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## **Project on strengthening and protecting women's and children's rights in Ukraine (TRES)**

### **Recommendations on Ukrainian Policy, Institutional and Legislative Issues, Implementation Mechanisms and Practices in line with the European Standards in the Field of Women's and Children's Rights**



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**The Joint Project between the Council of Europe and the European Union on strengthening and protecting women's and children's rights in Ukraine** (hereinafter – the TRES Project) was implemented in Ukraine from December 2008 until March 2011, in co-operation with leading Ukrainian governmental institutions and non-governmental organisations. The project was aimed at assisting decision-makers responsible for the elaboration of the governmental policy in Ukraine, bringing national legislation and practices in line with European standards in the field of children's protection from sexual exploitation and sexual abuse, ensuring equal rights and opportunities for men and women, and the protection of women and children from violence in any form.

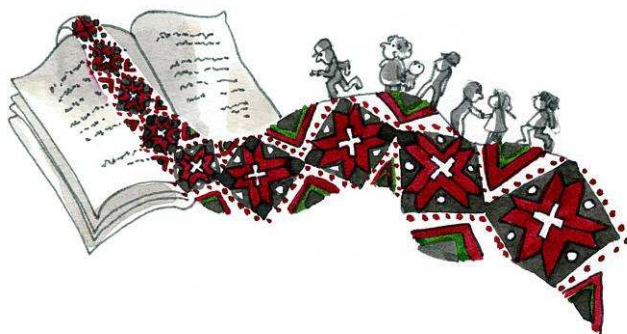
Based on the outputs of the TRES Project activities implemented in accordance with the Consolidated Work Plan, numerous conclusions and recommendations have been developed and systematised and are presented in this document in the following order:

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# 1. Protecting children from sexual exploitation and sexual abuse

## 1.1. Main conclusions and recommendations on improving the legal framework and governmental policy for the protection of children from sexual exploitation and sexual abuse

Based on the priority objectives of the TRES Project, significant achievements were made, and detailed recommendations drafted, concerning the improvement and reform of the legislative framework, policy and practice in the field of combating sexual exploitation and sexual violence against children, in line with the standards established by the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201).



These conclusions and recommendations on the protection of children from sexual exploitation and sexual abuse are the result of a series of international and national research projects and practical events, held and promoted by TRES. The following events enjoyed the most attention from the government, public and mass media: *an open meeting of the Verkhovna Rada of Ukraine Committee on Family*

*Matters, Youth Policy, Sports and Tourism* on combating sexual and other forms of violence against children (Kyiv, 26 March 2010); an international workshop *“Investigation, prosecution and procedural law in cases of sexual exploitation and sexual abuse of children: Ukrainian and international best practices in the implementation of the Council of Europe standards”* (Lviv, 24-25 February 2010); an international conference *“Protection of Children against Sexual Exploitation and Sexual Violence”* (Warsaw, 28-29 October 2009); and many other related events.

In the field of combating sexual violence against children, a major achievement of the TRES Project was the foundation of potent analytical research, conducted in the scope of the Project, which became an inter alia analysis of compliance with the Ukrainian criminal legislation and Art. 20 of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse. This was conducted by experts of the Ukrainian National Academy of Law Sciences and TRES Project experts, whose analytical reports and memos were prepared within the scope of their speeches at the workshops, conferences and other events conducted under the Project. The elaboration, approbation and implementation of the Training Course *“Ways of Integrating the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201) Requirements in the Ukrainian Criminal Process”* have been a further achievement of the Project. This training course was aimed at improving the skills of those engaged in the Ukrainian law enforcement and judiciary employees, and on the introduction of the standards enshrined in the Convention CETS No. 201, with regard to the enforcement of rights and the best interests of a child witness and victim in criminal proceedings.

In addition to the above events, analytical materials produced as part of the Project, provided the basis for making the following **principal conclusions and recommendations in the field of protection of children against sexual exploitation and sexual abuse:**

To the end of combating extreme forms of violence against children, the Council of Europe opened the “*Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse No. 201*” (hereinafter – Convention CETS No. 201) for signature on 25 October 2007. CETS No. 201 was signed on behalf of Ukraine by O. Lavrynovych, following Order No.222/2007-rp of the President of Ukraine dated 19 October 2007, and is subject to ratification by the Verkhovna Rada of Ukraine to take effect in Ukraine.

The ratification of CETS No. 201 would facilitate the formation of an effective mechanism for combating the sexual exploitation of children, in particular, child pornography and prostitution, and all other forms of child sexual abuse, which are destructive to children’s health and psycho-social development but have nevertheless grown to worrying proportions at both national and international levels. Recognition of the legal effect of the Convention by Ukraine would bring it in line with European standards of children’s rights protection, as they are one of the most vulnerable groups in society, requiring special protection of the state.

*The goals, objectives and principal provisions of Convention CETS No. 201 completely correspond to and promote the implementation of Ukrainian primary legislation dealing with the protection of children’s rights, including:*

- **Ukrainian Constitution**, dated 28 June 1996 No. 254k/96-VR. Art. 52 of this fundamental law, which directly addresses the prevention of violence against children, provides explicitly that *any violence against a child, or his/her exploitation, shall be prosecuted by law*. Pursuant to Art. 51 of the Ukrainian Constitution, the family, children, mothers and fathers are under the protection of the State;
- **Ukrainian Family Code**, dated 10 January 2002 No. 2947-III//VR. Art. 150, para. 6 of the Ukrainian Family Code “Parental Responsibilities in respect of the Child’s Education and Development”, for example, directly establishes that *any exploitation of a child by his/her parents is prohibited*;
- **National Action Plan on the Implementation of the UN Convention On the Rights of the Child**, approved by the law on the Nationwide program “National Action Plan on the Implementation of the UN Convention on the Rights of the Child” for the period until 2016, (5 March 2009, No. 1065-VI). By way of example, para. 4.7. of the National Plan directly addresses the problems of *eliminating child trafficking, sexual exploitation, other forms of child abuse* and the formation of conditions for the effective rehabilitation of children;
- **Law of Ukraine “On Protection of Childhood”** dated 26 April 2001 No. 2402-III, which is a key special Ukrainian legislative act, dealing with the protection of children’s rights and the combating of all forms of violence against them. For instance, Art. 10 of the Law ensures the state’s protection of a child from all forms of physical and psychological violence, like insults, negligent and abusive treatment, *exploitation, including sexual abuse, as well as from parents or persons responsible for children’s care, for making and distributing pornographic materials, coercion into prostitution, etc.*

Ratification of Convention CETS No. 201 would require Ukraine to pursue a consistent governmental policy with respect to combating child sexual exploitation and sexual abuse and adds major amendments to the national legislation, which to date remains inconsistent with Convention CETS No. 201 in many respects.

However, by signing Convention CETS No. 201, Ukraine thereby expresses agreement with the main principles of the instrument and may, even prior to its ratification, *ensure the compliance of Ukrainian court and law enforcement practices, in the domain of children’s protection against sexual abuse and exploitation, with many provisions of the Convention.*

To this end, *a conclusion has been drawn for the first time* in the course of the Project’s implementation, that a comparative analysis of the provisions of the effective criminal procedural legislation of Ukraine and Convention CETS No. 201 makes it possible to divide the statutory provisions of the Convention into three groups, depending on the capability to implement them in Ukrainian law enforcement and court practices at this stage:

1) the statutory provisions of Convention CETS No. 201 correspond to the relevant provisions of the applicable Ukrainian legislation, thus there is an opportunity to implement requirements of the Convention (specifically, some paragraphs of Articles 30 “Principles”, 31 “General measures of protection”, 32 “Initiation of proceedings”, 34 “Investigations”, 35 “Interviews with the child”, 36 “Criminal court proceedings”);

2) statutory provisions of the Convention CETS No. 201, which do not directly correspond to the applicable legislation of Ukraine, are nevertheless possible to implement, thanks to an extended interpretation of the applicable legislative provisions to ensure greater rights for parties to proceedings, without entering any amendments into current legislation (in particular, Art. 31 para. 1 item g, para. 2, 5,6 of “General measures of protection”);

3) statutory provisions of the Convention, for which implementation requires amendments to the current legislation of Ukraine.

As a result of the aforementioned observations it follows that, subject to the adequate training and corresponding understanding of the provisions of the Convention CETS No. 201, *judicial and law enforcement practices of Ukraine may not only comply with those provisions of the Convention which directly correspond to the relevant provisions of the current Ukrainian legislation, but also to the provisions of the Convention which do not directly correspond to such provisions, their implementation nevertheless made possible as a direct result a raised awareness of Convention standards.*

This conclusion should be widely disseminated among professionals and suitably emphasised during training sessions and workshops on the protection of children from sexual exploitation and sexual abuse when covering these issues in curricula, including in Ukrainian institutions of higher education.

At the same time, the full incorporation of the requirements established by the Convention CETS No. 201 demands that the relevant amendments are made to the current Ukrainian legislation, in the first instance into the ***criminal and criminal procedural*** legislation. To achieve this goal, it is necessary to:

**1) Form a working group of experts to prepare the required legislative reforms**, composed of representatives from the Ministry of Justice of Ukraine, the Ministry of Internal Affairs of Ukraine, the Ministry of Education and Science, Youth and Sports of Ukraine, the General Prosecutor’s Office of Ukraine, the Committee of the Verkhovna Rada of Ukraine on Legislative Support of Law Enforcement, the National Expert Commission of Ukraine on Public Morals Protection, the Legislation Institute of the Verkhovna Rada of Ukraine, researchers, human rights activists and experts of representative offices of international organisations in Ukraine, in order **to elaborate a uniform terminology on sexual violence and the exploitation of children**, specifically, to reconcile the following terms: “pornography”, “child pornography”, “erotic”, “child erotic”, “products of sexual nature made with children involved”, “child prostitution”, “child engaged in prostitution”, “sexual exploitation of a child”, “sexual violence against a child.” This is a necessary prerequisite to the reform of the criminal legislation, which requires precise and strict wording of the *corpus delicti*, to avoid the overlapping of criminal law categories and the use of terms in different ways in alternative contexts.

**2) Bring the national legislation of Ukraine in line with the Convention CETS No. 201, in the first instance with regard to the Ukrainian Criminal and Criminal Procedural Codes, as concerns those persons covered by the protective provisions against sexual abuse and sexual exploitation.**

The Convention covers *all persons under 18* and does not contain any exceptions from this requirement (Art. 3 of the Convention). Ukrainian national legislation allows that a person under 18 can be deprived of the status of ‘child,’ and the relevant protections by the state (see Art. 1 of the Law of “On Protection of Childhood”), in certain circumstances. It is necessary to reconcile these provisions concerning the age of victims of sexual abuse and exploitation with Convention CETS No. 201, making the relevant age of majority 18 in all circumstances.

**3) Bring substantive Ukrainian criminal law concerning the protection of children from sexual abuse and sexual exploitation in line with Convention CETS No. 201, amend the Ukrainian Criminal Code** (hereinafter – Ukrainian CC) as appropriate.

