

ANALYSIS OF VERDICTS OF MISDEMEANOR COURTS IN MONTENEGRO IN THE FIELD OF DOMESTIC VIOLENCE AND GENDER-BASED VIOLENCE WITH REFERENCE TO THE PRACTICE OF THE OMBUDSMAN AND THE ECtHR





**ANALYSIS OF VERDICTS OF MISDEMEANOR COURTS IN MONTENEGRO IN
THE FIELD OF DOMESTIC VIOLENCE AND GENDER-BASED VIOLENCE WITH
REFERENCE TO THE PRACTICE OF THE OMBUDSMAN AND THE ECtHR¹**

Authors:

Prof. PhD Nebojša Vučinić

Ombudsperson, Siniša Bjeković

Chief Advisor, Dina Knežević

Senior Advisor, Nemanja Dujović

Photo credits:

OSCE/istockphoto.com

Podgorica, 2021.

¹ This analysis has been prepared from the original material as submitted by the author and has not been edited by the editorial staff of the OSCE. The views expressed remain the responsibility of the author and do not necessarily represent the views of the OSCE, Missions, or its participating States. Neither the OSCE, Missions, nor its participating States assume any responsibility for consequences which may arise from the use of this publication.



Contents

| | |
|---|-----------|
| I INTRODUCTION..... | 3 |
| 1.2. FORMS OF VIOLENCE IN PRACTICE | 4 |
| 1.3 GENERAL NOTES FROM THE GREVIO'S REPORT ON MONTENEGRO..... | 8 |
| II INTERNATIONAL LEGAL FRAMEWORK | 12 |
| 2.1. DOCUMENTS OF THE UNITED NATIONS | 12 |
| 2.2. DOCUMENTS OF THE COUNCIL OF EUROPE | 15 |
| 2.3 EUROPEAN UNION DOCUMENTS | 17 |
| III NATIONAL LEGAL FRAMEWORK..... | 18 |
| IV ANALYSIS OF DATA OBTAINED FROM MISDEMEANOR COURTS | 22 |
| 4.1. MISDEMEANOR COURT IN PODGORICA | 22 |
| 4.2. MISDEMEANOR COURT IN BIJELO POLJE | 32 |
| 4.3. MISDEMEANOR COURT IN BUDVA..... | 41 |
| V THE PROTECTOR'S PRACTICE IN CASES OF GENDER-BASED VIOLENCE AND DOMESTIC VIOLENCE | 49 |
| Example No 1..... | 50 |
| Example No 2..... | 54 |
| Example No 3..... | 55 |
| Example No 4..... | 56 |
| Example No 5..... | 57 |
| Example No 6..... | 58 |
| Example No 7..... | 60 |
| Example No 8..... | 61 |
| VI STATISTICS ON CASES OF DOMESTIC VIOLENCE AND GENDER-BASED VIOLENCE | 63 |
| VII DOMESTIC VIOLENCE AGAINST WOMEN - CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS | 65 |
| VIII RECOMMENDATIONS OF THE CEDAW AND GREVIO COMMITTEES ON DOMESTIC VIOLENCE AND GENDER-BASED VIOLENCE | 82 |



I INTRODUCTION

According to various indicators, domestic violence is one of the most severe forms of violation of human rights and freedoms. Many indicators speak in favor of the conclusion that victims of domestic violence and violence against women are among the most vulnerable social groups. Moreover, economic, social, sociological, psychological, and other factors shape the community's attitude towards this phenomenon creating stereotypes and matrices of negative behavior that further isolate and marginalize victims of violence. Conservative and retrograde attitudes are conducive to the idea that violence is a family matter - if any information or fact reached the authorities, or even worse if the domestic violence got to the court of public opinion that would be understood as a violation of dignity and reputation of a family. Therefore, a matter of great concern is that even lawyers are wary of radical, but effective and efficient mechanisms for the protection of victims and the combat against of violence, which call for zero tolerance for violence.

The World Health Organization (WHO) identifies violence against women, especially partner violence and sexual violence, as the greatest health risk in women's human rights. On a global scale, every third woman has experienced physical or sexual violence committed by her partner at least once in her lifetime. This type of violence often develops into a much more severe form that ends in death, which is why almost 38% of femicides are thought to be committed by a male partner.

Violence against women has many negative reflections on a woman's psychophysical state and health. In addition to physical and mental health, domestic violence has grave repercussions on the reproductive health of women. Thus, violence against women becomes one of the most severe forms of violence as it endangers fundamental values of every person, such as life, freedom, safety, physical, sexual and psychological integrity, and dignity.

Many factors have been analyzed in assessing the situation and causes of domestic violence and violence against women. Some authors believe these causes are a combination of different psychological, socio-economic, social, cultural, and other factors. Also, researches suggest that post-conflict societies, i.e. the ones that are in transition from war to peacetime and face all the consequences that come with it, are conducive for the escalation of violence, especially against vulnerable groups such as women or children.

Within these general remarks on risk factors, some researchers suggest other risks too, such as the low level of education, the genesis of violence that occurs at the earliest age, the experience with domestic violence, antisocial disorders in perpetrators, harmful effects of alcohol and other addictions, dysfunctional families that reflect in the instability of interpersonal relationships, economic dependence and prejudices regarding the property status of women, and especially traditional and conservative prejudices and gender stereotypes in such communities and society as a whole.

When it comes to the impact of domestic violence, which is primarily directed at women as victims, it has a lasting effect on the most vulnerable members of the community - children. Namely, children who grow under such circumstances are susceptible to various behavioral



and emotional disorders. This is further reflected in the neglect of children and their needs, which leads to the conclusion that violence against women has strong repercussions on the position of children and their development in terms of inheritance of negative behavioral patterns passed down from one generation to the next.

The latest researches suggest another negative trait of this type of violence i.e. enormous costs it generates for the state and the society. This refers to a whole line of factors that put women victims of violence in an unequal and subordinate economic and social position, such as social isolation, lack of employment opportunities, loss of earnings and risk of being dismissed, inability to actively participate in social activities, and finally, a lack of resources that allow women to take care of themselves and their children.

In this context, it is important to raise public awareness (laymen and professionals, politicians), that would alter the image of domestic violence as a sporadic incident which may be solved by minor punishments, or where close family and friends choose “reconciliation by family members” as the ultimate goal for the benefit of the community and the family. This misconception is a likely reason why domestic violence is hidden from the public eye and it encourages the expansion of violence without an appropriate reaction from state authorities. Besides, despite evident institutional and normative changes, it seems that society today has not done much to decrease violence to a reasonable level as it has done with other types of crime. Instead, many statistical and empirical studies suggest that the number of registered cases is disproportionately small compared to the actual number of cases of violence. Namely, according to relevant indicators, every fifth woman in Montenegro has suffered some form of violence, while the number of registered and processed cases is significantly lower.

1.2. FORMS OF VIOLENCE IN PRACTICE

The Council of Europe’s Convention on Preventing and Combating Violence against Women and Domestic Violence is a comprehensive international treaty that tackles the area of human rights. It covers different fields in which action is taken to combat this phenomenon, to prevent and eradicate it, to provide victims with effective and efficient protection, and prosecute offenders. The Convention indicates that violence against women is a special form of discrimination, which is very important, especially when it comes to taking a wide range of measures to implement it. Thus, to exercise the rights and obligations arising from the Convention, it shifts the focus from repressive and reactive objectives to preventive and proactive ones. That is why states have to take “the necessary legislative and other measures to adopt and implement state-wide effective, comprehensive and co-ordinated policies encompassing all relevant measures to prevent and combat all forms of violence covered by the scope of this Convention”.

According to the Convention, the states have to collect disaggregated relevant statistical data at regular intervals on cases of all forms of violence covered by its scope. These measures aim to assess at regular intervals the prevalence of and trends in all forms of violence covered by the scope of the Convention. It is for these reasons that the material provided in this publication should be used as a tool to monitor indicators of implementation of the Convention in the national law, with a focus on proceedings before misdemeanor courts, especially those whose territorial jurisdiction encompasses majority of the territory of Montenegro.



The Convention recognizes several forms of violence against women, all of which have been transposed to a greater or lesser extent into national legislation of states that have ratified it. Thus, the Convention recognizes psychological and physical violence, stalking, sexual violence including rape as a particularly severe form, forced marriage, female genital mutilation, forced abortion, forced sterilization, and sexual harassment. The Convention also calls on member states to take the necessary legislative or other measures to prescribe as a criminal offense the intentional aiding or abetting of criminal offenses concerning violence against women, as well as the punishability of the very intention to commit such a criminal offense. The existing construction presents a clear analogy between the standards of criminalization of violence against women concerning aiding, abetting, and intent to commit a tort, and the provisions of anti-discrimination legislation relating to these legal institutes.

Although the manifestations of offenses related to violence are given in the Convention as special forms that occur during the phase of preparation or execution of the offense, in reality, the violence appears as a combination of several forms. This particularly applies to physical and psychological violence, given that both of these forms are strongly linked to a deviant behavior that is a common trait of majority of offences and misdemeanors in this area.

Physical violence is the most visible one, followed by causing pain or harming that results in physical or emotional pains. It may manifest itself in many forms and is related to painful physical contact and violation of the victim's physical integrity. In addition to the use of physical force against a person that causes harm, such as slapping, hitting, physical incapacitation, or denying freedom of movement by physical means (imprisonment, locking, tying), imposing physical barriers, it also implies administration or denying the use of drugs or other addictive substances to victims.

