Institute, available at: <https://safeandtogetherinstitute.com/about-us/about-the-model/> Safe & Together Institution, available at: <https://safeandtogetherinstitute.com/>, last accessed 12 June 2020.

## **Annex P**

### **Establishing effective inter-agency coordination mechanisms**

The following recommended actions and practices are drawn from Module 5 of the UN ESP and EIGE.

1. Identifying all relevant actors that should be involved.
2. Clearly define the roles and responsibilities of each agency and ensure that these are well understood by all relevant stakeholders.
3. Establish a coordinating structure (with possibly rotating chairs) to plan and convene meetings and to ensure that agreed upon procedures and goals are implemented and monitored.
4. Develop a common understanding of risk assessment aims and objectives among all actors, and use shared/harmonised risk assessment tools that facilitate the use of a common language and a shared understanding of risk.
5. Share information among agencies in a timely manner, considering all the necessary elements to ensure privacy and confidentiality in accordance with locally agreed protocols and national standards.
6. Establish protocols and partnership agreements (or MoUs) among different actors in order to ensure that victims have access to specialist support services as appropriate and according to their specific needs through an agreed upon referral system.
7. Establish monitoring and evaluation systems to improve the accountability of all agencies involved and to allow stakeholders to participate in and make decisions about improvements.

## **Annex Q**

### **Staff safety checklists for social workers**

#### **Team systems and routines:**

1. Ensure that staff never make potentially dangerous home visits alone. Co-work or use a police escort where necessary.
2. Have a clear framework to assess potential risks to staff in individual cases
3. Routinely record the timing and details of planned home visits.
4. Have clear protocols in place when interviewing alleged perpetrators.
5. Systematically record incidents and threats of violence to staff from clients.

#### **Guidance for individual staff members:**

1. Report any incident. Not doing so can put others at risk.
2. Always be alert, be aware of your surroundings and other people.
3. Develop skills, behaviour and ways of working to recognise and deal with anger.
4. Trust your intuition and act on any warning. Do not ignore it.
5. Strike a balance between sensible caution, awareness and confidence.
6. Keep reasonably fit. Good posture, stamina and strength aid protection.
7. Avoid meeting aggression with aggression.

## **Annex R**

### **Safety checklists for victims attending court hearings**

I have a women's legal advocate. That person is:

I have a support person (family, friend) who is coming to court with me. That person is:

I have visited the courthouse and know where to go on my court date.

I know how to find:

Court security/police assistance

The washrooms

The courtroom I have to be in

I have contacted court security and given them relevant information, including:

The perpetrator's name

The restraining order against him

A copy of his bail conditions

A photograph of him

This is what the court security officer has said they can do to help me stay safe:

I know what to do if/when I see my ex-partner:

Ask court security for assistance

Move away from where he is sitting

Ask him to move away from where I am sitting

Go into the washroom

Ask my support person to intervene

Other:

I have made arrangements to get to and from court as safely as possible. I am going to:

Take a taxi.

Use public transit with a friend.

Bring my car and travel with a friend.

Park in a safe place.

Have a friend/police escort walk me from my parking spot or the transit stop to the courthouse.

Have a friend meet me at the courthouse.

Bring a cell phone so I can call if there are any problems.

Get to court early.

Ask court security to help me leave safely.

All my documents are organised and ready for me to take to court.

I have reviewed all the court documents.

I have booked time off work.

I have arranged for childcare.



## **Annex S**

### **Legal safety checklists for victims**

#### **Legal protection status:**

- An urgent injunction
- A restrictive measure

#### **I have a court order:**

- I have provided my children's school and/or daycare centre with a copy of relevant orders
- I have provided others with a copy of the relevant court orders, such as my workplace security, landlord or home security.
- The perpetrator has been released on bail. These are his conditions:

#### **Plan for safety:**

- I have made several copies of my safety plan. I carry one with me, have one in a safe place that I can get to if I need it, and I have given one to a trusted friend or family member.
- I have a calendar where I write down all contacts with the perpetrator.
- I have someone else at the house when the perpetrator picks up and returns the children.
- I have a system for managing the perpetrator's email and other contacts with me. It is:

## **Annex T**

### **Safety tips and checklists for children**

These safety tips could be used by parents, social workers, mobile teams, NGO service providers and shelter staff.