The Ukrainian CC does not contain a separate chapter concerning crimes against children or crimes of sexual nature against children. Constituent elements of crimes corresponding in some way to the illegal acts provided for in Convention CETS No. 201 are present in various chapters of CC of Ukraine, in particular:

- trafficking in human beings and other illegal transfer deals made with respect to a human being (Art. 149, para. 2, 3 of CC of Ukraine) ;
- rape (Art. 152, para. 3, 4 of CC of Ukraine);
- violent, unnatural sexual gratification (Art.153 ,para. 2, 3 of CC of Ukraine);
- sexual intercourse with a sexually immature person (Art.155 of CC of Ukraine);
- debauchery of minors (Art.156 of CC of Ukraine);
- creating or running brothels and trading in prostitution (Art.302, para. 3. of CC of Ukraine);
- pimping or engaging a person in prostitution (Art.303, para. 3, 4 of CC of Ukraine);
- engaging minors in criminal activity (Art.304 of CC of Ukraine).

With the view to incorporating the requirements of Convention CETS No. 201, Laws of Ukraine No. 1520-VI, dated 11 July 2009, and No. 1819-VI, dated 20 January 2010, were adopted to amend Art.301 of CC of Ukraine “Importation, making, sale or distribution of pornographic items” by establishing more severe punishment for committing the acts envisaged by this article with regard to pornographic works, images or other items containing child pornography, or compelling minors to participate in making pornographic works, images or motion and video films, and computer programs. However, despite attempts to improve the Ukrainian legislative framework with respect to child pornography, the current framework still *does not* fully comply with Convention CETS No. 201, primarily, Art.20 of the Convention.

*In general, the list of sexual crimes against children does not wholly correspond to the list of activities for which Convention CETS No. 201 demands criminal sanctions, and should be significantly revised. In particular, it is necessary:*

- to amend the Ukrainian CC by specifying those actions related to child pornography, and criminalise the production and possession of child pornography for any purpose (i.e. regardless of whether they are intended for sale or distribution, or not);
- to establish the importation, production, sale or distribution of pornographic items (Ukrainian CC, Art. 301) as criminal, as well as introducing more severe sanctions for such actions committed against all minors, rather than merely those below the age of consent;
- to criminalise the “engagement” of children as participants in child pornography. This term would cover both the “coercion” of children to participate in child pornography, which is already a criminal offence, and such actions as persuasion and manipulation;
- to enhance the criminal penalties for producing, disseminating and possessing child pornography through information telecommunication systems or information communication systems;
- to criminalise the recruitment of children for participation in pornographic performances;
- to criminalise the solicitation of children for sexual purposes through information and communication technologies;
- to change dramatically Art.156 of the Ukrainian CC, which is currently inconsistent with Convention CETS No. 201 in that it bans any sexual activity or other acts of sexual

nature with a person under 16, whether consensual or coerced, and regardless of the age of both victim and perpetrator, thereby criminalising all sexual activity between teenagers;

- to set the age below which children may not be engaged in any sexual activity. This may not necessarily be the age of sexual maturity, as this merely indicates a child's physiological, rather than psychological, readiness for the sexual dimension of adult life;

- to revise Art.150 of the Ukrainian CC, which establishes criminal responsibility for the "exploitation of children", but which defines the exploitation of a child in merely the economic context, i.e. the engagement of a child's labour for profit. Direct criminal liability for the sexual exploitation of children (as defined by Convention CETS No. 201) is not established in Ukraine, although it is partially covered by the ban on trafficking in human beings, or other illegal transfer deals in respect of a human being (Art.149, para. 2, 3 of CC of Ukraine), and some other articles of the Ukrainian CC (specifically, Art.301; Art.302, para. 3; Art.303, para. 3, 4);

- to amend the Ukrainian criminal legislation to remove *the statute of limitation in cases where sexual crimes against children have been committed, from the date a victim reaches the age of majority*. These amendments to the Ukrainian CC, Art.49, para. 2 are already envisaged by the bill "On Amendments to the Criminal and Criminal Procedural Codes of Ukraine (concerning interviews with underage victims and witnesses)". (See para. 2.1. of the Conclusions and Recommendations);

- to add the following circumstances to the aggravating circumstances provided for by the Ukrainian CC:

- commitment of a crime against a particularly vulnerable victim, as explained in the note to Art.67 of the Ukrainian CC;
- commitment of a crime by a member of the family, a person cohabiting with the child or a person having abused his or her authority (performing the duties of care or upbringing of a victimised child);

- to introduce the mandatory seizure of property and funds earned illegally as a result of sexual crimes against children;

- to study whether it is reasonable to establish stricter sanctions for sexual crimes against children thus ensuring such crimes fall into the category of serious and especially serious offences;

- to study whether it is reasonable to introduce a separate chapter "crimes against children" or "crimes against the family and children" into the Ukrainian CC.

#### **4) To ensure the launch of intervention programmes for perpetrators of sexual abuse and the sexual exploitation of children.**

To meet the requirements of Convention CETS No. 201 concerning intervention programmes aimed at correcting offenders' behaviour, it is necessary:

- to develop a legislative and institutional mechanism for launching intervention programmes for those who have committed illegal sexual acts against children, or feel that they may commit such acts, including those who have not yet reached the age of criminal responsibility for the relevant sexual crimes;

- to include such intervention programmes into the Ukrainian criminal procedural and executive legislation, and align them with other preventive actions, for example the taking of a perpetrator into custody, or the delivery of sentencing as regards the deprivation or restraint of liberty.

#### **5) To ensure the improvement of interviews with child victims or witnesses of crimes related to sexual abuse and sexual exploitation, to guarantee respect for the rights of child victims throughout all stages of proceedings, in particular for their safety and health and to ensure the non-disclosure of information about them.**

Convention CETS No. 201 contains a separate chapter concerning "investigation, prosecution and procedural law." The extant Ukrainian criminal procedural legislation should be adapted to the requirements set out in the Convention, and essential amendments should be entered into the Ukrainian Criminal Procedural Code and the Laws of Ukraine "On Ensuring Safety of Persons Partaking in Criminal Proceedings", and "On Operational Investigation Activity".

The Provisions of Convention CETS No. 201, concerning the specifics of criminal proceedings, should also be incorporated at this stage into the elaboration of a new Ukrainian Criminal Procedural Code, of which a draft is now at the approval stage.

The main requirements for interviews with child victims or witnesses to crime, contained in Convention CETS No. 201, have been incorporated into the draft law "On Amendments to the Criminal and Criminal Procedural Codes of Ukraine (on interviews with underage victims and witnesses)," developed and supported by the TRES Project, and submitted to Ukraine's Verkhovna Rada for consideration, and which now requires urgent approval following some refinement to its content (See para. 2.1. of the Conclusions and Recommendations).

***Implementation of Convention CETS No. 201 also requires that amendments are entered into other Ukrainian legislative acts of Ukraine: in particular, it is necessary:***

- to approve the draft law on amendments to the Law of Ukraine "On Advertising" (concerning prevention of prostitution-related advertisements); the draft law on free legal assistance;

- to develop amendments to the Ukrainian Code on Administrative Offences concerning: the establishment of parental responsibility for allowing a child's engagement in prostitution, or the production of pornographic products, etc.; the elimination of the responsibility of those under 18 for prostitution offences.

- to bring the definitions and types of child pornography in the Law of Ukraine "On Protection of Public Morals" and provisions of Art.21 of the same Law, concerning criminal sanctions for offences related to child pornography, in line with Convention CETS No. 201 (primarily Convention Art.20);

- to specify a list of grounds for the deprivation of parental rights, or the removal of a child from his or her parents without the deprivation of parental rights envisaged by para. 1 of Art.164 of the Ukrainian Family Code, adding sexual abuse and the sexual exploitation of children to the list;

- to introduce public responsibility for failure to report proven cases of sexual violence against children, taking full advantage of the appropriate NGO, and other nongovernmental institutions, support and protection to child victims of sexual abuse and exploitation, the confidentiality principle notwithstanding;

- to study the possibility for the Ukrainian legislation to include various types of corporate responsibility, in order to enhance corporate liability for crimes and other offences related to the sexual abuse and exploitation of children;

- to study international best practices and the possibility for the national legislation to cover the recording and storing of DNA code, fingerprints and other convicted sexual offenders' personal details, in cases where crimes have been committed against children;

- to study the possibility of resorting to reservations to Convention CETS No. 201 whilst the ratification process progresses, thereby accelerating the process in Ukraine.

The TRES Project hopes that these recommendations will be incorporated by the interdisciplinary working group formed at the Ministry of Justice of Ukraine when preparing Convention CETS No. 201 for ratification.

In addition to the proposals for improving the Ukrainian legislation, in order to bring it in line with Convention CETS No. 201, the TRES Project has prepared a set of proposals on

the improvement of the state policy for the protection of children against sexual exploitation and sexual abuse.

The fight against the sexual abuse and exploitation of children should be based on an integrated approach, with effective measures to prevent gross violations of the rights of children, identify crimes, and investigate and punish perpetrators, as well as provide for comprehensive measures designed to assist and protect child-victims of sexual abuse and exploitation. As such, it is reasonable to elaborate a state policy in the field of combating and preventing the sexual abuse of children in three principal areas – the prevention, prosecution and punishment of offenders, as well as the assistance and protection of child victims.

An unhelpful public attitude to victims, poor awareness of the options for the support services and assistance infrastructure, where sexual violence against a child has taken place, complicate efforts to end sexual violence against children.

***Concerning the sexual exploitation and sexual abuse of children, it is reasonable:***

- to study national opportunities for the launching of effective measures of protection, aimed at the prevention of the sexual exploitation and sexual abuse of children;
- to introduce age-appropriate measures into primary and secondary school curricula, aimed at raising children's awareness of the risks of sexual exploitation and sexual abuse, and ways they can defend themselves from it;
- to develop and introduce an action plan for the general public, which includes public awareness campaigns on the sexual abuse and sexual exploitation of children, measures designed to influence public opinion on the significance of the problem and generate public support for the fight against violations of children's rights, and launches severe sanctions for such offences and preventive measures, in order to prevent the victimisation of children;
- to introduce such a system in public-oriented preventive activities;
- to simultaneously develop programmes and action plans aimed at the timely detection and prevention of the potential risks to children of sexual abuse and sexual exploitation within their circle of trust (family, school, friends) and monitor such programmes and measures, in order to assess their efficiency;
- to develop and implement a governmental policy monitoring mechanism on combating the sexual abuse and sexual exploitation of children;
- to incorporate courses on the prevention of the sexual abuse and sexual exploitation of children, particularly into the training curricula for staff regularly working with children;
- to ensure that candidates for roles working with children are checked to establish whether or not they have been convicted of offences against children;
- to develop a mechanism for the vetting of educational institutions' employees, with regard to assessing their propensity to commit crimes of sexual nature against children;
- to encourage the popular press to properly report information concerning all aspects of the sexual exploitation and sexual abuse of children, paying due respect to the principle of liberty and freedom of speech, whilst simultaneously preserving the rights of children to privacy and the non-disclosure of information about their private lives;
- to ensure the engagement of the private sector (corporations, companies, etc.) in social work against sexual violence against children, and of charitable foundations' support to finance such activities;
- to strengthen the work on facilitating child participation in the development and implementation of state policy, programmes and other initiatives, concerning the prevention of sexual abuse and sexual exploitation of children;
- to develop a detailed action plan to implement paragraph 4.7. "Elimination of trafficking in children, sexual exploitation, other forms of cruel treatment" of the National Plan

of Implementation of the UN Convention On the Rights of the Child until 2016 including the performance indicators and monitoring mechanism;

- to enter a chapter dealing with sexual violence against children in an annual report of the Verkhovna Rada Ombudsperson.