Physical violence is perpetrated by the use of physical force or other force against another person to inflict or attempt to inflict physical injuries. Under the Convention, "physical violence" refers to "bodily harm suffered as a result of the use of direct and unlawful physical force and includes violence that results in the death of the victim".

Signs of physical violence in most cases are visible as injuries on the face, legs, arms, chest, abdomen, as hematomas, cuts, scratches, burns, broken bones, traces of strangulation, etc. To recognize the physical violence it is not necessary to have visible changes on the victim's body - they are mostly proven by a medical examination and may be the subject of expertise.²

Psychological violence is the one that seriously violates the mental integrity of a person through threat or coercion. This type of violence often precedes or accompanies physical and sexual violence in an emotional relationship or family. It can be found beyond the family too, i.e. in the habitual environment of the victim. It occurs in various forms, verbal and non-verbal, such as insults, swearing, name-calling, humiliation, belittling, and in the isolation which implies restriction of movement or contact with other people, especially with the primary family, relatives, and friends; intimidation carried out through blackmail and threats, such as the abduction of children, eviction, or proclaiming the victim as a mentally ill person. Furthermore, psychological violence may be manifested as the dominance over women, destruction of objects of sentimental value, deprivation of sleep, defining what clothes the woman should wear, and the like.

2 D. Krstinić, J. Vasiljković, Forms of domestic violence, Law - Theory and Practice No. 07-09 / 2019, p.71



Any intentional conduct seriously impairing a person's psychological integrity through coercion or threats is to be severely sanctioned, according to the Convention. Interpretation of the word "intentional" is left to national law, but the requirement for intentional conduct is linked to all elements of the offense. The scope of the offense is limited to intentional conduct that "severely damages and impairs the psychological integrity of another person which can be done in a variety of ways and by a variety of methods". The Convention does not define what is considered under severe damage. The focus is on the use of coercion or threat so as the behavior may fall under the provision of psychological violence. This provision refers to a pattern of behavior, not to an isolated event, so the illegal nature of the pattern of behavior that occurs over time - within or outside the family - can be perceived.

The authors of the Convention intended to keep the principle of criminalization of psychological violence in the Convention while allowing flexibility for cases where the state's legal system provides only non-criminal sanctions. On the other hand, penalties for psychological violence must be effective, proportionate, and dissuasive.

Sexual violence, including rape, means all forms of sexual acts committed against another person without his or her consent if committed intentionally. The interpretation of the word "intentional" is left to national laws, but the requirement for intentional conduct is linked to all elements of the nature of the offense or misdemeanor. This offense refers to the non-consensual vaginal, anal or oral penetration of a sexual nature in the body of another person. Penetration can be done with any part of the body or an object. By requiring penetration to be sexual in nature, the authors of the Convention wanted to emphasize the limitations of this provision and avoid problems in interpretation. The term "sexual in nature" describes an act that has sexual connotations. It does not apply to acts that do not have such a connotation or tone. The provision of the Convention in point b. covers all other non-consensual acts of a sexual nature with a person without penetration.

Finally, Article 36 point c, covers a situation where another person is caused to engage in non-consensual acts of a sexual nature with a third person. In abusive relationships, victims are often forced to engage in acts of sexual nature with a person chosen by the perpetrator. This provision aims to cover situations in which the perpetrator is not a person who commits an act of sexual nature, but causes the victim to engage in sexual activity with a third party, provided that such behavior is related to intentional conduct that must be criminalized under the Convention.

In assessing the constitutive elements of the offense, states take into account the jurisprudence of the European Court of Human Rights. In this regard, the judgment in the case of *MC v. Bulgaria* of 4 December 2003 is important, in which the Court stated in paragraph 166 that it is "persuaded that any rigid approach to the prosecution of sexual offenses, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardizing the effective protection of the individual's sexual autonomy. Following contemporary standards and trends in that area, the member states' positive obligations under Articles 3 and 8 of the European Convention on Human Rights must be seen as requiring the penalization and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim.

The Court also noted: "Regardless of the specific wording chosen by the legislature, in many countries the prosecution of non-consensual sexual acts in all circumstances is sought in prac-



tice by means of interpretation of the relevant statutory terms (“coercion”, “violence”, “duress”, “threat”, “ruse”, “surprise” or others) and through a context-sensitive assessment of the evidence”(Ibid., para. 161).

The prosecution of sexual offenses requires an assessment of the evidence sensitive to the context to determine for each case whether the victim has consented to the sexual act or not. The assessment has to recognize a wide range of behavioral responses to sexual violence and rape, expressed by victims, and must not be based on assumptions about typical behavior in such circumstances. It is equally important to ensure that interpretations of laws regarding rape and the prosecution of rape cases are not influenced by gender stereotypes and myths about male and female sexuality.

To implement this provision of the Convention, criminal legislation must include the notion of non-consensual sexual act. However, states have the discretionary right to decide on the wording of laws and the factors they consider to preclude free consent. Consent must be given voluntarily as the result of the person’s free will in the given context.

Article 36 paragraph 3 of the Istanbul Convention indicates that states should take the necessary measure to ensure that criminal offenses sexual violence and rape, under the Convention, apply to all non-consensual acts of sexual nature, regardless of the relationship between the perpetrator and the victim. Sexual violence and rape are common forms of expression of power and control in abusive relationships and are more likely to occur during and after a breakup. It is crucial to ensure that there are no exceptions to the criminalization and prosecution of such offenses when committed against former or current spouses or partners, as recognized by national laws.

Stalking is defined as an intentional behavior of repeated intimidation towards another person that causes him or her to fear for his or her safety. This includes any repeated intimidation against a particular person that results in fear. Intimidation may consist of repeated stalking of another person, including engaging in unwanted communication with another person or letting the other person know that they are being followed. This includes physical surveillance, coming to work, sports or educational facilities, as well as surveillance of the victim in the virtual world (chat, social networks, etc.). Engaging in unwanted communication includes attempts of any active contact with the victim through any available means of communication, including modern tools of communication and IC technology.

Intimidation may include various behaviors such as destruction of another person’s property, leaving traces of contact with a person’s personal belongings, targeting a person’s pet, or creating false identities or spreading false information online. Any act of such behavior must be done intentionally to provoke a feeling of fear. This provision refers to a pattern of behavior consisting of recurring incidents. The intention is to determine the punishable nature of the pattern of behavior whose elements, if observed separately, do not always represent wrongdoing. For this to constitute an offense within the meaning of the Istanbul Convention, it has to be directed at the victim. However, states can extend it to the behavior against any person in the victim’s social circle, including family members, friends, and colleagues. The experience of stalking suggests that many stalkers stalk not only their victims, but often focus their attention on other persons close to the victim. This often intensifies the feelings of fear and loss of control over the situation and can be covered by this provision.



Article 40 of the Istanbul Convention stipulates that sexual harassment is subject to criminal or “other” legal sanctions, which means that states are to choose the type of sanction that the perpetrator would face after committing such offense. Even though popular opinion is that it is better to consider the conduct from this article under the criminal law, the fact is that many national legal systems classify sexual harassment under civil or other law (in Montenegro i.e. those are the Law on Prohibition of Discrimination and the Labor Law). As a consequence, states may choose whether to classify sexual harassment under criminal or other legal sanctions, while ensuring the law has to include a norm on sexual harassment.

There are many forms of behavior covered by this provision. They include three main forms of behavior: unwanted verbal, nonverbal, and physical conduct. Verbal conduct refers to words and sounds uttered or communicated by the perpetrator, such as jokes, questions, remarks that may be expressed verbally or in writing. On the other hand, non-verbal conduct includes expressions or statements made by the perpetrator that do not include words or sounds, facial expressions, hand movements, symbols, or the like. Physical behavior refers to any sexual conduct of the offender and may include situations involving physical contact with the victim’s body. Any of these forms of conduct must be sexual in their nature to be subject to this provision. Furthermore, any form of the above conduct must be unwanted by the victim or imposed by the offender. Moreover, they have to be committed with the purpose to violate the victim’s dignity. This happens when the conduct such as the above creates a frightening, hostile, degrading, humiliating, or offensive environment. The intention is to recognize the pattern of conduct, whose individual elements, if observed separately, do not necessarily have to be sanctioned.

The offenses listed here are usually linked with the context of abuse of power, the promise of a reward, or threats of retaliation. In most cases, the victim and the offender know each other and their relationship involves differences in hierarchy and power. The scope of application of this article is not limited to employment only. However, it is important to emphasize that the conditions for legal liability may differ depending on the situation, i.e. fields in which this behavior takes place.

This chapter presents typical, but not all, manifestations of violence against women. Those given here in many ways constitute the most common and most brutal forms of violence, and on the other hand, according to the jurisprudence of Montenegrin courts, often present a dilemma when choosing the legal measure for protection.

1.3 GENERAL NOTES FROM THE GREVIO’S REPORT ON MONTENEGRO

GREVIO states that Montenegrin legislation does not define the term “violence against women” but offers, in the Law on Gender Equality, a definition of “gender-based violence”. This definition covers any “act that causes or may cause physical, mental, sexual or economic harm or suffering as well as threats of such acts which seriously impede a person’s enjoyment of his rights and freedoms in public or private life, including domestic violence, incest, rape and human trafficking [...]”. It does not provide that the violence is perpetrated for reasons of the victim’s gender as the Istanbul Convention would require. The list of examples includes trafficking in human beings and incest. Even though there is clearly a gender dimension to these



forms of violence, they are not exclusively perpetrated against women and girls for reasons of their gender. GREVIO therefore considers the current definition of gender-based violence offered by the Law on Gender Equality not to be in keeping with the definitions of “violence against women” and “gender-based violence” as set out in Article 3 of the Istanbul Convention.