Safety planning for children should be aligned with the adult caretakers. Yet, since children within the same family vary in age, needs and abilities, they may require different plans. The goal is to empower the children by making sure they know how to get help when they need it.

Safety plans should be made for each situation that has happened or that could happen to the children. This will help them to be prepared and to know what to do in those circumstances. Children's safety plans will need to be updated in light of changing circumstances. Identify increased risk factors such as: court dates, special events in the children's lives, changes in visitation times, threats from the perpetrator, etc., and update the safety plan as needed.

It is of primary importance that children understand that they are not responsible or to blame for the violence or abuse they witness or to which they are subjected!

#### **Tips for preparing for emergency situations**

- Teach children that, during a violent episode, they must get away from the violence, stay safe and, if it is safe for them to do so, get help.
- Create a code word. This will be a cue for them to find a safe place and/or get help.
- Teach children how to call a hotline or local police services in an emergency.
- Role play with the children to give their address and location, a description of the situation, their phone numbers and names.
- Depending on their ages, you may want to talk to them about the five-finger system. In this system, each finger represents a safe person for them to contact in an emergency and/or someone they can talk to about what is going on at home: the police, a trusted neighbour, their teacher, the parent of a friend, a close relative.

#### **Support for children**

- Talk to children about who they can go to for help in their community (family members, friends, teachers, neighbours, police, etc.).
- Talk to supportive people involved in the child's life (e.g., teachers) so that they know they are part of the child's safety plan.
- If social welfare services or child protection is involved, consider speaking to them about the child's safety plan.
- Connect with an advocate or social worker who understands the dynamics of domestic violence and its impact on children, to help to formulate a safety plan,
- Seek professional support/psychological assistance to help the children to emotionally deal with what is happening in their family (trauma).
- Use formal resources such as the family court, police, social welfare or child protection services to help ensure the child's safety. It can be very helpful to do this with the support of an advocate or psychologist.

## **Contact challenges**

- Keep a journal of the impact of the time the child spends with the perpetrator, recorded by visit dates.
- Explore amending the restrictive measure or custody order if it becomes apparent that the child is being mistreated or abused.

## **Ongoing**

- If the children have smart phones, tablets or other electronic devices, consider shutting down any tracking functions. While these functions can be helpful if the child is abducted or withheld by the perpetrator, they can also be used by him to find the victim and/or the children. Check the devices from time to time to be sure no such functions have been installed by the perpetrator.
- Talk to the children about their experiences, worries and hopes, and allow them to express own their feelings.
- Safety planning with infants and toddlers is challenging, because they are too young to play a role in keeping themselves safe or even to understand the situation. However, a parent can help a very young child feel safer and more secure by assuring them that they will always come back if they leave, that things will be okay and that the situation is not one for them to worry about. If a victim has to leave home, it is advisable bring some of the child's special belongings (a blanket, toy or book) to help them feel more secure in your new location.
- Even though safety planning with children requires discussing risks posed by a family member or parent (possibly their father), let them know that it is okay for them to love their parent or family member and to want to spend time with him.

## **Annex U**

### **Indicators to identify child victims of domestic violence in the education sector**

#### **Indicators of physical abuse**

- Extensive bruises, especially in areas of the body that are not normally vulnerable? Are the bruises of different colours indicating various stages of healing?
- Frequent bruises around the head or face, the abdomen or midway between the wrist and elbow? Although bruises to the knees, legs, and elbows frequently occur in normal falls, the above areas are less likely to occur in falls and should be investigated.
- Bruises in specific shapes such as handprints, hangar marks, or belt buckles?
- Marks that indicate hard blows from an object such as an electrical cord or other whip-like object that make a burn around the body?
- Bruises on multiple parts of the body indicating blows from different directions?
- Unexplained abdominal bleeding (i.e., caused by internal bleeding) that might be observed as discoloration under the skin or blood-filled lumps?
- Extreme sensitivity to pain or complaints of soreness and stiffness or awkward movements as if caused by pain?
- Bald spots from severe hair pulling?
- Adult-sized, human bite marks?
- Burns, especially from objects such as cigarettes, irons, and other objects?
- Injuries for which the explanation given is inadequate?