***Concerning protection and help to child victims of sexual violence and sexual exploitation, it is reasonable:***

- to develop an effective system of assistance to child victims of sexual abuse and exploitation in order for them to recover their mental and physical health;

- to develop a mechanism which combines the victims of trafficking in the work with child victims of sexual violence;

- to extend the scope of social services, including those for child victims of sexual violence;

- to strengthen support activities for existing and new found information services for children and parents (telephone and Internet help lines), to provide advice and assistance;

- to study the possibility of establishing special rehabilitation centres for child victims of sexual violence and exploitation, including sheltering services, services for children's social and psychological rehabilitation, and socio-rehabilitation services (for example, children's camps);

- to strengthen activities for equipping premises in various organisations and institutions intended for working with children, in accordance with the "child-friendly" principle, specifically those of law enforcement bodies, services for children, social services, health care institutions, and the courts, etc.;

- to study whether it would be possible to establish a network for assisting child victims of sexual abuse in the Kyiv region, and if it would be possible to replicate this in other regions of Ukraine;

- to study whether it would be possible to establish a special fund for the assistance and protection of child victims of such crimes, using seized property and illegally-earned money confiscated from offenders, to compensate child victims and pay for their lawyers, psychologists, protection and support services, etc.;

- to develop methodological models for employees of law enforcement, childcare, healthcare, education, and the providers of psychological and sociological rehabilitation to child victims of sexual violence and exploitation;

- to explore the possibility of reforming the training system intended to the Police by introducing courses in the psychology of working with children, including those who have been the victims of sexual exploitation and abuse, and create a separate specialisation of "children's Police";

- to ensure perpetrators are removed from the family, rather than child victims of sexual violence, by law (see para. 3.2. of the Conclusions and Recommendations).

**1.2. Recommendations on combating cybercrime and sexual violence against children through Internet**

During the implementation phase, the TRES Project specifically addressed the problem of cybercrime with respect to the sexual abuse and exploitation of children, in particular investigative procedures and the collection and storage of electronic data as

evidence, as well as the ability to assist children through Internet, which have been ignored by state regulation and proper public attention for a long time.

These problems were actively discussed by experts in the course of the TRES Project, in particular workshops *on the establishment of Internet helplines in Ukraine* (Kyiv, 18 - 19 March 2010), *the legal issues inherent in cybercrime and its connection to child pornography, sexual exploitation and sexual violence against children* (Kyiv, 30 September - 1 October 2009). As a result of these events, the following problems and recommendation of the TRES Project have been developed:



Convention CETS No. 201 calls upon member States to criminalise the abuse of children through grooming. This problem has become rather urgent, with the rapid development of new technologies in Ukraine. However grooming is currently not illegal under the Ukrainian legislation: moreover, Ukraine has no mechanism to identify groomers.

“Cybernanny” applications (the special software blocking access to certain websites), which should be installed at schools and other educational institutions, are not routinely installed. In general, the education sector has insufficient technical support, especially schools in rural areas.

One of the highest priorities should be the installation of a system of Internet help line in Ukraine for child victims of sexual abuse and exploitation. In addition, Ukraine remains outside the international network of assistance to child victims of sexual violence. Help lines were likewise identified as an important component of children’s protection at the World Congress III against the Sexual Exploitation of Children and Adolescents, held in November 2008 in Rio de Janeiro (Brazil).

Social services working with children also do not have sufficient technical education, and staff is not routinely trained in Internet use. Existing social service help lines operate inconsistently, and funding is insufficient.

*In order to prevent the abuse of the Internet for sexual purposes involving children, whilst at the same time promoting the Internet as a resource and communication network for the provision of help to child victims of sexual abuse and exploitation, it is necessary:*

- to establish a mechanism to combat grooming in law;
- to strengthen the law enforcement agencies’ ability to combat sexual violence against children, by allowing them to maintain profiles of “travelling pedophiles’ and “groomers”, as well as records of those inclined towards sexual violence against children;
- to ensure the development and dissemination of software among teachers, parents, trainers, and others who work with children, that better ensures children can safely use the Internet;
- to develop filtering systems for mobile telephones to ban access to pornography, and ensure such systems are distributed to teachers, parents, trainers and others who work with children;
- to consider the possibility of hosting companies and providers to take part in events aimed at combating the distribution of child pornography;

- to oblige Internet club owners to deliver educational services to children concerning Internet threats;
- to establish a legal responsibility for Internet clubs or educational institutions to install filtering systems on PCs that prevent access to pornography;
- to make Internet providers legally obliged to report child pornography of which they become aware, on the Internet;
- to give the Ministry of Education, Science, Youth and Sports responsibility for establishing and supporting Internet help lines for children, by engaging NGOs operating in this field;
- to facilitate Ukraine's joining of "Child Helpline International," by way of the platform built by the Project;
- to support the process of elaborating the standards necessary for the effective operation of a helpline for children in Ukraine, which may in future facilitate Ukraine to become a member of the International Association of International Help lines INHOPE.



## **2. The protection of child victims of violence in criminal proceedings, taking account of the child's opinion in the settlement of disputes concerning his or her rights and best interests**

### **2.1. Conclusions and recommendations on the participation of child victims of violence in criminal proceedings**

The TRES Project specifically focused on the procedural issues relating to the criminal prosecution of sexual violence and other forms of child abuse. These problems were core subjects discussed at the workshop on preventive and protective measures and assistance to child victims of sexual exploitation and sexual abuse (Kyiv, 11 - 12 February 2009) and the workshop "The judge facing child abuse and human trafficking" (Lviv, 26 - 27 January 2011).



The implementation of the Project action plan demonstrated that the prevention of child abuse is one of the priorities of the Ukrainian government as regards legal policies. Violence against children is deemed to be a gross violation of their human rights, causing serious physical and emotional damage to children, resulting in their social maladjustment, and tendency to reproduce the abuse they suffered with their own children in later years. Thus, the child must have greater socio-legal protection, which stipulate the necessity to pay particular attention to cases where children are the victims of crimes. However, in practice, the child victim of violence repeatedly faces complications that can arise at each of the three following stages:

- the initiation of criminal proceedings resulting from violence against the child;
- the child's participation in criminal proceedings as a victim or witness of a crime;
- following completion of criminal proceedings relating to violence against the child and delivery of the court's judgment.

1) The National legislation on the **initiation of criminal proceedings resulting from violence against the child** is characterised by a lack of substantive procedures, established by the law, which governs the operations of agencies and services responsible for combating the abuse of children, primarily law enforcement agencies.

*The virtual non-existence of a reporting mechanism to report such abuse is a direct violation of international standards on the protection of child victims rights.*

The current situation results from the departmental (interdepartmental) regulatory acts of the Ministry of Internal Affairs of Ukraine, and their controversial regulation of acceptance procedures for applications and messages from the general public.

Pursuant to cl. 2.1. of the order of the State Committee of Ukraine for Family and Youth, the Ministry of Internal Affairs of Ukraine, the Ministry of Education and Science of Ukraine, the Ministry of Health of Ukraine "On Approval of the Procedure of Considering Applications and Reports on Abuse of Children or Real Threat of the Same," dated 16 January 2004 No. 5/34/24/11, "appeals (report) on the details of child abuse may be filed **either by a child** or by individuals at the place of residence where there has been ill-treatment, or a real threat of ill-treatment".

However, this provision remains declarative and is not implemented in the common practice of internal affairs agencies, primarily due to the provision of the Order of the Ministry of Internal Affairs of Ukraine "On Procedure of Acceptance, Registration and Consideration of Appeals and Reports of the Crimes Committed or Being Prepared," dated 14 April 2004, No. 400. This order **does not stipulate** any special procedure of acceptance and registration of an appeal from a child and under the general rules of acceptance, appeals may not be exercised where a child under 16 makes the submission.

Thus, departmental regulatory acts of the Ministry of Internal Affairs of Ukraine should be brought into line with international standards as far as guaranteeing children the opportunity to submit direct appeals, upon the infliction of violence or other illegal acts against them, is concerned.

In addition, in order to promote the facts about child abuse, in particular sexual violence against children, and galvanise those who work with children and the public at large to make efforts to oppose it, it is necessary:

- to legally oblige those working in contact with children to report suspected offences to the relevant social services (primarily, services for children), and law enforcement agencies;
- to make the relevant amendments to those laws defining employees' job descriptions (the Law of Ukraine "On Education", health care legislative framework, etc.).
- to repeal the provisions of the relevant order, issued by the Ministry of Education and Science (restructured into the Ministry of Education and Science, Youth and Sports of Ukraine), which makes the administrations of educational institutions liable for cases of violence against the children in their care, in order to encourage staff to report suspected violence against children committed by parents or other children.

## **2) *The child's participation in criminal proceedings as a victim or witness of a crime***

The current Ukrainian Criminal Procedural Code, dated 28 December 1960 (hereinafter – CPC of Ukraine), contains the standards which guarantee the observance of a child's rights throughout the investigation, pre-trial process and court proceedings, by law.

At the same time, an analysis of the legislative provisions of Ukraine's CPC highlights significant inconsistencies in the scope of the child's guaranteed rights, where they are involved in criminal proceedings, depending on his/her procedural status. In particular, remedies for a suspected or accused child in criminal proceedings prevail in the Ukrainian CPC, forming a separate chapter of the Ukrainian CPC, namely chapter eight "Proceedings in Juvenile Crimes".

At the same time, it is obvious that measures to protect the rights of the child witness to, or victim of, a criminal offence, are inconsistent. Thus, in the course of the project, it was highlighted many times that Ukrainian interview procedures with respect to minors do not comply with international standards of children's rights.

International instruments, in particular the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, provide for the following requirements regarding interviews with minors:

- interviews with the child should take place without unjustified delay, once the facts have been reported to the competent authorities;
- interviews with the child should take place, where necessary, in premises designed or adapted for this purpose;
- interviews with the child should be carried out by professionals, specifically trained for this purpose;
- the same person, where possible and if appropriate, should conduct all interviews with the child;
- the number of interviews should be limited to as few as possible, and only conducted as strictly necessary for the purpose of criminal proceedings;
- the child may be accompanied by his or her legal representative or, where appropriate, an adult of his or her choice, unless a reasoned decision has been made to the contrary in respect of that person.

The Convention requires that the Party takes the necessary legislative or other measures to ensure that all interviews with the victim or, where appropriate, those with a child witness, may be videotaped and that these videotaped interviews may be accepted as evidence during the court proceedings, according to the rules provided by domestic law.

The Ukrainian criminal procedural law stipulates that individual measures to ensure the best interests of a child witness or victim of a crime should be established, specifically:

- interviews with the child may be conducted in absence of the accused;
- interviews with the child may take place in other premises including outside the court building, via technical means;
- where a court approves a decision to interview a child, the opinions of all parties to the trial shall be considered.