Definitions of domestic violence in the Law on Domestic Violence Protection and the Criminal Code of Montenegro differ. While the first law defines it as any “omission or commission by a family member in violating physical, psychological, sexual or economic integrity, mental health and peace of another family member”, irrespective of where the incident of violence has occurred (which is in line with the definition of domestic violence from the Istanbul Convention, the definition from the Criminal Code contained in its Article 220 is slightly different and covers fewer criminal acts (“use of gross violence to harm the bodily or mental integrity”) and operates on a narrower definition of “family member”. While it is a legitimate policy choice to differentiate between different criminal acts on the basis of the type of sanction they are to carry (misdemeanor vs. criminal offence), all domestic violence offences should apply to the same scope of victims.

GREVIO emphasizes that, in line with the general multi-agency and comprehensive approach promoted by the Istanbul Convention, it requires parties to ensure that there are appropriate mechanisms in place that provide for effective co-operation among the judiciary, public prosecutors, law enforcement agencies, local and regional authorities and NGOs. This would require the establishment of any structure such as round tables, case conferences or agreed protocols that would enable a number of professionals to co-operate on individual cases in an impartial manner.

Many initiatives have been taken in Montenegro to institutionalise co-operation around domestic violence cases. The Law on Domestic Violence Protection recognises that the duty to provide victims of domestic violence with full and co-ordinated protection extends to many governmental institutions, including the police, misdemeanour courts, prosecutors, Centres for Social Work, health care institutions, and other institutions that act as care providers. Those institutions must “prioritise dealing with cases of domestic violence and ensure mutual communication and provide assistance in order to prevent and detect violence, address its causes, and provide assistance to victims in rebuilding their lives”.

The Protocol on Actions, Prevention of and Protection Against Family Violence that is in existence since 2011 and innovated in 2018, seeks to equip all relevant actors with practical guidance to ensure, in their daily work, a co-ordinated approach to cases of domestic violence. It sets out specific measures to be taken by responsible institutions in each sector and further identifies a set of obligations for all authorities. However, GREVIO finds that the evaluation procedure in respect of Montenegro has not revealed the existence of any remedies which a victim of violence against women, including domestic violence, may take against the perpetrator or the state officials that have failed in their duty to take the necessary preventive or protective measures within the scope of their powers.

As a *lex specialis*, the Law on Domestic Violence Protection introduces specific provisions for the prevention of and the protection from domestic violence in all its forms. It also contains sanctions in the form of a misdemeanour offence. At the same time, it identifies the existence of criminal offenses of domestic violence, coercion and physical abuse. Amendments to the Criminal Code of Montenegro introduced entirely new offences such as female genital muti-



lation and stalking and thus aligned the Criminal Code more closely with the requirements of the Istanbul Convention. However, GREVIO notes that it does not cover the inciting, coercing or procuring of a girl or woman to undergo the procedure.

According to the information provided to GREVIO, the Law and its misdemeanour offence of domestic violence were originally introduced to ensure a higher rate of reporting of domestic violence cases by offering victims a more efficient and responsive system compared to that of the criminal justice system. Additionally, this Law introduces a range of protective measures (such as emergency barring and restraining orders) that are more easily obtained than those available under Criminal Code. According to the Montenegrin authorities, the introduction of the Law has led to an increase in the number of domestic violence cases reported. GREVIO also notes that cases that come before the misdemeanour courts are generally dealt with swiftly and without any particular delay. Moreover, the behaviour sanctioned under the Law is broader than that captured by the criminal offence of domestic violence. Both in the case of a criminal offense and in the case of misdemeanor sanctions, their qualified forms are envisaged. However, the problem is the qualification of a criminal offense and misdemeanor when it is necessary to opt for a legal way of protection, bearing in mind that criminal liability in national law and practice is considered more rigid and harsher than liability for the offense.

It would appear from the wording of the respective legal provisions that the Criminal Code provision is reserved for more severe cases of domestic violence perpetrated with more severe violence, while the misdemeanour offence is intended to cover mainly psychological violence in all its forms. Information provided to GREVIO by the authorities does suggest that this may have been the original intention. However, the terminology chosen in the two legal texts does not support such a precise distinction between the two. Article 220 of the Criminal Code also applies where the behaviour in question has violated the “mental integrity” of the victim. At the same time, the misdemeanour offence as stipulated in the Law on Domestic Violence Protection may be invoked for any physical violence as well. The experience gained by the Protector of Human Rights and Freedoms in his work is close to the information received by the GREVIO mission that frequently even serious cases of physical violence are charged under the misdemeanour offence, and that in turn, cases of psychological violence have, led to convictions under the Criminal Code.

In practice, the determination of the legal nature of the act is decided during the pre-trial stage: law enforcement officials called to the incident consult the prosecutor on duty over the phone regarding the qualification of the act as a misdemeanour or a crime. Depending on the severity of the incident, prosecutors do not always assess the available evidence themselves nor do they request that additional evidence be collected before qualifying the case as a misdemeanour or a criminal offence. Often, charging decisions are taken without access to previous police reports on, or information on previous convictions of, the perpetrator in question. Inconsistent and manual data collection at the level of law enforcement on measures taken in response to domestic violence complaints by victims makes useful information unavailable. In GREVIO’s view, this practice is unsuitable to assess the real level of severity of the case and the impact it has had on the victim, for example whether or not it has negatively impacted her “mental integrity” (which would make it a criminal offence).³ Furthermore, GREVIO noted with concern

3 (Baseline) Report of the GREVIO Committee on Legislative and Other Measures giving effect to the Provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention), GREVIO / Inf (2018)5



that cases of rape and sexual violence in marriage or intimate relationships were systematically targeted at misdemeanor courts and treated as less repressive offenses. Finally, GREVIO points to the unacceptably low level of sanctions (fines) for the basic form of misdemeanor for domestic violence, just as the Protector repeatedly warned about, including a formal proposal to amend the Law on Protection from Domestic Violence, in order to remove that anomaly. A reason more is that the Law on Prohibition of Discrimination would make this offence more punishable than in sui generis law which is used to achieve the goal of the Istanbul Convention.

This publication aims to address the dilemmas regarding the efficiency and effectiveness of proceedings before misdemeanor courts, the characteristics of proceedings and offenses, and personal characteristics of offenders and victims. All this should be done with the aim to, in addition to the penal policy acquired through statistical indicators, obtain more data on cases whose number (despite all the measures taken so far) is not declining.



II INTERNATIONAL LEGAL FRAMEWORK

International standards in the field of domestic violence and gender-based violence are observed from three levels: the United Nations, the Council of Europe and the European Union's international instruments. Below is a chronological overview of most important documents.

2.1. DOCUMENTS OF THE UNITED NATIONS

After the adoption of the *United Nations Universal Declaration of Human Rights*⁴ that guarantees freedom and equality of rights and dignity to all human beings, many other instruments of human rights instruments were adopted too, such as *International Covenant on Civil and Political Rights*⁵ which guarantees a whole set of rights, including the right to life, the prohibition of torture, inhuman or degrading treatment or punishment, as well as the right to liberty and security of person, and *United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*⁶ according to which all states have to prevent all forms of torture on their territories.

The most important instrument, or rather the first comprehensive internationally recognized document on women's rights, is the *CEDAW Convention - Convention on the Elimination of All Forms of Discrimination against Women*⁷. Currently, 179 countries or 90% of the United Nations are signatories to the CEDAW Convention, Montenegro including. At the time of the adoption of this Convention, violence against women and domestic violence were not included. However, in 1989, the Committee on the Elimination of Discrimination against Women in *its General Recommendation no. 12 on violence against women*⁸ highlights that state parties have to act to protect women against violence of any kind occurring within the family, at the workplace, or in any other area of social life. In 1992 *General recommendation no. 19 on violence against women was adopted*. It⁹ states that the definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. Furthermore, state parties are to adopt specific legislation on domestic violence, including criminal sanctions.

The Convention calls on state parties to take appropriate measures to eliminate discrimination against women by individuals, institutions or enterprises, in social, cultural, economic, politi-

4 Adopted by the UN General Assembly on 10 December 1948
Available at: <https://www.un.org/en/universal-declaration-human-rights/>

5 Adopted by the UN General Assembly on 16 December 1966
Available at: <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

6 Adopted by the UN General Assembly, 10 December 1984
Available at: <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

7 Adopted by the United Nations General Assembly on 18 December 1979
Available at: <https://www.un.org/womenwatch/daw/cedaw/>

8 Available at: <https://www.refworld.org/docid/52d927444.html>

9 Available at: <https://www.ohchr.org/en/hrbodies/cedaw/pages/recommendations.aspx>



cal, civil and in any other field. The document is divided into 16 articles and covers ten main areas - which include: women's equal rights to participate in political and public life, including the right to vote and be eligible for election, to participate in the formulation and adoption of government policies, equal right of women to represent their governments at the international level, to education, training and equal opportunities for career advancement, equal rights in retaining and changing nationality, in employment, including the right to work, the right to same employment opportunities, the right to promotion, job security, and all benefits, especially the obligation of the state to provide maternity benefits, and equal access to health care, including family planning, prohibition of trafficking in women and exploitation of prostitution of women, ensuring equal participation of rural women in all benefits for rural development, equal opportunities for rural women in access to health and education, equal rights for rural women to enter into agreements and manage property, equal rights for men and women in family relations, equal rights and possibilities of marriage, the right to choose a spouse freely, the same rights and responsibilities in marriage, including guardianship, adoption of children and the right to reproductive choice, the same rights to choose the family name, the right to choose an occupation, and the same rights in terms of ownership and management and disposition of property.