#### **Indicators of emotional abuse**

- Inappropriate affect such as turning negatives into jokes and laughing when in pain?
- Extremes in behaviour – manically happy or very depressed?
- Withdrawal – no verbal or physical communication with others?
- Self-destructive behaviour (e.g., cutting oneself)?
- General destructive behaviour?
- Difficulties with concentrating or learning new material or compulsive attention to detail?
- Cruelty to others?
- Vandalism, stealing, cheating?
- Rocking, thumb sucking, head banging?
- Enuresis (wetting one's pants) or soiling after an age when such behaviour is inappropriate?
- Substance abuse?
- Eating disorders?
- Physical manifestations such as frequent stomach-aches or headaches or unexplained weight loss or gain?
- Delinquent behaviour?

## **Indicators of sexual abuse**

Does the child:

- Have difficulty in walking or sitting?
- Complain of genital or anal itching, pain, or bleeding?
- Have frequent psychosomatic illnesses?
- Frequently vomit without organic causes?
- Become pregnant at a young age?
- Have any sexually transmitted diseases?

Does the child exhibit:

- Exceptional secrecy?
- More sexual knowledge than is age appropriate (especially in younger children)?
- Indepth sexual play with peers (different from the normal "playing doctor" form of exploration)?
- Extreme compliance or withdrawal?
- Overt aggression?
- An inordinate fear of males (or females)?
- Extremely seductive behaviour?
- A drop in school performance or sudden nonparticipation in school activities?
- Sleep problems or nightmares?
- Crying without provocation?
- A sudden onset of wetting or soiling of pants or bed?
- Sudden phobic behaviour?
- Feelings of little self-worth or talk of being damaged?
- A much older and worldlier appearance than peers?
- Suicide attempts or ideas of wanting to kill self?
- Excessive attempts to run away from home?
- Cruelty to animals (especially those that would normally be pets)?
- Setting fires and enjoying watching them burn?
- An eating disorder?
- Self-mutilation (cutting or scratching to draw blood)?

## **Indicators of neglect**

Does the child:

- Come to school in soiled clothing or clothing that is significantly too small or large for them or often in need of repair?
- Seem inadequately dressed for the weather?
- Always seem to be hungry, hoarding, or stealing food, but coming to school with little of their own food?
- Appear listless and tired with little energy due to no routine or structure around bedtimes?

- Often report caring for younger siblings?
- Demonstrate poor hygiene, smell of urine or feces, or have very bad breath or dirty or decaying teeth?
- Seem emaciated or have a distended stomach indicative of malnutrition?
- Have unattended medical or dental problems such as infected sores or badly decayed or abscessed teeth?
- Exhibit stealing, vandalism, or other delinquent behaviours?
- Have frequent school absences or tardiness?
- Have poor peer relationships, possibly due to hygiene problems or a depressed or negative attitude?
- Appear withdrawn?
- Crave attention, even eliciting negative responses to gain it?
- Demonstrate destructive or pugnacious behaviour and show no apparent guilt over his or her acts?
- Exhibit low self-esteem?
- Have a conduct disorder diagnosis or act oppositionary defiant?
- Have difficulty problem solving or coping?
- Have difficulty with language comprehension and expression?
- Have a variety of academic problems?

## **Annex V**

### **Recommended legislative and regulation amendments related to victim and witness protection**

#### **Recommended amendments to the Domestic Violence Law**

- Article 26 should be amended to foresee longer-term protection without requiring the victim to reinitiate civil proceedings. It should foresee protection as long as necessary.

#### **Recommended amendments to the Code of Administrative Offences**

- Amend the Code of Administrative Offences to criminalise the violation of an urgent injunction.

#### **Recommended amendments to the Criminal Procedure Code**

- Consider amending Article 177(1) to include threat of violence to victims/witnesses as a grounds for pre-trial detention.
- Article 178(1)(12) should be amended to require judges to consider non-lethal forms of violence as a ground or circumstance for the pre-trial detention of domestic and gender-based violence perpetrators.
- Consider amending the Domestic Violence Law and Civil and Criminal Procedure Codes to ensure the application of diverse in-court protection measures for hearings involving domestic violence, including:
  - Separate waiting areas
  - The use of screens
  - *In camera* hearings
  - Using statements (audio-visual) given during the preliminary phase of the procedure as evidence
  - Testimony via video-conferencing
  - Accompaniment by a support person
  - Police escort
- Amend the Criminal Procedure Code to require *ex officio* prosecution in domestic violence cases.
- Amend the Criminal Procedure Code to ensure specific in-court protection measures for child victims

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