However, *the majority of the above requirements, established by international instruments, are not present in the Ukraine's national legislation. Certain other important procedural matters regarding interviews with children remain unsettled, in particular the requirement to sign a witness or victim's report of the interview by the interviewee, which communicates the report's contents, etc.*

Moreover, international standards of children's rights set out the specific requirements of the interview, and other investigative activities, for all persons under 18 while, according to the criminal procedural legislation of Ukraine, such requirements concern only persons *under 16. Therefore, it is necessary:*

- to bring the Ukrainian criminal procedural legislation in line with international standards of interview procedures, where the victim or witness to a crime is a child: this is even more urgent, given the current stage of development of Ukraine's new criminal procedural code;
- to develop a *methodology of interviews with child witnesses and victims of crimes*, which law enforcement staff should use when interviewing children.

In order to bring the Ukrainian legislation in line with international standards of child participation in criminal proceedings, the draft law "*On Amendments to the Criminal and Criminal Procedural Codes of Ukraine (on interviews with minor victims and witnesses)*" has been developed and submitted to Ukraine's Verkhovna Rada. This draft law provides for various innovations, and is compliant with international requirements for interviewing children, and incorporates the best practices of EU and Council of Europe member states. Approval of this draft law would, in principle, initiate a new approach to children's participation in criminal proceedings.

It should be underlined that the submitted draft law concerns making amendments to Ukraine's CPC, while its provisions should be mandatorily incorporated in *the draft of the new CPC of Ukraine* developed by the Ministry of Justice of Ukraine: so far it is planned to submit it to the Verkhovna Rada of Ukraine for urgent approval.

Even if the said amendments to the Ukrainian criminal procedural legislation are approved, the problem of developing a *methodology of interviews with child witnesses and victims of crimes*, to be used by law enforcement and judicial staff when interviewing children, remains.

Prior to the approval of the relevant regulations, this interviewing methodology may be developed and approved by alternative methods, in particular, through *joint instructions of the heads of the relevant high courts, prosecutors and Police leaders, which would be by nature recommendations and, as such, consistent with the existing legislation*. This methodology may define socio-psychological rules and techniques of court and law enforcement staff communication with the child victim of abuse, or witness, and should contain in particular the following requirements:

- resist so-called "first impressions";
- examine the situation in detail;
- maintain distance with respect to the perpetrator, and do not get into arguments with the subject;
- not to deny the existence of violence, even if it seems that the child is exaggerating or does something to cause you to mistrust or develop a loathing for him/her;
- do not express support or consent if the child victim affirms that she/he is guilty;

- underline that nobody deserves such treatment and that the child has already made the first step to a change for the better;
- do not underestimate the seriousness of the incident that has happened;
- keep calm and behave in an unbiased fashion;
- sympathise with the child victim: give what is due to her/his feelings;
- provide information about shelters for children and other local centres where they can get help.

**3) Upon the close of criminal proceedings, following the court's delivery of judgement, in cases of violence against a child**, the child victim in many cases feels the threat of re-victimisation. This is due to the fact that in cases related to violence against children, the *courts often groundlessly apply probation or prescribe punishments not related to deprivation or limitation of liberty*. This trend has resulted from recent European reforms of the Ukrainian penitentiary system, which promote a gradual transition from punishment-oriented to rehabilitation-oriented justice. On the other hand, this approach demands that the state develops and consistently introduces a system of effective means of preventive and educational work with convicted offenders, the provision of appropriate intervention programs, tailored to the crime, in this case, crimes against children. However, the system currently in place remains inadequate and by sentencing so as to not deprive or limit the perpetrator's liberty, he or she can remain in the vicinity of their victim, or even return to a place of residence shared with their victim: this scenario *endangers the life and health of the child and other family members, and should be addressed by the state*.

To this end, it is necessary to provide, in the Ukrainian legislation, for the option of the perpetrator's removal from such residential premises shared with their victim, either by way of forced division of the residential property, or its forced exchange (if it has been found that the offender possesses no other residential space in which to live). This should apply to all offenders who have compromised the life, health, safety and inviolability of the child, regardless of the perpetrator's title to the residential space where the child lives (right of ownership, right of use, etc.).

It is further necessary to provide, in the Ukrainian legislation, for the timely, temporary removal of a person suspected of sexual crime, or other offences against a child, where the offender cohabits with him or her, via a judicial restraining order, until the court passes judgment on the matter (where no preventive action has been taken against the offender, in the form of, say, taking them into custody).

## **2.2. Conclusions and recommendations on child participation in civil proceedings, taking due account of the child's opinion in the settlement of disputes concerning his/her rights and best interests**

Issues surrounding taking a child's opinion into consideration in civil cases was never the subject of discussions during TRES Project events, however, it was not envisaged to research this aspect as a discrete problem. The project merged the conclusions of the appropriate experts, which were based on the findings of court practices regarding taking children's opinions and interests into account, when trying civil and family cases concerning the necessity to recommend the following steps to courts, to ensure children's best interests and take account of his/her opinion, in particular:

1. Courts should not violate international legal instruments (in particular, the UN Convention on the Rights of the Child, the Council of Europe Convention on the Exercise of Children's Rights, the Convention for the Protection of Human Rights and Fundamental Freedoms ratified by Ukraine) or the Ukrainian legislation, relating to the consideration of children's opinions and interests in civil proceedings. Instead of allowing such violations, Courts should rather indicate in the judgment the ways in which the child's opinion, as well as his/her consent, has been obtained (interview with the child in court's sitting, opinion of the wardship and guardianship authority, testimonies of the parties to an action, etc.). This will also serve to reproduce the court's judgment regarding the position of the child, as interviewed in the course of proceedings, in greater detail.



2. Courts should eliminate the formal treatment of the child's position in dispute settlement, where it is related to his/her property and personal non-property-related rights and interests; should treat the child as *the subject rather than an object of family and civil relations*; and seek contact with the child, rather than ignoring their opinion. Courts should be obliged to create the appropriate conditions for the exercise of children's rights in court proceedings.

3. The *Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine concerning Protection of the Children's Rights,"* dated 21 May 2009, No. 1397-VI, became an important step towards improving the Ukrainian legislation relating to the inclusion of the child's opinion and interests in civil proceedings, bringing it in line with European standards of children's rights. However, the Ukrainian courts rarely refer to Art.27-1 of the Ukrainian Civil Procedural Code when awarding judgments, therefore its provisions have hardly been implemented in proceedings concerning children's rights and interests. This betrays inefficient legislative implementation and a lack of awareness amongst Ukrainian judges, and a new approach needs to be formulated as a result.

4. The courts should ensure that the child has the right to voice his or her opinion, and to be heard where his or her parents - or other persons - are seeking to settle disputes as to his/her education, or place of residence, including those relating to the deprivation of parental rights, restoration of parental rights and disputes concerning property management.

5. The courts should ensure strict compliance with the Ukrainian Family Code, as regards obtaining the child's consent *with respect to adoption, living with a foster family, placing an orphan child or child deprived of parental care with a foster family or family-type orphanage*, where he/she has reached the appropriate age and development level for him/her to be considered capable of voicing their own opinion.

6. It is necessary to engage professional psychologists or teachers with psychological training, as well as, where necessary, to assign a psychological expert to assess a child, at the request of a party to proceedings, or by the court's initiative, in order to assess the psychological state of the child, which should be determined by circumstances subject to proceedings, and may influence his/her opinion concerning the essentials of the case, as well as enabling them to interpret the child's position.

7. With the aim of preventing an apparent gender imbalance in the distribution of parental rights between a child's mother and father, the courts should consider the significance of gender in such cases, and evaluate the actual consequences of their

judgments in view of ensuring equal rights and opportunities to men and women. A gender approach to the settlement of the cases relating to the upbringing and development of children, would prevent the common scenario which causes women to bear a disproportionate childcare burden.

8. Finally, it is necessary to raise the level of children's awareness of their procedural rights in civil proceedings; therefore large-scale awareness campaigns should be held to enable young people to better understand their rights and the means by which they can exercise them.

### **2.3. Recommendations on taking due account of the child's interests in the context of further reforming the judicial system and implementation of an administrative reform in Ukraine**

As early as 2005, the Order of the President of the Supreme Court recommended that the courts *introduce a specialised system of juvenile justice in Ukraine*. At this time, the concept of juvenile justice was restricted to cases of juvenile delinquency only (*criminal justice in juvenile cases*). The concept of juvenile justice needs to be modified, specialist courts should continue to operate, and a new specialist division should be established within the Ukrainian judicial system, which would try all cases concerning children's rights and interests, including offences or objectively unlawful acts, with their full participation.

It is worth considering providing **psychological support services** at local courts, to ensure the engagement of psychologists in court process, so they can provide psychological support to the victims and witnesses of crime, as well as assist judges suffering from professional emotional overload.



It is further necessary to address the establishment of a **system of temporary fostering of children** in Ukraine, which is consistent with the Guidelines on Alternative Care of Children approved by the Resolution of UN GA A/RES/64/142, as well as continue with efforts to deinstitutionalise the existing system, which places orphans and children otherwise deprived of parental care into boarding school type institutions.

Reform of the Ministry of Ukraine for Family, Youth and Sports and the internal structure of the Ukrainian Ministry of Internal Affairs, within the context of the current administrative reform process, must proceed from the perspective of the best interests of the child, demanding the preservation and improvement of the functions and powers in the area of children's rights protection assigned to relevant structural units of central authorities.

### 3. Combating violence against women and children in and outside the family

#### 3.1. Conclusions and recommendations on the improvement of the government policy, the legislative framework and court practices in the field of preventing and combating violence against women and children

The following conclusions and recommendations are based on the outputs of the TRES Project, which aimed to reform the legislative and regulatory framework for preventing and combating violence against women and children, including domestic violence, bringing it in line with European standards in this area, as well as improving national court practices in cases related to violence against women and children, both within and outside the family. One should bear in mind that this section provides general conclusions on combating violence against women and children, which need to be addressed simultaneously with the developments in the protection of children from sexual violence (*Section 1 of the Conclusions and Recommendations*), and combating trafficking in human beings (*Section 4 of the Conclusions and Recommendations*), as violence against women and children principally tends to take these forms.

These Conclusions and Recommendations have been the result of thorough research, numerous themed activities, and likewise related scientific and practical publications defining achievements of TRES Project in this area, specifically:

- an expert legal assessment of Ukrainian legislation's compatibility with European standards in the field of combating violence against children and women, conducted under the auspices of the Project assignment, and debated with leading experts in the field;

- the issue and dissemination of research and a practice manual "*Protecting Women's and Children's Rights by the Judicial and Law Enforcement Authorities of Ukraine*," which focused specifically on the problems of combating violence against women and children, including domestic violence;

- the preparation and dissemination of a unique brochure "*Monitoring Court Practices in Cases of Sexual Exploitation and Abuse of Children as well as of Violence against Women and Children*";

- support of the review and publication of the manual for law enforcement personnel "*Prevention of Domestic Violence*" prepared by the Ukrainian State Research Institute of the Ministry of Internal Affairs;



- the holding of a workshop at the Supreme Court of Ukraine, entitled “Legal Aspects of Prosecution and Prevention of Violence against Women” (Kyiv, 9 October 2009);

- the holding of a round-table discussion on the problems associated with the implementation of the legislation on preventing domestic violence against children by law enforcement and judiciary bodies in Ukraine (Kyiv, 11 December 2009);

- the holding of a training session on the prevention of domestic violence - working with perpetrators (Kyiv, 12 August 2010), etc.