*The Declaration on the Elimination of All Forms of Violence against Women*¹⁰, is the first international instrument that exclusively tackles violence against women and which emphasizes that violence against women is a manifestation of historically unequal power relations between men and women, which led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men. Furthermore, some groups of women, such as women belonging to minority groups, indigenous women, refugee women, migrant women, women living in rural or remote communities, destitute women, women in institutions or in detention, female children, women with disabilities, elderly women and women in situations of armed conflict, are especially vulnerable to violence. The Convention defined that there is a need for a clear and comprehensive definition of violence against women, and for the first time, the term "violence against women" was defined to mean any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.

In *Vienna Declaration and Program of Action*¹¹, that was adopted at the World Conference on Human Rights in Vienna in 1993, a deep concern by various forms of discrimination and violence was expressed, to which women continue to be exposed all over the world and reaffirmed that the human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights¹². Gender-based violence and all forms of sexual harassment and

10 Adopted by the General Assembly on 20 December 1993. .

Available at: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/ViolenceAgainstWomen.aspx>

11 Available at: <https://www.ohchr.org/Documents/ProfessionalInterest/vienna.pdf>

12 "The human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights. The full and equal participation of women in political, civil, economic, social and cultural life, at the national, regional and international levels, and the eradication of all forms of discrimination on grounds of sex are priority objectives of the international community. Gender-based violence and all forms of sexual harassment and exploitation, including those resulting from cultural prejudice and international trafficking, are incompatible with the dignity and worth of the human person, and must be eliminated. This can be achieved by legal measures and through national action and international cooperation in such fields as economic and social development, education, safe maternity and health care, and social support." Vienna Declaration, paragraph 18



exploitation, including those resulting from cultural prejudice and international trafficking, are incompatible with the dignity and worth of the human person, and must be eliminated. This can be achieved by legal measures and through national action and international cooperation in such fields as economic and social development, education, safe maternity and health care, and social support.

Among other things, this declaration encouraged countries to define special programs for human rights at national levels and formulate a human rights strategies appropriate to their situation. It was pointed out that the adoption of strategies should be a true national endeavor, free of party interests, and that the national action plan must be supported by the government and include all sectors of society, because its success depends largely on if the citizens feel it as their own. What is special about this declaration is the appointment of a special rapporteur on violence against women who has the competence to seek and obtain information on violence against women, and give recommendations at the local, national and international levels to combat violence against women.

*Beijing Declaration and Platform for Action*¹³ was adopted at the Fourth World Conference on Women, held on September 15, 1995. This declaration is based on the principle that women's rights are human rights and contains a set of 12 critical areas of concern or strategic objectives for empowerment of women. Of the 12 critical areas in the Beijing Declaration, Montenegro opted for eight areas in which it intends to work to achieve gender equality: promoting women's human rights and gender equality; gender sensitive upbringing and education; gender equality in the economy; gender sensitive health care; gender-based violence; gender equality in the media, culture and sports; equality in the decision-making process in political and public life; institutional mechanisms for the implementation of gender equality and international cooperation. The fourth area of concern (out of 12) includes the matter of elimination of all forms of violence against women and actions, i.e. practical measures that states, international and non-governmental organizations should take to prevent and combat violence against women.

On the occasion of the 25th anniversary of the Fourth World Conference on Women and the adoption of the Beijing Declaration and Platform for Action (1995), the UN Economic and Social Council decided at its 64th session in 2020 that the Commission on the Status of Women would review and evaluate implementation of the Beijing declarations and platforms for action, and the results of the 23rd special session of the General Assembly, including an assessment of current challenges affecting the implementation of the Platform for Action and gender equality and women's empowerment and its contribution to the full implementation of the 2030 Agenda for Sustainable Development. The Council called on all participating states to take a comprehensive look at the progress made at the national level. In order to make a comprehensive review at the national level, Montenegro drafted the Report¹⁴ on the implementation of the Beijing Declaration and Platform for Action and the 2030 Agenda for Sustainable Development. *Sustainable development goals*¹⁵ lean on *Millennium Development Goals*¹⁶ that tackle the matter of violence against women, among other things. The 2030 Agenda for Sustainable Development contains 17 sustainable development goals, also known as Global Goals that are

13 Available at: <https://beijing20.unwomen.org/en/about>

14 file: /// D: / Downloads / Izvje% C5% A1taj% 20Crne% 20Gore%20o%20implementaciji% 20Pekin% C5% A1ke%20 deklaracije.pdf

15 <https://sustainabledevelopment.un.org/sdg5>

16 <https://www.un.org/millenniumgoals/>



an upgrade of the Millennium Development Goals (MDGs). One of the goals, i.e. goal number five, refers to achieving gender equality and empowering all women and girls. This goal, among other things, implies the elimination of all forms of discrimination against women; elimination of all forms of violence against women, including trafficking and sexual and other types of exploitation; elimination of all harmful practices, such as child, early and forced marriage and female genital mutilation.

2.2. DOCUMENTS OF THE COUNCIL OF EUROPE

The European Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe, regulated the institute of discrimination on several grounds, including the sex-based discrimination¹⁷. The Convention was adopted in 1950 in Rome, followed by the adopted of another 16 protocols¹⁸ regulating new rights or mechanisms for its implementation. The Convention is the Council of Europe's fundamental legal instrument for the protection of human rights and one of the most important international instruments for establishment of the rule of law, democracy and protection of human rights, and the Protocol no. 12 is important for the field of discrimination. It promotes protection against discrimination by providing that the enjoyment of any right set forth by law must be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. The notion of law in the Convention is not only law in the formal sense. It may include some other regulation (e.g. by-laws), a decision of a state authority, the Constitution, an international treaty ratified by the state party, as well as the *acquis communautaire* of the European Community¹⁹.

Having gained its independence in 2006, Montenegro sent a declaration of succession to the Council of Europe regarding all conventions signed by the State Union of Serbia and Montenegro, and Montenegro became a member of the Council of Europe on 11 May 2007. In the case *Bijelić v. Montenegro and Serbia*, the European Court of Human Rights concluded that its jurisdiction in relation to Montenegro is valid as of 3 March 2004, when Montenegro, within the State Union of Serbia and Montenegro, submitted instruments of ratification of the European Convention on Human Rights to the Council of Europe.²⁰

With the *ratification of the Council of Europe Convention on preventing and combating violence against women and domestic*²¹ (Istanbul Convention) on 22 April 2013 and its entry into force on 1 August 2014, Montenegro has undertaken a number of new obligations regarding the structural prohibition of discrimination and enforcement the principle of "zero tolerance" towards the violence against women and domestic violence through the effective and coordinated cooperation of all competent authorities, institutions and organizations. As this is one of the key documents in the area of domestic violence and gender-based violence, it deserves an elaboration.

17 <https://www.un.org/millenniumgoals/>

18 <https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/results/subject/3>

19 ECtHR, *Malone v. The United Kingdom*, judgment of 27 June 1984, § 67;

20 ECtHR, judgment of 14 December 2009, paragraph 69;

21 <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168008482e>



The Istanbul Convention is open for signature by member states of the Council of Europe, the non-member states that have participated in its elaboration, and by the European Union and for accession by other non-member States. It entered into force following 10 ratifications, eight of which were required to be member states of the Council of Europe). According to official data of the Council of Europe,²² as of the day of this analysis, as many as 45 states have signed the Convention and 34 states have ratified it. The Convention entered into force in the following countries: Albania, Andorra, Austria, Belgium, Bosnia and Herzegovina, Montenegro, Denmark, Estonia, Finland, France, Greece, Georgia, the Netherlands, Croatia, Iceland, Ireland, Italy, Luxembourg, Cyprus, Malta, Monaco, Germany, Norway, Poland, Portugal, Romania, San Marino, Slovenia, Northern Macedonia, Serbia, Turkey, Spain, Sweden and Switzerland. It is important to point out that this document was signed but not ratified by the European Union.

The Convention sets forth specific standards, and above all defines violence against women as a form of discrimination against women and violation of their human rights. Furthermore, it sets forth the standard of “due diligence” in prevention, protection, prosecution and sanctioning of violence. In practice of international institutions, the application of this concept is very complex because it must be proven that a state had not acted in accordance with the standard of “full commitment”, and its institutions had not taken all required measures for prevention, contrary to their obligation to take measures to prevent and punish the perpetrator of a violent act.

This Convention sets forth clear standards in the areas of legislation, prevention, comprehensive measures of legal and institutional protection and support to victims (including the establishment and sustainable development of general and specialist support services for victims), as well as effective prosecution and punishment of perpetrators and treatment programmes for them. In addition to the above, the Convention requires significant changes in the legislative and strategic framework for the prevention and suppression of violence against women in many countries. What is special about the Convention is the recognition and affirmation of achievements of the non-governmental sector. Furthermore, the Convention recommends women’s non-governmental organizations as key actors in providing specialist services and crucial partners in prevention, coordinated actions of protection and other main areas of combating violence against women. It must be mentioned that the Convention has a clear gender dimension that permeates the provisions and establishes clear structural links between violence against women and gender inequalities.

This instrument recognizes the problem of victims of multiple discriminations, primarily refugees, migrants, asylum seekers, and establishes an independent international mechanism to monitor the implementation of the Convention at the national level - the GREVIO Committee. The Convention stipulates that all investigations and court proceedings about all forms of violence are to be conducted without undue delay and with full respect for the rights of the victim, and it offers a holistic response to violence against women and domestic violence.

Another international standard worth noting is the *Recommendation 1450 (2000) Violence against women in Europe*²³. In it, the Assembly notes that although domestic violence is one of the commonest forms of violence against women, it remains the least visible. However, it is estimated that more women in Europe die or are seriously injured every year through domestic violence than through cancer or road accidents. The costs, in terms of human and other

22 <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/signatures>

23 Available at: <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16783&lang=en>



resources, are as great to the medical and health services as they are to employers, the courts and the police.

*Recommendation 1582 (2000) 1 Domestic violence against women*²⁴ sets forth that states should take a number of measures to combat domestic violence: to improve statistics on domestic violence, to develop a partnership between the authorities responsible for the protection of women's rights and regional and local authorities in order to increase the number of rehabilitation centers and shelters for women victims of domestic violence, to launch, through the media, national awareness campaigns against domestic violence, to increase state funding to support the social services dealing with the problem of domestic violence, to encourage women to learn self-defense techniques, the concept of domestic violence should be defined in national legislation in such a way that it is treated as a serious criminal offence, whatever its form.

*Recommendation Rec (2002) 5 of the Committee of Ministers to member states on the protection of women against violence*²⁵ recommends that the governments of member states encourage all relevant institutions dealing with violence against women (police, medical and social professions) to draw up medium- and long-term coordinated action plans, which provide activities for the prevention of violence and the protection of victims and to promote research, data collection and networking at national and international level. In addition, the recommendation adds that it is necessary to improve interactions between the scientific community, the NGOs in the field, political decision-makers and legislative, health, educational, social and police bodies in order to design co-ordinated actions against violence.

*Recommendation 1681 (2004) 1 Campaign to combat domestic violence against women in Europe*²⁶ highlights that the acute nature of this problem must force Council of Europe member states to regard domestic violence as a national political priority and to deal with it in a broader political framework, with government, parliament and civil society involvement. Member states have an obligation under international law to act with due diligence to take effective steps to end violence against women, including domestic violence, and to protect its victims/survivors. If they do not themselves want to be held responsible, states must take effective measures to prevent and punish such acts by individuals and to protect the victims/survivors.

2.3 EUROPEAN UNION DOCUMENTS

In its articles, *Treaty on the Functioning of the European Union*²⁷ regulates equality between men and women, while the Union is to seek to eliminate inequalities, and to promote equality, between men and women.

*Directive 2011/36 / EU of the European Parliament and of the Council*²⁸ on preventing and combating trafficking in human beings and protecting its victims and replacing Council Framework

24 Available at: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17055&>

25 <https://www.coe.int/en/web/genderequality/recommendation-rec-2002-5-and-other-tools-of-the-council-of-europe-concerning-violence-against-women>

26 Available at: <https://pace.coe.int/en/files/10781#trace-3>

27 Available: http://www.azzk.me/1/doc/Ugovor_o_funkcionisanju_EU.pdf

28 Available: <https://eur-lex.europa.eu/legal-content/HR/TXT/PDF/?uri=CELEX:32011L0036&from=GA>



Decision 2002/629 / JHA regulates violence against women and children who are victims of trafficking in human beings if the family is in the territory of the Member States.

*Directive 2011/99 / EU of the European Parliament and of the Council*²⁹ applies to protection measures which aim to protect all victims and not only the victims of gender violence, taking into account the specificities of each type of crime concerned.

Directive 2012/29 / EU of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime.

III NATIONAL LEGAL FRAMEWORK

To begin with, *the Constitution of Montenegro*³⁰ defines the supremacy of international law over national legislation, which means the direct application of international standards and ratified conventions in the legal order of Montenegro.

In that sense, Article 9 of the Constitution clearly prescribes that “ratified and published international agreements and generally accepted rules of international law shall make an integral part of the internal legal order, shall have the supremacy over the national legislation and shall apply directly when they regulate relations differently than the national legislation”. Montenegro is a signatory to many international treaties that are crucial for the recognition of domestic violence as a violation of human rights under international law and as a form of discrimination against women.

Part of the Constitution “Human Rights and Liberties” regulates the entire set of rights and freedoms of citizens which, among other things, guarantee fundamental human rights and freedoms, prohibit discrimination on any grounds, guarantee gender equality, dignity of human beings and security, inviolability of the physical and mental integrity, privacy and personal rights, prohibition of torture or inhuman or degrading treatment, freedom of movement and residence. Article 8, paragraph 1 of the Constitution stipulates that any direct or indirect discrimination on any grounds is prohibited, while paragraph 2 sets forth that the regulations and introduction of special measures aimed at creating the conditions for the exercise of national, gender and overall equality and protection of persons who are in an unequal position on any grounds are not considered discrimination.

Furthermore, according to Article 18 the state guarantees the equality of women and men and is to develop the policy of equal opportunities, which is the foundation for the adoption of the first anti-discrimination law in Montenegro, the Law on Gender Equality. Then, Article 21 prescribes that everyone has the right to legal aid which may be provided free of charge, in accordance with the law. In the part of the Constitution that refers to the temporary limitation of rights and liberties, it is said that limitations of rights and liberties must not be done on the basis of gender or any other personal characteristic, and limitations will not be removed for infliction or encouragement of hatred or intolerance; discrimination; trial or conviction twice for one and the same punishable act, forced assimilation while Article 73 paragraph 1 sets forth special protection for mother and child.

²⁹ Available: <https://eur-lex.europa.eu/legal-content/HR/TXT/?uri=CELEX%3A32011L0099>

³⁰ (Official Gazette of Montenegro 001/07 dated 25 October 2007, 038/13 as of 2 August 2013)



*The Criminal Code of Montenegro*³¹ in Article 220 prescribes that Domestic Violence is a criminal offense. This article prescribes four forms, one of which is the basic form of a criminal offense, and three forms are qualified forms of a criminal offense that result in violation of the physical or mental integrity of a member of a family or family community. The same article stipulates that whoever violates the protection measures against domestic violence imposed on him by court or another state authority under law shall be punished by a fine or a prison sentence for a term not exceeding one year.

The criminal offense of domestic violence is prosecuted *ex officio*, which means that the state prosecutor initiates criminal proceedings, which is in line with the recommendations and legal standards contained in international documents on human rights.

The Code in its Title Thirteen and Article 142 "Definition" clarifies who is considered a member of the family and family community: former spouses, blood relatives and relatives by full adoption in the direct line of descent without restriction, and in a collateral line up to the fourth degree inclusive, relatives by simple adoption, relatives by marriage up to the second degree inclusive, persons who live in the same household and persons that parent a child or whose child is on the way, even where such persons have never shared a household, however, this document fails to recognize domestic violence.

Article 67 of the Code prescribes that security measures may be imposed on a criminal offender in order to eliminate the situations or conditions which might influence a perpetrator to re-offend, and the law recognizes the following security measures: 1) compulsory mental health treatment and placement in a health care institution; 2) compulsory outpatient mental health treatment; 3) compulsory drug dependence treatment; 4) compulsory treatment of alcoholism; 5) disqualification from performing a profession, activity or duty; 6) prohibition against operating a motor vehicle; 7) confiscation of property; 8) expulsion of a foreign national from the country; 9) publication of the judgment; 10) restraining order; 11) removal from the place of residence.

The court may impose one or more security measures against a criminal offender provided that the requirements for their imposition as set by this code are met. Compulsory mental health treatment and placement in a health care institution and compulsory outpatient mental health treatment shall be imposed as individual measures.

In this analysis, one should note the amendments to Article 42a of the Criminal Code, which prescribes that where a criminal offence is committed out of hatred towards another person due to his/her national or ethnic affiliation, race or religion or due to the lack thereof, or due to disability, sex, sexual orientation or gender identity, such a circumstance is to be taken as aggravating by the court. This way, the legislator provided stricter punishment, and thus increased criminal protection of particularly vulnerable social groups whose members are victims of various crimes committed out of their hatred because of their affiliation - children, persons with disabilities, pregnant women, the elderly, refugees, but it fails to include persons of a different gender identity and LGBTIQ persons who are often victims of domestic violence.

31 (Official Gazette of the Republic of Montenegro 070/03 of 25 December 2003, 013/04 of 26 February 2004, 047/06 of 25 July 2006, Official Gazette 040/08 of 27 June 2008, 025/10 of 5 May 2010, 073/10 of 10 December 2010, 032/11 of 1 July 2011, 064/11 of 29 December 2011, 040/13 of 13 August 2013, 056 / 13 of 06 December 2013, 014/15 of 26 March 2015, 042/15 of 29 July 2015, 058/15 of 9 October 2015, 044/17 of 6 July 2017, 049/18 of 17 July 2018, 003/20 of 23 January 2020)



*Code of Criminal Procedure*³² Article 109, paragraph 2 stipulates that exemption from the duty to testify does not apply to persons called to testify in the criminal offense of neglect and ill-treatment of a minor, domestic violence and incest, when the minor is injured party.

*Law on Misdemeanors*³³ contains reference norms to the Law on Protection from Domestic Violence, but it is important to point out that Article 177, paragraph 5 stipulates that a plea agreement cannot be entered into during the process of determining whether a domestic violence misdemeanour was committed.