The findings of the expert legal assessment of the *Ukrainian legislation’s compatibility with European standards in combating violence against children and women* allowed the general conclusion to be reached that the current Ukrainian legislation concerning the prevention and combating of violence against women and children broadly complies with existing European norms and standards. However, whilst there is still no specific Convention of the Council of Europe to consult, which exclusively addresses combating violence against women and children (although its active development is in progress), there are nevertheless special recommendations of the Committee of Ministers of the Council of Europe. Thus, the legal experts selected the following instruments from the list of European standards for their assessment:

- the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – the European Convention) and Protocols to the Convention;

- the Council of Europe Convention on Action against Trafficking in Human Beings;

- the Recommendation No. R (85) 4 on violence in the family.

Relevant judgments of the European Court of Human Rights and the practices of some EU member states in this area of legal regulation were recognised as further benchmarks for improving standards in the protection of women and children from violence.

A legal analysis of the Ukrainian legislation against European standards in the field of combating violence against women and children identified the following generic characteristics:

- the Ukrainian government policy regarding tackling violence against women and children is orientated towards Council of Europe instruments and the best practices of several European countries as regards combating this form of violence;

- Ukraine, in implementing its international commitments, seeks to optimise the measures aimed at overcoming violence against women and children;

- the current Ukrainian legislation quite clearly regulates the field of counteracting violence against women and children, through established mechanisms designed to respond to this form of violence and prosecute perpetrators of it;

- in proceedings of cases related to violence against women and children, Ukrainian judicial and law enforcement agencies take insufficient account of international Council of Europe and UN treaties that have been ratified by Ukraine, in particular the European Convention and related Protocols; the UN International Covenant on Civil and Political Rights; the UN Convention on the Elimination of All Forms of Discrimination against Women; the UN Convention against Tortures and other Cruel, Inhuman or Degrading Treatment or Punishment; and the UN Convention On the Rights of the Child. Individuals appealing or reporting violence very rarely refer to these, or any other, international legal instruments.

In consideration of recognised European standards, the following principal areas should be defined as those to be amended within the Ukrainian legal framework relating to the protection of women and children from violence:

- *the prevention of violence against women and children;*

- *the strengthening of criminal liability for the acts of violence against women and children;*

- *the provision of assistance to victims and compensation for damages caused by the acts of violence against them.*

Each of the areas in which standards of women's and children's protection should be raised includes a range of actions reasonable for introduction in the legal framework of Ukraine.

It is worth highlighting the application and improvement of *measures aimed at preventing violence against women and children* as a priority, providing for the establishment of a specialist social infrastructure and promoting the issue to change public perceptions of violence against women and children. These measures are as follows:

- raising public awareness that all violence against women and children, whether within or outside the family unit, is unlawful;

- raising public awareness of possible methods of assistance and protection in the event of violence against women and children;

- the collection, analysis and publication of information about the various forms of violence against women and children and the consequences for victims of violence;

- the creation of specialist institutions for children lacking the appropriate socio-economic living conditions, where they can be provided with meals, recreation opportunities and opportunities to study and develop their creative potential;

- adding information into school curricula on children's rights, help lines, agencies and those services authorised to provide assistance to child victims of the various forms of violence, which children may contact for support;

- adding training courses and specialised training programs into curricula regarding the relevant issues (legal, psychological, sociological, medical) associated with preventing and combating violence against women and children for law enforcement agents, judicial and medical staff, and workers in social institutions;

- continuing active efforts aimed at raising awareness of European standards, and the specifics of the national Ukrainian legislation and law enforcement practices in the domain of preventing and combating violence against women and children among judges, prosecutor's office staff, and the relevant units of internal affairs officers: holding training sessions, workshops and round-table discussions, etc.;

- encouraging those responsible in local government to take due account of the need to more robustly address women's safety and prevent acts of violence in public places, by providing additional lighting in public places, safe public transport, regulating taxi services, and addressing safety issues in parking lots and residential buildings;

- ensure the annual assessment of the regulation and methodical implementation of *the Action Plan of the National Campaign "Stop Violence!" for the period until 2015*, as approved by the Order of the Cabinet of Ministers of Ukraine dated 1 December 2010, No.2154-r.

Among *the activities aimed at strengthening criminal liability for violence against women and children*, the following should be underlined:

- the formation of a coherent conceptual framework for preventing and combating violence against women and children, as a methodological basis for the improvement of the legislation in this field; the generation of essential interdisciplinary categories "abuse of children" and "gender violence," as well as aligning them with the relevant categories ("violence against children", "violence against women", "domestic violence", "exploitation of a child", "sexual exploitation", "trafficking in children", "engagement of a child in criminal actions, prostitution", "coercion to begging", etc.);

- introducing new classifications of acts punishable by law to include regularly repeated offences, for example sustained domestic violence over time;

- aligning the provisions of the Ukrainian CC with the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, dated 25 October 2007 concerning the criminalisation of acts now recognised as crimes in the Convention provisions (*see Section 1 of the Conclusions and Recommendations*);

- eliminating inconsistencies between the provisions of the Ukrainian CC, establishing criminal liability for trafficking in human beings and related provisions of the Convention of the Council of Europe on Action against Trafficking in Human Beings dated 16 May 2005 (*see Section 4 of the Conclusions and Recommendations*);

- stipulating in the Ukrainian CC that acts of domestic violence against women and children, committed by members of the family, as constituent elements and aggravating circumstances of an offence;

- enhancing criminal sanctions for any sexual act, regardless of its nature and means used, where committed against a person without her/his consent;

- enhancing criminal sanctions for any abuse of the vulnerability of a victim, e.g. pregnancy, helplessness, disease, physical or mental disabilities or dependent status;

- enhancing criminal sanctions for violence committed by a perpetrator abusing his/her official position, in particular, by a teacher, educator, or medical practitioner abusing his/her official position with regard to the child.

The provision of *post-trauma assistance to victims and the compensation of damages inflicted by violence against women and children* should aim to 1) identify the emotional and financial damage suffered; and 2) restore psychological health and compensation for inflicted damages. To this end, it is necessary to provide for the following measures:

- the engagement of psychologists to work with women and children who have been the victims of violence in order to identify the actual scope of the violence committed and, consequently, the scope of emotional damage caused;

- the running of intervention programmes, aimed at encouraging the perpetrators of violence to re-evaluate their behaviour and make them aware of their liability for their actions, enabling them to address their behaviour and to end the violence;

- to ensure interaction and coordination between intervention programmes focused on perpetrators, and those responsible for the rehabilitation of victims;

- the further establishment of specialist institutions in all regions of Ukraine, where women and children who have fallen victim to violence may receive emergency psychological assistance and temporary shelter as appropriate, guaranteeing their accessibility for the most vulnerable categories of victims (former migrants, refugees, national minority representatives, disabled persons, etc.);

- the introduction of legal mechanisms to mitigate victims' distress, and guarantee them the opportunity to apply for compensation for any emotional and financial damage they have suffered.

On 1 December 2010, the Ukrainian Committee of Verkhovna Rada for Family, Youth Policy, Sports and Tourism discussed the expert assessment of the Ukrainian legislation's compatibility with European standards concerning the prevention of violence against women and children, within the scope of the TRES Project implementation and other project developments in this field, in order to communicate them to Ukrainian MPs and those policy makers responsible for the elaboration and implementation of the policy in the field of protecting and safeguarding women and children from all forms of violence.

An urgent problem demanding special attention is **court practices in proceedings concerning violence against women and children**, as it is the effective protection of the courts that gives real meaning to international and national standards on women's and children's protection.

*The monitoring*

*The monitoring of court practices in Ukraine, cases relating to violence against children and women*, was conducted within the context of the TRES Project. This monitoring was required as a result of the necessity to provide methodological support for legal proceedings, to enable the uniform application of the legislation relating to the rights of women and children by Ukrainian courts, in cases relating to violence, exploitation, abuse and the violation of gender equality. The principal sources of data for the monitoring project were statistical reports, derived from data provided by the State Court Administration of Ukraine and 126 court judgments delivered in criminal, administrative and civil cases relating to the various forms and facts of violence against women and children, which have become effective in law.

*The most significant problems requiring solution, inherent in court practices in cases of violence against women and children, were revealed in the course of the monitoring to be:*

1. Official statistical data on the number of women and children falling victim to violence, demonstrates the law enforcement agencies' and the courts' focus on investigating and prosecuting more serious crimes, neglecting those they deem to be less serious, which limits the system's ability to prevent more serious forms of violence.

For example, according to data collected in 2009, the number of female victims of murder with intent (1172 persons) was **35.5 times** higher than the number of women who suffered battery and torture (33 persons); correspondingly, almost **8 times** more children were the victims of murder with intent (143 children), than those who suffered battery and torture (18 children). Approximately the same proportions are observed in the data on victims of trafficking in human beings and coercion into prostitution.

At the same time, over one hundred and four thousand appeals and reports on domestic violence accompanied by battery, incidents of torture, and minor bodily injuries were filed with the law enforcement bodies in 2009; only rarely were victims of domestic violence able to get protection in criminal proceedings.

The above data visibly demonstrates that the current legislation is inadequate and that some significant implementation issues have rendered inadequate the victims' access to justice.

2. Cases relating to more intimate aspects of life are not routinely heard in closed court sessions, although such a possibility is provided for in Art.20 of the Ukrainian CPC, in particular in cases relating to sexual crimes, and other cases where the prevention of disclosure of intimate details of the parties' personal lives is desirable to ensure the safety of those under the system's protection.

3. The legislation on safeguarding parties to criminal proceedings has not been implemented to its fullest extent, thereby leading to the re-victimisation of the victim of violence and abuse, subsequent to them making their complaint to the authorities.

4. The analysis of court practices in cases of violence against women and children has shown that in some cases victims have not been provided with adequate legal support thereby violating their rights as victims.

5. The application of specialist skill, at that point in a case where the investigation tries to establish the circumstances of the violence suffered, is vital. It should be recognised that forensic, medical, psychological, psychiatric and other expert examinations are essential for cases in this field.

6. In cases relating to violence against women and children, victims currently do not get appropriate satisfaction, as they often do not file applications for compensation, or their legal representatives are not aware of their rights to compensation for both the tangible and intangible damage caused by the violence they have suffered.

7. When trying a case, the courts should establish the cause and circumstances of activities that have resulted in an unfavourable result, and should respond by a separate decision addressed to individual officials, institutions, organisations, to eliminate the

shortcomings detected in their activities. However, this influential mechanism was not actively used by courts.

8. Often courts unhelpfully apply probation, prescribe a less severe sentence than the recommended minimum, as established by the provisions of the Ukrainian CC relating to violence against women or the abuse of children, in particular: the commission of a sexual crime against a child, trafficking in human beings, illegal acts of domestic violence, etc.

Whilst recognising that the trend to make sanctions against perpetrators fairer is legitimate, it is necessary to highlight that the fair treatment of those convicted of crime should not result in a culture of impunity, which would make society unsafe and perpetuate crimes, such as violence against women and children, endangering victims and infringing their rights.

9. Courts routinely experience delays in trying cases on the protection of children's rights, in spite of Art.40 of the UN Convention On the Rights of the Child, which states that any case concerning a child should be determined, without delay, by a competent, independent and impartial authority or judicial body in a fair hearing according to the law.