Thanks to the long-term efforts of women's NGOs to make domestic violence socially visible and their systematic public advocacy and lobbying for the adoption of appropriate legal instruments in Montenegro, a legal framework has been established to prevent, combat and protect victims of domestic violence. The *Law on Protection from Domestic Violence*³⁴ provides a definition of domestic violence. Violence is defined as the omission or commission by a family member in violating physical, psychological, sexual or economic integrity, mental health and peace of other family member, irrespective of where the incident of violence has occurred. This law also prescribes the definition of a family member, and this term means: spouses or former spouses, children they have in common, and their stepchildren; consensual partners or former consensual partners irrespective of the duration of consensual union, children they have in common, and their stepchildren; persons related by consanguinity and relatives by full adoption, in the direct line of descent with no limitation and in collateral line of descent up to the fourth degree; relatives by incomplete adoption; relatives on the side of wife/consensual partner up to the second degree in a married or consensual union; persons sharing the same household irrespective of the nature of their relationship; persons who have a child in common or who have conceived a child.

The Law on Protection from Domestic Violence prescribes five measures of protection that can be imposed on the offender: order of removal from place of residence or other premises; restraining order; prohibition of harassment and stalking; mandatory addiction treatment; mandatory psycho-social therapy.

When it comes to a coordinated and comprehensive approach to the application of the Law, institutions dealing with protection from domestic violence are the public administration agency in charge of police affairs (police), a misdemeanor body, state prosecution, social work centers or other social and child protection agencies, health care institutions, and other agency or institution acting as care provider. These bodies have the duty to provide victim with full and coordinated protection, within their respective powers and depending on the severity of violation. A non-governmental organization, other legal or natural person, may provide protection in accordance with the law. These bodies and institutions act in accordance with the law are to ensure mutual communication and provide assistance in order to prevent and detect violence, eliminate causes, and provide assistance to victim in regaining security in life.

Article 11 of the Law on Protection from Domestic Violence prescribes the possibility for the social work centre to set up an expert team composed of its representatives, as well as repre-

32 Official Gazette 057/09 of 18 August 2009, 049/10 of 13 August 2010, 047/14 of 7 November 2014, 002/15 of 16 January 2015, 035/15 of 7 July 2015, 058/15 of 9 October 2015, 028/18 of 27 April 2018, 116/20 of 4 December 2020.

33 Official Gazette 001/11 of 11 January 2011, 006/11 of 25 January 2011, 039/11 of 4 August 2011, 032/14 of 30 July 2014, 043/17 of 4 July 2017, 051/17 of 3 August 2017.

34 Official Gazette 046/10 of 6 August 2010, 040/11 of 8 August 2011.



sentatives of local government bodies and service agencies, police, non-governmental organizations and experts for family matters. The team will design victim assistance plan and coordinate victim assistance activities, in accordance with victim's needs and choice.

It is necessary to point out that one of the international standards is incorporated in *the Law on Alternative Dispute Resolution*³⁵ that in Article 53 indicates that the mediator takes special care whether the circumstances of the case indicate the existence of domestic violence, as well as whether the mediator has to suspend the mediation procedure in all cases where mediation would not be expedient due to suspicion of domestic violence.

Based on this law, four bylaws were adopted: *Rulebook on the detailed manner of execution of a protective measure of mandatory treatment for addiction*³⁶, *Rulebook on the detailed manner of execution of measure of protection, removal from the place of residence, restraining order and prohibition of harassment and stalking*³⁷, *Rulebook on the detailed manner of determining and implementing the protective measure of mandatory psychosocial treatment*³⁸ and *Rulebook on the detailed content and design of the form on removal or prohibition of return to the place of residence*³⁹.

In order to have a better implementation of the Law on Protection from Domestic Violence, a special strategic document was adopted in June 2011 that tackles the issue of protection against domestic violence - *Strategy for protection from Domestic Violence 2011-2015*⁴⁰. As a follow-up to a comprehensive approach to relevant matters for protection from domestic violence, a new strategy was adopted in December 2015 - *Strategy for protection from domestic violence 2016-2020* with an accompanying action plan for its implementation. As of the date of this analysis, a National document for the implementation of the Istanbul Convention was being drafted. It is intended to replace the *Strategy for protection from domestic violence 2016-2020*⁴¹.

With the aim of having a coordinated response of all institutions, the *Protocol on the treatment, prevention and protection against domestic violence* was signed in 2011. The signatories to the Protocol are the Ministry of Justice, the Supreme Court of Montenegro, the Supreme State Prosecutor's Office, the Ministry of Education, the Ministry of Health, the Ministry of Labor and Social Welfare, the Police Directorate and the Misdemeanor Council of Montenegro. The protocol defines the roles and duties of all relevant institutions.

Protocol on the handling of cases of violence against women and domestic violence, from 2018, signed by the Protector of Human Rights and Freedoms, was innovated and improved in accordance with the commitments under the Istanbul Convention and it improved inter-institutional action, in order to ensure: implementation of the Istanbul Convention in the day-to-day practice of institutions and organizations to provide effective and rapid protection to victims of violence; Exchange of data and information through information systems between relevant institutions and organizations; Harmonization of methodology of data collection with relevant institutions and organizations, in order to form a single database.

35 Official Gazette of Montenegro no. 077/20 of 29 July 2020

36 Official Gazette of Montenegro no. 021/12 of 18 April 2012

37 Official Gazette of Montenegro no. 004/14 of 24 January 2014

38 Official Gazette of Montenegro no. 050/13 of 30 October 2013

39 Official Gazette of Montenegro no. 042/12 of 31 July 2012

40 Available at: <https://mrs.gov.me/biblioteka>

41 Available at: <https://mrs.gov.me/biblioteka>



IV ANALYSIS OF DATA OBTAINED FROM MISDEMEANOR COURTS

To implement this project, which is a joint co-operation of the Protector and the OSCE, we analyzed decisions made by misdemeanor courts and identified the main problems in the judicial response to domestic violence and gender-based violence.

Project activities include generating statistics about the number of reported and prosecuted cases of domestic violence and violence against women, and the analysis of court verdicts for misdemeanors of domestic violence and violence against women in 2019, and the analysis of actions during the COVID 19 pandemic for March - July 2020.

The analysis involved the following courts: Misdemeanor court in Bijelo Polje (divisions in Pljevlja, Berane and Rožaje), Misdemeanor court in Budva (divisions in Ulcinj, Bar, Kotor and Herceg Novi), Misdemeanor court in Podgorica (divisions in Nikšić, Cetinje and Danilovgrad).

The Protector requested court headquarters and their divisions to submit randomly selected copies of ten verdicts in cases of domestic violence and gender-based from 2019 and for the period 1 January - 31 July 2020. As a special request, at least 30% of submitted verdicts from 2020 had to be from the period March-July i.e. COVID-19 pandemic. Owing to the good long-term cooperation, all three courts submitted the required sample that we used to carry out this analysis.

When it comes to the length of proceedings, on the one hand, we are pleased to note that courts acted promptly in many cases on the submitted requests for misdemeanor proceedings and brought verdicts quickly. However, on the other hand, we are concerned that proceedings in some cases were inappropriately delayed. As those were urgent proceedings, mostly not overly complex in terms of facts and law, we appealed to courts to minimize cases with delayed proceedings in the future. Any otherwise acting in such cases may have fatal consequences, both for the victim of violence and society as a whole.

Sud za prekršaje Podgorica

42

Sud za prekršaje Budva

104

Sud za prekršaje Bijelo Polje

38

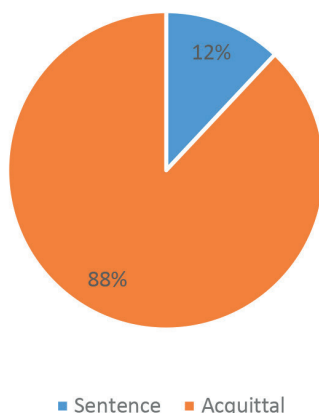
4.1. MISDEMEANOR COURT IN PODGORICA

This Court submitted 42 verdicts on time - 12 verdicts from the jurisdiction of the Misdemeanor Court in Podgorica, 10 verdicts from the division in Nikšić, 10 from the division in Danilovgrad, and 10 verdicts from the division in Cetinje. Of the total number of verdicts, 12 were made during the COVID-19 pandemic, March - June 2020.



Regarding the outcome of the proceedings in this Court, out of 42 verdicts - 37 are convicting verdicts, while 5 are acquittals.

TYPE OF VERDICT



As for the category “*petitioner of misdemeanor proceedings*”, the Police Directorate was a petitioner in all three courts. Allegedly, victims of domestic violence are not aware of the possibility to initiate misdemeanor proceedings themselves.

**Podnosilac zahtjeva za pokretanje
prekršajnog postupka**

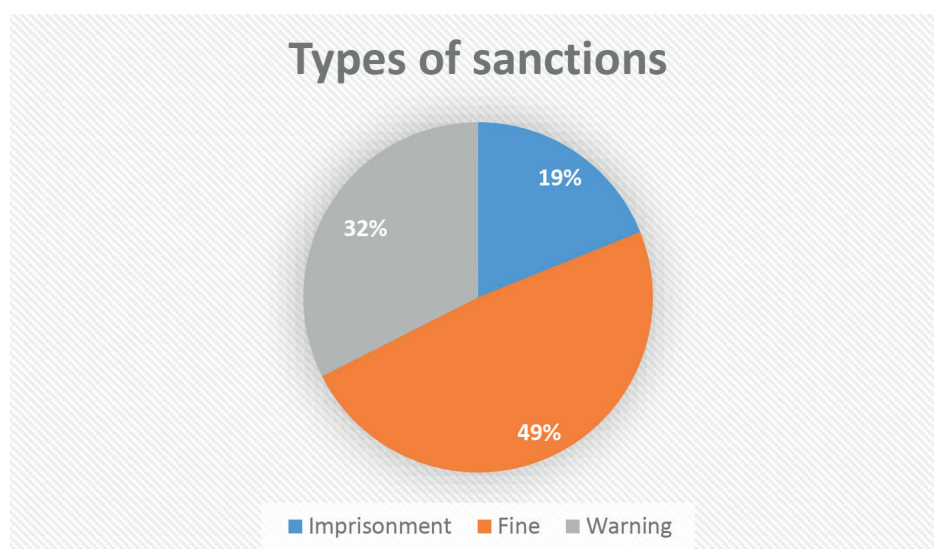
**UPRAVA POLICIJE
100%**

To review the efficiency of court proceedings, an element that was in our focus was the *length of proceedings*. Therefore, we noted that most of the proceedings were terminated under the principle of efficiency in all courts. However, in some cases, the Protector was not able to justify delaying the proceedings because it could have fatal consequences for victims of domestic violence or gender-based violence. We would like to reiterate that urgency and efficiency in proceedings before misdemeanor courts are advantages of that procedure.