10. On the whole, the generic reasons underlying violations of the law in court proceedings, in cases relating to violence against children and women are:

- inexperienced investigators and judges (some of whom have yet to master the specific requirements relating to investigating and trying cases of this nature);
- professional overload of staff;
- desire to simplify proceedings;
- neglect of the legal requirements to safeguard and guarantee higher standards of *legal protection to children and women*, due to their vulnerability, based on their age, dependent status, gender stereotypes and other discriminatory factors.

11. In order to improve proceedings in cases of the nature researched herein and ensure the formulation of uniform standards of legal safeguards for women and children, the Higher Specialized Court of Ukraine for Criminal and Civil Cases, and the Ukrainian Supreme Court (taking into consideration the dynamics of their power to regulate and reorganise court practice) should develop a uniform methodology to this end, on the basis of which ***Ukrainian court practices can be standardised*** in cases relating to violence against women and children. They should likewise elaborate recommendations concerning improvements, and facilitate the strengthening of the *rule of law and fundamental human rights* in Ukraine.

### **3.2. Reforming the Ukrainian legislation in the area of defeating and preventing domestic violence and implementing it in practice**

In the course of implementing the TRES Project, special attention was given to matters relating to overcoming domestic violence and its consequences. A complete picture of the current scope of domestic violence is not available, either nationally, or regionally, because the family as a system is not transparent, the relationship between victims and the perpetrators of violence can cloud the issue, and there are limited means of access to the family for social workers and other authorised persons. In addition, there is insufficient information on the consequences of violence provided by the employees of medical and educational institutions etc. However, most of the representative sociological research and official statistical data show that nearly 90 % of acts of domestic violence are committed against women and children. Thus, as of 1 October 2010, 99 796 persons were entered into the record of the interior agencies for preventive purposes, for committing acts of domestic violence, including 6 614 women, 93 008 men and 174 underage persons.

Despite some gaps in the Ukrainian law and limitations in the practical activities regarding overcoming violence against women and children, it is worth mentioning the existence of a separate legal act in Ukraine, which is directly aimed at the prevention of domestic violence – the Law of Ukraine on Preventing Domestic Violence No. 2789-III dated November 15, 2001. According to article 15 of this Law, family members who have committed acts of violence in the family are held criminally, administratively and civilly liable.

*Numerous problems arise when offenders are held legally liable for acts of violence in a family, in particular:*



1. Law enforcement bodies do not always properly qualify *acts of domestic violence* understanding it only as beatings having obvious physical consequences. A person's criminal behaviour, which constitutes one of the various manifestations of domestic violence (physical, psychological, economic or sexual), may contain indicators of several types of violence (murder, bodily injuries of various degrees, beatings, torments, torture, murder threats, sexual abuse, rape, using a child for begging, involving children in criminal activities etc.)

2. Of all the consequences of physical domestic violence, the most frequent involve the physical health of the victim, in the form of intentional minor bodily injuries (article 125 of the

Criminal Code of Ukraine), beatings, or torture (part 1, article 126 of the Criminal Code of Ukraine). Such criminal acts relate to private actions, which are only prosecuted in court upon the request of the aggrieved party, who must support the prosecution himself/herself; thus, only few such cases actually get to court. However, in the context of domestic violence, the victim often feels helpless and dependent on the accused party. Therefore, cases associated with domestic violence committed both against children and other family members, who have vulnerable or dependent status, must be initiated *by the prosecutor when the complaint of the aggrieved party is not available as well, or must be submitted by the court, as provided for by article 111 of the Code of Criminal Proceedings of Ukraine, to the prosecutor to instigate proceedings and ensure a pre-trial investigation.*

3. Contrary to the criminal and civil law, the Ukrainian administrative law contains a special provision for the commission of domestic violence. Such actions are provided for under article 173-2 *Committing acts of domestic violence, violation of a protective warrant, or failure to undergo an intervention program of the Ukrainian Code of Administrative Violations (hereinafter – article 173-2 of the UCAV).* Although article 173-2 of the UCAV contains material logical contradictions (in particular, points to the “use of physical violence, which has not inflicted physical pain”, “as a consequence of which (...) damage has been made to the physical health of the aggrieved party”, this article is actively applied in practice.

A considerable number of persons are held administratively liable for domestic violence, however, with no observable effect. Ukrainian law regarding combating domestic violence is aimed primarily at its application in identifying the offence, rather than prevention of the crime itself. Penalties provided for by article 173-2 of the UCAV are inadequate and are often problematic for a family because, as a rule, the offender is unemployed. The implementation of the court's judgement, often the payment of a fine, is detrimental to other family members. When determining the penalties under article 173-2 of the UCAV, the courts

have to be more active in identifying the forms of penalties which relate to personal negative consequences for the offender only, in particular *community service or administrative arrest*.

4. Domestic violence always affects a child's interests, even if it takes place between adult family members. When considering cases concerning the initiation of a person's administrative liability under articles 173-2 of the Ukrainian Code of Administrative Violations, where a child (children) has the status of the aggrieved party, or is a witness of domestic violence, he or she should be interrogated by the judge in court regarding the offender's attitude towards the person involved. The court may take into account the opinion of the child in such cases, when making judgment.

5. The failure to fulfill those duties relating to child rearing, which may consist of various omissions relating to ensuring the necessary living, education and rearing conditions and may bear the signs of cruelty towards minors or underage persons, parents or persons substituting them are held administratively liable based upon part 1, article 184 of the UCAV.

6. When cases, which concern the initiation of administrative proceedings under articles 184 and 173-2 of the UCAV, are considered, the court predominantly raises the requirements of articles 280 and 245 of the UCAV. *Failure to fulfill the requirements concerning the comprehensive, complete and impartial clarification of all circumstances of the case by the court, and the perception of such cases by the courts as being of secondary importance, results in purely pro-forma, superficial judgments on said administrative violations, which renders the institution worthless as a means to counteract child cruelty.*

7. Judges and law enforcement agents must be guided by the notion that domestic violence is the most widespread manifestation of violence against women and children, and is a violation of their basic human rights. Under international and European standards, domestic violence is an illegitimate act, *which is based on gender stereotypes, the traditional sharing of social roles in the family context and is predominantly discrimination on the grounds of gender or age.*

Problems in the field of combating domestic violence arise not only at the level of law enforcement. They are caused by the respective status of legislation in this field: the Law of Ukraine on Preventing Domestic Violence has considerable limitations and there are inconsistencies in the by-laws concerning this issue, which can primarily be identified as the following:

1. The title of the law on Preventing Violence in a Family itself (hereinafter – the Law) calls for some criticism, as it does not include other forms of combating domestic violence, as well as restricting the range of entities to which the Law applies to family members only, compared to the notion of “domestic violence” generally used in UN and European standards;

2. The Law contains a mechanism by which violence within the family can be prevented. However, this mechanism is inadequate and ineffective, containing gaps and inconsistencies, both in the text of the Law itself, and with other regulations, preventing its proper and effective implementation;

3. In the context of implementing the requirements of the Law, the constitutional principle of non-interference of the state into family and private life should be observed (protection of the right to privacy), in light of the requirements regarding the inviolability of property rights, whilst appreciating that, in many cases, the latter impedes the effective prevention and prosecution of domestic violence;

4. The Law does not determine generic social activities for the prevention of domestic violence, and the list of such actions is contradictory, inefficient and inadequate in the context of related procedures and the basis for their use in domestic violence cases;

5. Protective warrants and the referral of the offender to intervention programmes by law enforcement agents, as provided for by the Law, do not satisfy UN and European standards regarding combating domestic violence. Any legal limitations of the rights of a specific person, including those associated with the prevention of domestic violence, are a

prerogative of the court; so the implementation of said actions can depend entirely on the judiciary;

6. The range of persons to whom the Law applies should be specified, because the Law does not currently extend to ex-spouses, although they may be residing in the same premises, ex-partners and other persons to whom protection against domestic violence should extend according to international standards;

7. The law does not take into account the practical specifics of preventive action in families where children have or may become victims of domestic violence, and contains inconsistencies rendering it considerably more difficult to protect a child who has suffered from the gravest forms of domestic violence, which has all the attributes essential to a crime. Therefore, a more detailed specification of the mechanism for the protection of children, as well as physically challenged persons, who are most vulnerable to such acts of violence, is needed.

8. Currently, the Law does not provide for guarantees of explanation of rights and duties to the victim and the offender;

9. In the list of bodies and institutions defined by the Law, to which actions for the prevention of domestic violence are entrusted, no bodies and institutions are specified, which actually take part in the prevention of domestic violence and the confrontation of its consequences, in particular, educational bodies and institutions, health care agencies, social care and children's services etc.

10. Inconsistencies in the by-laws governing the procedure for acceptance and consideration of applications and messages on cases of domestic violence should be eliminated, especially in cases where such violence concerns a child or contains the elements essential to a crime.

Thus, the contemporary state of the Ukrainian law on the prevention of domestic violence calls for a fundamental review, within the framework of the current legal reform on the prevention of domestic violence. This should not be comprised merely of separate amendments to the existing law; a new version of the Law of Ukraine on the Prevention of Domestic Violence should be drafted and approved, based upon international experience and national practice in Ukraine.

For the purpose of eliminating limitations in the Ukrainian law in the area of preventing domestic violence, the drafting of the new version of the Law of Ukraine on Prevention of Violence in a Family was undertaken under the Ministry of Ukraine for Family, Youth and Sports (as of now reorganised into the Ministry for Education and Science, Youth and Sports of Ukraine). With the support of international organisations, *an interdepartmental task force was set up*, which drafted the first version of the *draft Law of Ukraine on Preventing and Combating Domestic Violence*, as well as a range of draft amendments to other Ukrainian legislative acts, in particular, article 173-2 of the UCAV.

A considerable contribution to the improvement of the said draft has been *the legal expert opinion* on the proposed amendments to the Law of Ukraine on Prevention of Violence in a Family, obtained at the request of the TRES project, which was carried out by the international expert Ms J. Turner (London University, Child and Women Abuse Studies Unit).

The conclusions and results of this legal expert opinion were taken into account during the process of improving the draft Law of Ukraine "on Preventing and Combating Domestic Violence" (hereinafter – Draft Law), in order to satisfy all the fundamental requirements of UN and European standards for combating domestic violence, and takes into account the national specifics of this socially dangerous phenomenon. In particular, the Draft Law:

- introduces domestic violence as a concept into the domestic Ukrainian law;

- considerably broadens the range of persons to whom the legislation on preventing and combating domestic violence applies;
- fundamentally reforms the system and the competencies of bodies and institutions to whom actions for prevention and counteraction to domestic violence apply;
- determines the list of rights of those who have suffered from domestic violence;
- determines the system of general social activities for preventing and combating domestic violence;
- fundamentally reforms the system of special actions for preventing and combating domestic violence, in particular it implements the institution of the restrictive warrant, which is intended to become a truly efficient means of combating domestic violence;
- empowers the courts to issue a protective warrant and also refer the person who has committed the violent act to an intervention program;
- implements a fundamentally new system of action, as part of the restrictive warrant developed under international and European standards of combating domestic violence, in particular:
  - warning the perpetrator of domestic violence that no contact is allowed with the victim, either at their home, temporary accommodation, place of work, training establishment, or any other place;
  - enforcing a temporary prohibition of the perpetrator's exercise of parental rights towards the child (children) during the effective period of the restrictive warrant, except for the right to grant the parents' approval to take the child outside the territory of Ukraine;
  - requiring that a person who has committed acts of domestic violence should leave the common place of residence with the victim for an indefinite period, not greater than three months, irrespective of who owns the property by virtue of ownership title;
  - requiring that a person who has committed acts of domestic violence should eliminate any obstacles to the use, by the victim, of the property, which is in their joint ownership, or is owned by the victim, etc.

Thus, the introduction of changes to the Ukrainian law on the prevention of domestic violence, which have been proposed by the Draft Law, and its urgent approval for the purposes of its implementation by the Program of Actions relating to the National Campaign Stop Violence! for the period until 2015, should be supported through all possible means.

In addition, *the following propositions remain necessary in the area of preventing and combating domestic violence:*

- ensuring financial and other support, in particular: providing temporary housing for women (or women with children) who are trying to split up with violent partners; setting up a special fund for the compensation of domestic violence victims, over and above compensation for material losses, which must be carried out through court proceedings;
- strengthening the focus on work with offenders, ensuring a functioning mechanism of correction programmes for persons who have committed domestic violence, in all regions of Ukraine;
- implementing security programmes for women as an inseparable part of correction programs for persons who have committed domestic violence, within the context of social services and actions aimed at the rehabilitation of victims;
- setting up an intergovernmental model for co-operation between state and public institutions, based on the clear coordination of activities between the various specialised ministries and their local links (units), with the compulsory involvement of the local community, to enable coherent, consistent and effective progress in the area of combating domestic violence.

#### 4. Prevention of human trafficking, especially trafficking in women and children

The problem of human trafficking, especially the trafficking in women and children, has been given due consideration in the course of the TRES Project's implementation, and has become a key subject of discussion during respective Project activities, in particular the scientific and practical workshop "The judge facing child abuse and human trafficking: *International standards and experience*" (Lviv, 26-27 January 2011), and others.

A unique training module – *the lesson in secondary schools on combating human trafficking* – was developed as part of the Project, presented at the training session for teachers (Alushta, 15-16 June 2010) and widely distributed among the stakeholders.

Based upon the results of the training session, methodological recommendations were approved for teachers to conduct a secondary school class on combating human trafficking. Particular emphasis was placed on the necessity of the following:

- studying and analysing the human trafficking concept and distinguishing the difference of this from other forms of violence or cruel treatment;

- providing up-to-date practical examples of human trafficking, rather than only its historical aspect;

- focusing on the fact that *any child can become a victim of human trafficking, not only children from poor families;*

- the joint development by trainees of the "security plan" and a refusal to use the lecture method exclusively, but rather implementing interactive forms of work (small groups, "brainstorming" etc).

With a view to preventing human trafficking, it was recommended that the Ukrainian Ministry for Education and Science, Youth and Sports should incorporate the recommendations on combating human trafficking into secondary school programmes, which was developed as part of the TRES Project into compulsory materials for Ukrainian schools. The lesson itself should be included in the school syllabus and it should be ensured that teachers undergo the respective training (training courses, workshops etc).

*Based upon the results of implementing TRES Project activities, key problems were identified in the area of preventing and combating human trafficking, especially the trafficking in women and children, in particular:*

- no financing exists to support victims of human trafficking;

- no rehabilitation centres are available for women and children who are victims of human trafficking;

- the absence of interpreters, female investigation officers or psychologists, who could specifically help victims of human trafficking;

- the focus of law enforcement bodies on the investigation of crimes relating to human trafficking, rather than the prevention of such crimes;



- the complexity inherent in the identification of cases relating to human trafficking, in view of a lack of sufficient information and the victims' readiness to co-operate;
- the lack of specialised knowledge of law enforcement personnel, in the field of the prevention of human trafficking, especially the trafficking in women and children, and a negative attitude towards the victims of such crime, which may result in lost trust on the part of victims;
- an improper system of protective means to guarantee the security of the victims of human trafficking and the protection of their human rights;
- no adequate analysis of the status of violence among children at school ("horizontal violence") and its grounds is available.

*The following action steps in the area of combating human trafficking, taken by Ukraine, should contribute to the resolution of these problems:*

1. Based upon the Action Plan of the Council of Europe for Ukraine in 2008-2011 of 25 June 2008, by Law No. 2530-VI of 21 September 2010, Ukraine has ratified the *Council of Europe Convention on Action against Trafficking in Human Beings* adopted on 16 May 2005, in Warsaw, which came into effect for Ukraine on 1 March 2011. The provisions of this Convention should make a considerable contribution to the improvement of the system of actions for combating such major forms of violence as human trafficking, especially trafficking in women and children.

2. A Resolution of the Ukrainian Cabinet of Ministers No. 2257-p of 15 December 2010 approved the *Concept of the draft Law of Ukraine on Combating Human Trafficking*, which takes into account that human trafficking is the crime which applies to children and women the most, due to their vulnerable status. The adoption of the Law of Ukraine "on Combating Human Trafficking" should help to introduce the provisions of the recently ratified Council of Europe Convention on Action against Trafficking in Human Beings in legal practice in Ukraine.

3. For this purpose, an expert appraisal of the draft Law of Ukraine on Combating Human Trafficking should be carried out to establish its compliance with the Council of Europe Convention, taking into account the best practices and experience of other countries, members of the Council of Europe and the EU.

4. The compliance of the provisions of article 149 of the Ukrainian Criminal Code, with the definition of human trafficking and other provisions set forth in the Council of Europe Convention on Action against Trafficking in Human Beings, should also be analysed.

5. The main areas for improvement lie in the establishment of criminal liability for using the sexual services of a person who has suffered from human trafficking, if the person who has made use of such services knew about the human trafficking in advance. It should be determined whether this is a crime against public morals, or against a person and their dignity. In addition, methods to establish clients' criminal liability for the purchase of sexual services from children should be improved etc.

6. The improvement of court practices is an urgent need, without which effective action for the prevention of human trafficking cannot be taken. The activities of the court system should be aimed at the protection of rights and legitimate interests of victims, by developing the mechanism for the exercise of their rights and compensation of harm caused to them, as well as intensifying efforts for the prevention of public victimisation. With this purpose in mind, the Ukrainian Supreme Court, or a High Specialised Court of Ukraine for Criminal and Civil Cases, should *standardise Ukrainian court practices in cases of human trafficking and related crimes, as well as develop recommendations regarding an improvement of this practice.*

## 5. Implementing the standards of the European Social Charter (revised) in the area of protecting the socio-economic rights of women and children and ensuring gender equality

A considerable part of achievements and recommendations, based upon the results of the TRES Project's implementation, concerns the necessary reforms in the area of law-making and public policy, as well as the strengthening of the qualifications of relevant persons, with a view to implementing the standards of the European Social Charter (revised) (CETS No. 163) and ensuring gender equality in the Ukrainian society.



These issues were the key subject of discussion during, for example, the international workshop *Mainstreaming the Gender Perspective into Legislation, Policies and Programmes* (Kyiv, 15 – 16 April 2010), the international conference *Protecting Women and Children through Human Rights based instruments* (Yalta, 2 - 3 June 2010), and the international workshop *Strengthening the Protection of Children's Rights through the European Social Charter (revised)* (Kyiv, 15 – 16 February 2011).

The European Social Charter (revised) (hereinafter – the Charter) serves as the basis of the *statutory objectives of the Council of Europe, namely **democracy, rule of law and***

**human rights**. Ukraine ratified the Charter by virtue of the Law of Ukraine of 14 September 2006 No. 137-V, having acceded to 27 articles (74 paragraphs of the Charter). Thus, Ukraine has confirmed its European choice and undertaken obligations to contribute to ensuring reliable grounds for exercising the rights and freedoms of citizens in all their forms. At the same time, the Verkhovna Rada *has not ratified three out of the nine compulsory articles*, including article 12 (the right to social security), article 13 (the right to social and medical assistance) and article 19 (the right of migrant workers and their families to protection and assistance). Neither has Ukraine acceded to article 4.1. of the Charter, which guarantees the right to fair compensation (to recognise the right of workers to remuneration guaranteeing decent living standards for them and their families). Otherwise, all the said rights (except the rights for migrants) are guaranteed by the Constitution of Ukraine.

Upon ratification of the Charter, the Ukrainian Government approved an *Action Plan for the implementation of the provisions of the European Social Charter (revised) for 2007-2010* (Decree of the Ukrainian Cabinet of Ministers No. 237-p. of 26 April 2007). This action plan *has to become an effective instrument for monitoring the implementation of the Charter's provisions by Ukraine*, which can be used both by international monitoring bodies or groups of international experts and state bodies responsible for the implementation of the Charter, as well as public Ukrainian organisations working in this field.

In 2011 the Council of Europe will celebrate the 50<sup>th</sup> anniversary of the Charter. This celebration will take place during the presidency of Ukraine in the Committee of Ministers of the Council of Europe. Ukraine should make its contribution to the celebration of this anniversary, by taking the relevant action for that purpose, in particular:

- to accept all or some of the provisions of the Charter, which it has not yet ratified;

- to accept the *Additional Protocol to the European Social Charter (revised) providing for a system of collective complaints*. It should be emphasised that, contrary to the decisions of the European Court of Human Rights in cases decided against Ukraine, the procedure of consideration of collective complaints is not threatening the state with additional state budget expenditure for payment of compensation to individuals: the decision of the European Committee of Social Rights only contains actions of general nature, based on the consideration of individual complaints, which the country has to take to eliminate the identified violations of, or non-compliance with, the provisions of the Charter;

- take action to properly prepare for, and respond quickly to, the conclusions of the European Committee of Social Rights, based on the results of consideration of the annual reports of the Charter state parties, to ensure rapid assimilation of these conclusions and their communication to the public;

- ensure effective action to prevent potential violations of the Charter;

- strengthen the level of awareness of the Charter among judicial and law enforcement bodies, other state authorities, social workers, researchers, teachers and the public in general;

- contribute to the effective implementation of the provisions of the Charter in the Ukrainian legal system, through its use in court practice. As part of the Ukrainian domestic law, the Charter is subject to direct application by the Ukrainian courts and other government bodies and has prevailing legal effect, where this conflicts with the Ukrainian domestic law.

*The courts may apply the provisions of the Charter during consideration of particular cases:*

- to “strengthen” their interpretation of the provisions of the Ukrainian domestic law, in the light of European human rights standards;

- to broaden, or narrow, their interpretation of the provisions of the national law, according to the requirements of the Charter;

- to directly apply the provisions of the Charter in cases when separate provisions of domestic Ukrainian law do not satisfy its requirements.

Throughout their application of the Charter’s provisions, the courts must take into account the interpretations contained in the conclusions and decisions of the European Committee of Social Rights.