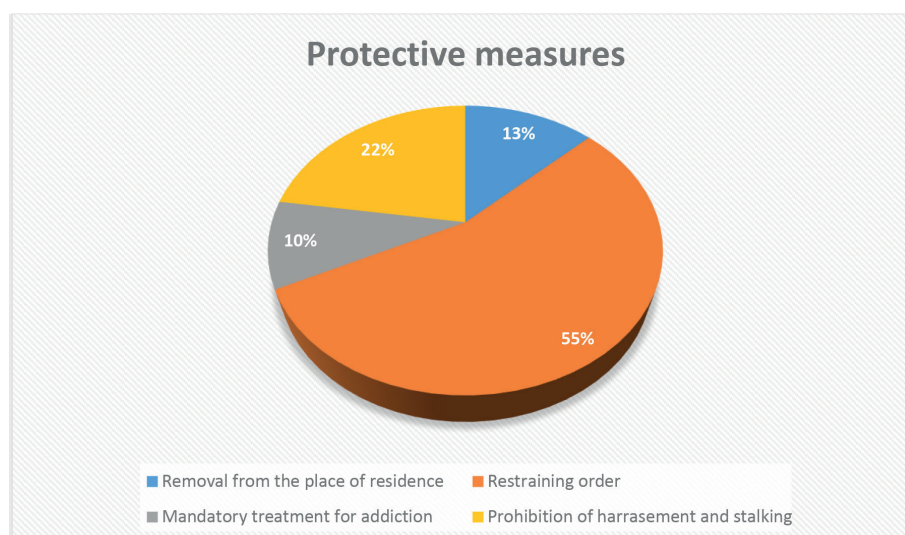
Having reviewed the misdemeanor sanctions of all divisions - prison sentences, fines, and warning measures, we see that only seven prison sentences were imposed (19%), followed by 18 fines (49%), and 12 warning measures (32%). Protective measures were reviewed separately. If we take into account that misdemeanor courts have seen an increase in the number of cases in the field governed by the Law on Protection from Domestic Violence i.e. 2.059 cases in 2019,



1.972 cases in 2018, and 1.790 cases in 2017, we conclude that the penalty policy is mild.⁴² Given the evident frequency of violence, we believe that this negative social phenomenon should be paid more attention to and followed by closer coordination of competent authorities, and a stricter penalty policy which, in addition to protective measures, should include proportional and dissuasive sanctions for offenders.



Speaking of *protective measures*, the Court imposed 31 protective measures in 20 cases, of which four removals from the place of residence (16%), 17 restraining orders (67%), three mandatory addiction treatments (5%), and seven bans on harassment and stalking (12%). As for divisions collectively, one protective measure was imposed in 11 cases, while two or more protective measures were imposed in nine cases. In all cases that involved protective measures, a body was designated to follow up their enforcement.

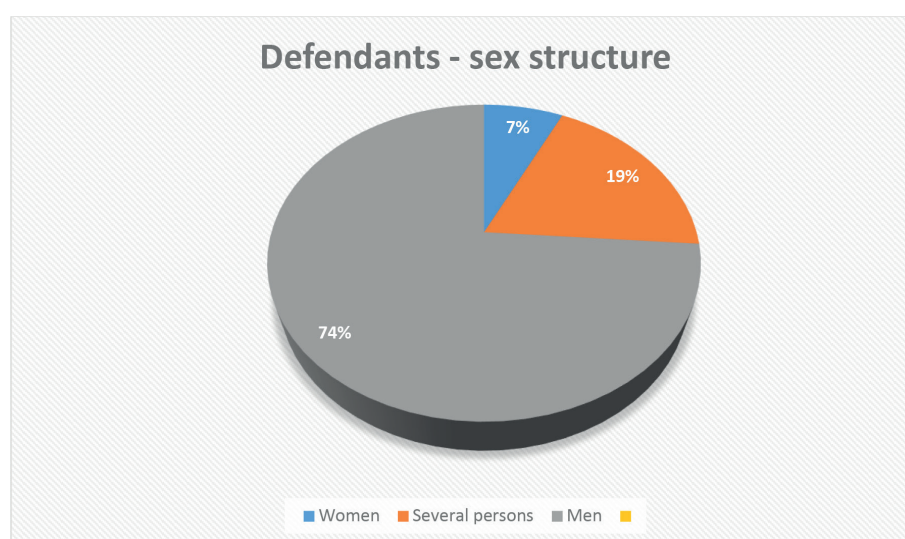


⁴² Report on the Protector's activities for 2019, https://www.ombudsman.co.me/docs/1590478014_www-final---05---izvjestaj-o-radu-za-2019.pdf;



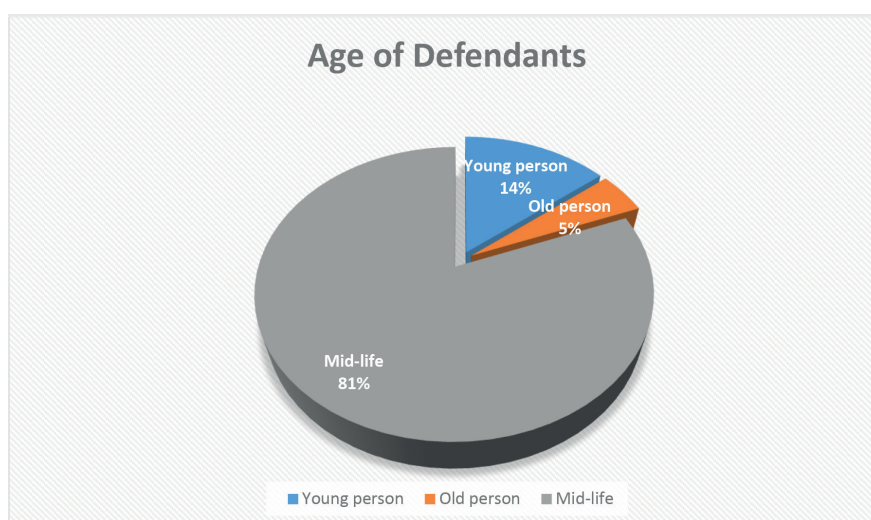
Furthermore, we analyzed other *characteristics of defendants*, such as *their sex, age, marital status, children, property, education, employment, and history of convictions for this type of offense*.

As for the sample in question, we found that in three cases there were four female offenders (7%), in eight cases there were twelve multiple offenders of both sexes (19%), while in 31 cases, 31 offenders (74%) were male. This finding corresponds fully to previous researches carried out by other national and international organizations, according to which offenders of domestic violence and gender-based violence are predominantly men, while female offenders are few. Indicatively, the verdicts showed that, in most cases, men are victims of violence by other male family members - blood relatives or in-laws (father, son, brother, son-in-law, father-in-law). Only one verdict established that a man had been a victim of domestic violence by a woman and that was a case of intimate partner violence. However, the extensive practice of the Protector in the field of domestic violence and gender-based violence that is based on personal contacts with victims, suggests that violence against men typically happens in the highly-conflicting relationship between intimate partners, with multiple incidents of mutual reporting to the police, where men are fully informed about institutional mechanisms and report incidents if the violence was inflicted upon them.

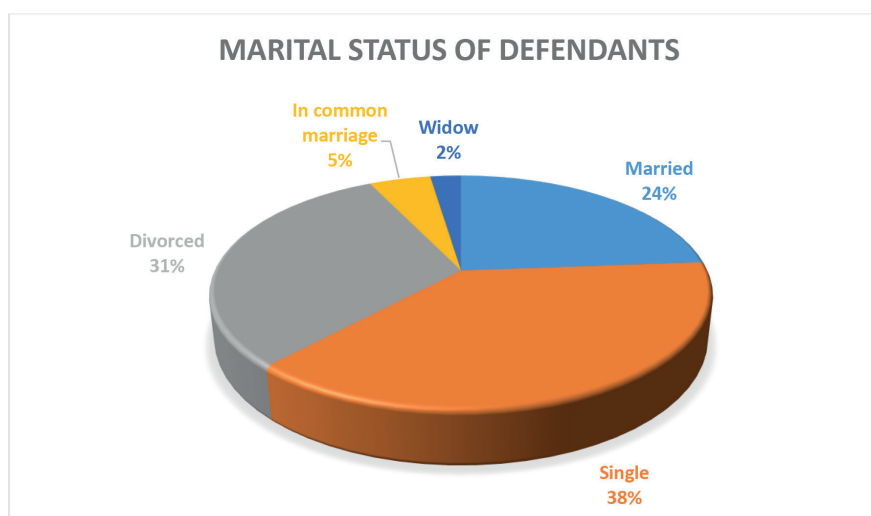




When it comes to *age structure*, defendants are divided into three categories: young people - up to 30 years of age as defined by international and national regulations⁴³, old persons⁴⁴ - persons above 60 years of age, and mid-age persons from 30 to 60. Hence, in six cases there were ten offenders from the category of young people (14%), in two cases there were two elderly persons (5%), while in 34 cases there were 35 offenders belonged to the mid-life category.