The European Social Charter (revised) is an extremely important and multifaceted document, which touches upon numerous areas of social life. Its scope includes housing rights, health protection issues, education, employment, and social insurance, as well as ban on discrimination. Although the Charter protects the rights of all persons, *children, women and senior citizens* are singled out specifically as requiring particular protection of their fundamental rights, in view of their role and status in society. Special emphasis in the Charter is made on gender equality issues. However, *a number of problematic issues exist in Ukraine in the area of the protection of children’s and women’s rights, as well as with regard to ensuring compliance with the principle of equal rights and opportunities for women and men, in particular:*

1. Child labour in Ukraine, in particular the earnings derived from the hard labour of children who have not reached the appropriate age (15 years), is quite often the only means of subsistence for those children and their family members. In some social groups there is a prevailing perception that child labour is impermissible and that its results cannot therefore be used by low-income families: however, all actions should be taken for the protection of children's rights in the area of labour and employment under the international obligations of Ukraine, irrespective of the position of some citizens or their associations, for which purpose the following action should be taken:

- *the conditions should be created for the proper combination of children's labour with their education;*
- a list of work should be determined, for which the use of child labour is prohibited;
- registers should be set up, indicating the type of work that can be performed by children up to 15 years of age, as well as those in the 15 to 18 year age bracket, in all sectors of the economy;
- a database of all low-income families should be created, together with a transparent system to determine the required amount of social assistance they receive, and the introduction of a system of indicators to determine their social and legal status;
- the facilitation of a system in which the involvement of children in the implementation of Charter provisions is ensured, as part of the Council of Europe's strategy of building a Europe, not only for children, but jointly with children.

2. The *legislative support of equal rights and opportunities for women and men in the social and economic fields*, the foundations of which are outlined in Section IV of the Law of Ukraine on Ensuring Equal Rights and Opportunities for Women and Men, provides for a range of actions targeted at eliminating discrimination on the grounds of gender in employment (including prohibition of the requirement concerning a certain gender of the applicant in advertisements), career growth, qualifications enhancement and retraining, in collective contracts and agreements, in the area of entrepreneurship, and social protection (articles 17 - 20 of the Law). However, these legislative requirements are not fully implemented in the area of labour and employment, as well as the marketing of services, which is evidenced by the official statistics, which show in particular: women's salaries are on average 30% lower than men's, there are still gender and age requirements for applicants in job advertisements, and sexism remains common in advertising.

The current Labour Code of Ukraine contains a considerable number of provisions stipulating *additional guarantees of women's employment rights* and provide for certain advantages relative to men, concerning primarily working women with children and other family members in need of care (in particular, articles 174 -186 of the Labour Code of Ukraine). The majority of *social guarantees relating to the care of children* make the woman the principal subject of such guarantees (articles 24, 28-32 of the Law of Ukraine on State Support to Families with Children etc).

Thus, a situation has occurred where women are given more advantages than men in the area of employment and occupation, however, such provisions weaken women's competitiveness in the employment market, as employers view being so "encumbered" with additional obligations unfavourably.

*A protectionist approach to the current Ukrainian Labour Code in practice has an adverse effect and strengthens the inequality of opportunities of women and men in the area of employment.* Such protectionism should be deleted from the new Labour Code, which is currently being discussed at the Verkhovna Rada of Ukraine. A "substantive" model of equality between women and men should serve as its basis, according to the Charter and other international obligations of Ukraine, which takes into account the differences between them, but is aimed at ensuring real equality of opportunity for both, and to which a gender expert's examination of the draft Ukrainian Labour Code will contribute.

3. The *issue of sexual harassment, especially harassment in the workplace, which is recognised as discrimination on the grounds of gender* under international standards for the protection of women's rights and the Law of Ukraine on Ensuring Equal Rights and Opportunities for Women and Men remains topical in Ukraine. Contemporary European law includes a new principle of the burden of proof, as determined in *Directive 97/80/EC on the burden of proof in cases of discrimination on the grounds of gender*, which is based on the presumption that such harassment has taken place as a result of the victim's gender. The person against whom a claim has been filed carries the burden of proving that the equality

principle has not been breached, in particular, that the reason for dismissal was not the refusal to have sex, but other legal grounds provided for by the labour laws of Ukraine.

Ukraine must *recognise the principle of transferring the burden of proof in cases of sexual harassment, and other forms of discrimination on the grounds of gender*, and to enshrine it in the Ukrainian law, providing the necessary clarifications to judges, attorneys and other practicing lawyers.

4. One of the most efficient methods in combating discrimination on grounds of gender, and other forms of discrimination, is the implementation of *temporary special measures* - or the so-called *affirmative actions* - based on the concept of allowing differences in attitude to persons on the basis of their differing social status, for the sake of preventing their actual discrimination (discrimination of the result).

The Law of Ukraine on Ensuring Equal Rights and Opportunities of Women and Men provides for the opportunity to introduce special temporary actions, both at governmental and non-governmental levels (businesses, institutions, organisations and public associations etc). The possibility to take affirmative action is provided for by *10 out of 24 articles of the Law*, in particular, articles 1, 3, 7, 12, 16, and 19, which demonstrate the breadth of their anticipated application. However, the Law does not stipulate precisely which affirmative actions can be taken, only providing for abstract implementation possibilities.

Examples of affirmative actions could include:

- the implementation of gender quotas in party lists at parliamentary elections;
- the granting of employment advantages in public services to persons of that gender, the representatives of which are fewer at a given hierarchical level, or in a specific area of activity, where applicants' qualifications are equal;
- the approval of a gender quota policy in "big business" when employing managerial staff in large industrial companies and financial-credit institutions, for the purpose of ensuring favourable conditions for women's access to economic resources;
- by providing economic incentives for men to stay on paternity leave for some time.

However, despite the broad scope of affirmative action provisions, such action is almost never taken in Ukraine. The UN Committee on the Elimination of Discrimination against Women has recommended that Ukraine starts to take affirmative action in all areas of social life. For this purpose the following actions are needed:

- to draft an action plan regarding the implementation of such temporary special actions;
- to develop and state new criteria for such special temporary actions in a separate act of domestic law, according to international standards, in particular, the general recommendation No. 25 of the UN Committee on the Elimination of the Discrimination against Women, for the purpose of preventing the ability of the state, corporations or public associations to abuse;
- to carry out an outreach campaign, broad in scope, regarding the potential for affirmative action and output requirements to positively affect the implementation of the law, by representatives of authorities, local government, business entities and interested public groups.

*Therefore, in the light of implementing the provisions of the Charter carried out in the context of the TRES Project, action taken has enabled the following results:*

- the neglect of the principles of the European Social Charter (revised) and a failure to observe the fundamental values of the Council of Europe, in particular those ensuring the equality of women and men, is having a detrimental effect on the socio-economic development and social demographic indicators of the Ukrainian state;

- the support of women's social rights and the introduction of corresponding standards in Ukraine, have resulted in the implementation of a paternalistic approach: women as objects of protection, not as the subject promoting their own rights. As a consequence, a woman's employment places a considerable additional financial burden on the employer, making women less competitive in the labour market;

- an important element in implementing the provisions of the Charter, is the introduction of the practice of budget gender analysis as a mechanism for communicating the advantages of supporting the equality of women and men both to employers themselves, and within the country's broader economic context;

- the domain of information in Ukraine is extremely aggressive from the viewpoint of implementing sexist messages and directives, which not only humiliates a woman's dignity, but also considerably complicates activities aimed at asserting the equality of men and women;

- the Ukrainian education system still does not have an appropriate gender component in the development of training programs – both in the humanities and specialised professional training;

- high officials (including through the ongoing rotation of staff and legal confusion) still do not understand the necessity to comply with and implement gender equality principles.

*With a view to implementing the standards of the European Social Charter (revised) in the area of protecting the socio-economic rights of women and children, and ensuring gender equality, it is necessary:*

1. to focus the attention of government entities and state institutions on the necessity to ensure and comply with the procedure of observing the provisions of the Charter, which is part of the Ukrainian domestic law;

2. for government entities, state authorities at various levels, local government, judicial bodies and non-governmental organisations, to take into account the recommendations of the UN Committee on the Elimination of Discrimination against Women, the UN Committee on Children's Rights, and other respective international institutions, in the context of the efficient implementation of the Charter provisions;

3. for the appropriate central government bodies to consider the issue of harmonising national law with international standards, for the purpose of further ratifying the Charter's principal articles – articles 12, 13 and 19 - as well as a range of other international legal instruments, in particular the Convention of the International Labour Organisation and the European Code of Social Security;

4. for non-governmental analytical centres and other NGOs, state scientific research institutions and the analysis units of central executive bodies to draft proposals regarding the harmonisation of domestic law with international standards, for the purpose of further ratifying the Charter's provisions described above;

5. to ensure the effective activity of advisory bodies (public councils, interdepartmental coordination boards etc.) as those representing the interests of the community in decision making, improving its impact upon decision making;

6. to change the approach towards the determination of social standards, and improve the means of identification and combating poverty, taking into account the basic principles of the Council of Europe, in particular, those set forth in the Charter;

7. to improve the system of gender and social expert examination, aimed at forecasting and identifying the consequences of signing international treaties and adopting acts of domestic law aimed at the protection of women's and men's rights, ensuring gender equality etc.;

8. to contribute to a stronger integration of central executive bodies for the purpose of creating a single intergovernmental strategy for the promotion of gender equality, preventing discrimination and protecting children's rights;

9. to consider the expediency of introducing the position of Ombudsperson for Gender Equality and Ombudsperson for the protection of children's rights, at both national and regional levels;

10. to reform the Ministry of Ukraine for Family, Youth and Sport as part of the process of administrative reform, prioritising the consistent implementation of gender policy and the protection of children's rights, which requires the maintenance and improvement of the appropriate functions and powers of the relevant organisational units of central government bodies;

11. to contribute by all possible means to the introduction of Ukrainian court practices in the area of dispute resolution, relating to the breach of the right to non-discrimination, including discrimination on grounds of gender;

12. to consider the expediency of setting up a Commission for Protection against Discrimination, following the example of some countries of Europe, in particular Bulgaria, with a view to prosecuting discriminatory acts in an efficient and timely manner;

13. to introduce standards of gender-orientated state and departmental reporting as the basis for implementing the provisions of the Charter, in particular regarding the assertion of principles of non-discrimination in the context of labour and education;

14. to ensure the implementation of pension reforms in Ukraine, on the basis of broad consultation with the public, and a fundamental analysis of its potential social implications, taking into account the social status of both genders (average life expectancy, maternity leave, "double" load as a consequence of doing housework etc.);

15. to review professional education standards for the purpose of combating discriminatory practices (on the grounds of gender and age) and ensuring equal rights and opportunities for men and women in the context of education and labour;

16. to create a gender-sensitive information environment and ensure the implementation of equality principles in the media space, and strengthen cooperation with the National Expert Commission of Ukraine for Protection of Public Morals, with a view to protecting women's rights in the context of information;

17. to consider the extension of the period of the State programme for the assertion of gender equality in the Ukrainian society for the period until 2010, as approved by the resolution of the Cabinet of Ministers of Ukraine No. 1834 dated 27 December 2006, based on the requirements of the Charter and other international instruments, as well as the recommendations of international institutions (the UN Committee on Elimination of Discrimination against Women, the European Committee of Social Rights etc.).

In summary, we should emphasise the necessity to continue further intensive work in the context of enhancing the level of awareness of central, local executive bodies and government agencies, judges, law enforcement agents, lawyers, education and medical staff, representatives of public organisations and society in general, regarding European and UN standards, the specifics of the domestic laws and the Ukrainian public policy in the area of the protection of women's and children's rights, taking into account the exploratory work, conclusions and recommendations made under the TRES Project, as well as the practical, scientific and training methodological literature prepared within the Project's scope. The achievements of the TRES Project should be taken into account in the implementation of further international and national projects in this area, which will enable the succession, continuity and consistency of the useful activities towards strengthening and protecting women's and children's rights in Ukraine.