To continue, we analyzed the marital status of the defendants too. In ten cases, ten defendants (24%) were married, in 16 cases 19 defendants (38%) were not married, in 13 cases, 14 defendants (31%) were divorced, in two cases three defendants (5%) were in a civil partnership, and in one case, one person (2%) was a widower. Evidently, marital status does not play an important role in domestic violence and gender-based violence, except for the category of widowers or persons in a civil partnership, where there are slightly fewer defendants.

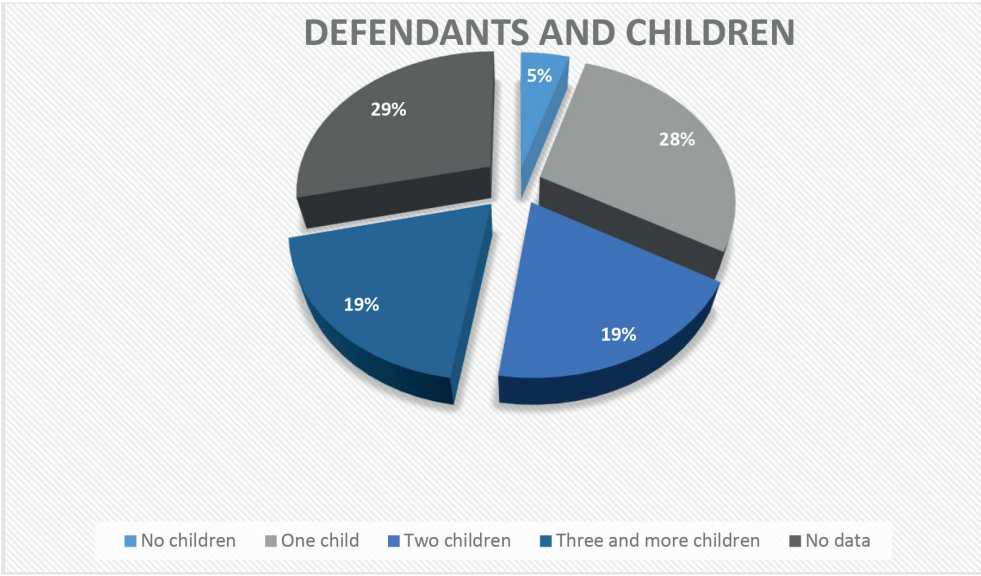


43 Law on Youth (Official Gazette of Montenegro 025/19 of 30 April 2019, 027/19 of 17 May 2019), Article 2;

44 UNITED NATIONS CONVENTION FOR OLDER PERSONS, Available at: <https://social.un.org/ageing-working-group/documents/sixth/Lesotho.pdf>

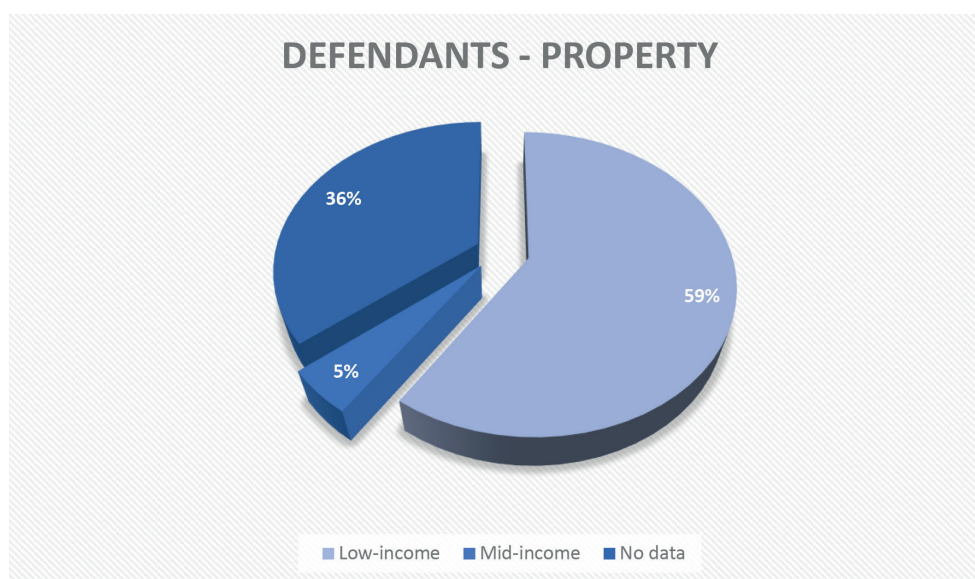


When it comes to children, our sample showed that in two cases two defendants (5%) did not have any children, in 12 cases 14 defendants (28%) had one child, in seven cases nine defendants (19%) had two children, in seven cases nine defendants (19%) had three or more children, while in 12 cases i.e. for 13 defendants (29%) there were no data about children. Therefore, when it comes to this criterion, being a parent does not affect the decision to commit an act of domestic violence. Moreover, given a considerable number of offenders who have children, there is a danger of the trans-generational inheritance of violence. Hence, the state should label combat against domestic violence as its top political priority. The combat against domestic violence and social protection to victims is fundamental, according to the Protector, because the family is a place where future offenders “learn about” the model of behavior where violence is an acceptable form of showing emotions, stress relief, or a way to resolve conflicts. Many studies in the region suggest that persons who were ill-treated or witnessed domestic violence in childhood have adopted the same pattern of behavior and abused their children.

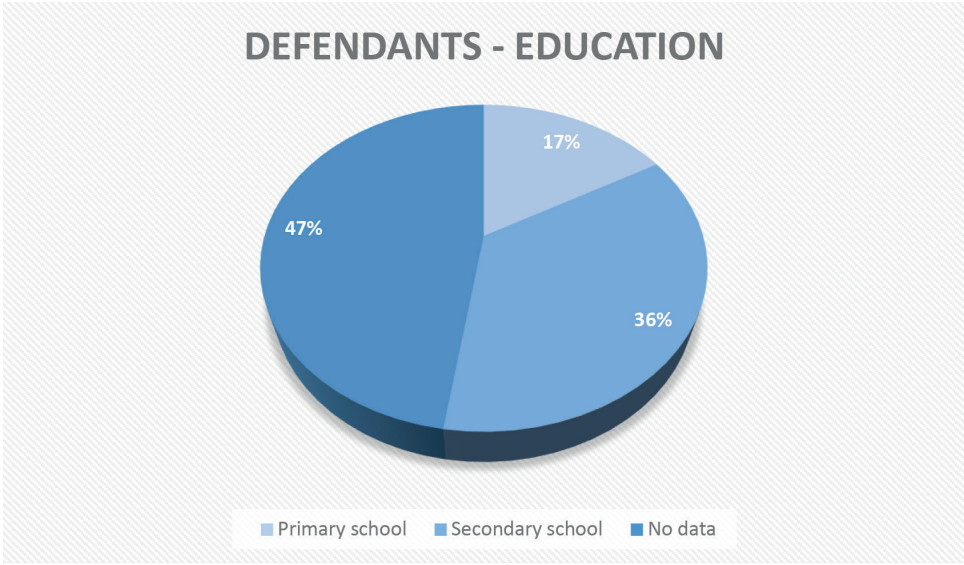




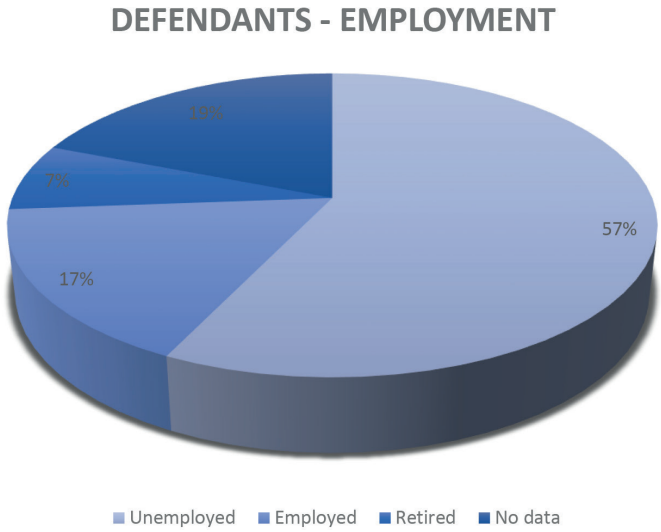
When it comes to the matter of *property*, in 25 cases, 30 defendants (59%) were persons of low-income financial status, while in two cases two defendants (5%) belonged to the mid-income category. The property status of defendants was not indicated in the remaining 15 cases i.e. for 15 defendants (36%). Although all national and regional researches suggest that domestic violence happens just the same regardless of the education or property status, these data indicate that the largest number of defendants come from socially disadvantaged families. However, such a conclusion is untenable given the fact that 15 verdicts failed to show the property status of defendants.



Education of defendants was the focus of this analysis too. So, in 15 cases 16 defendants (36%) were persons with secondary education, and in seven cases, eight defendants (17%) were persons with primary education only. However, verdicts failed to indicate education level in 20 cases for 23 defendants (47%). Data on education suggest a low percentage of verdicts where offenders of domestic violence have university degrees. Still, a conclusion about the education status of offenders cannot be made for sure because as many as 20 case files failed to provide data.



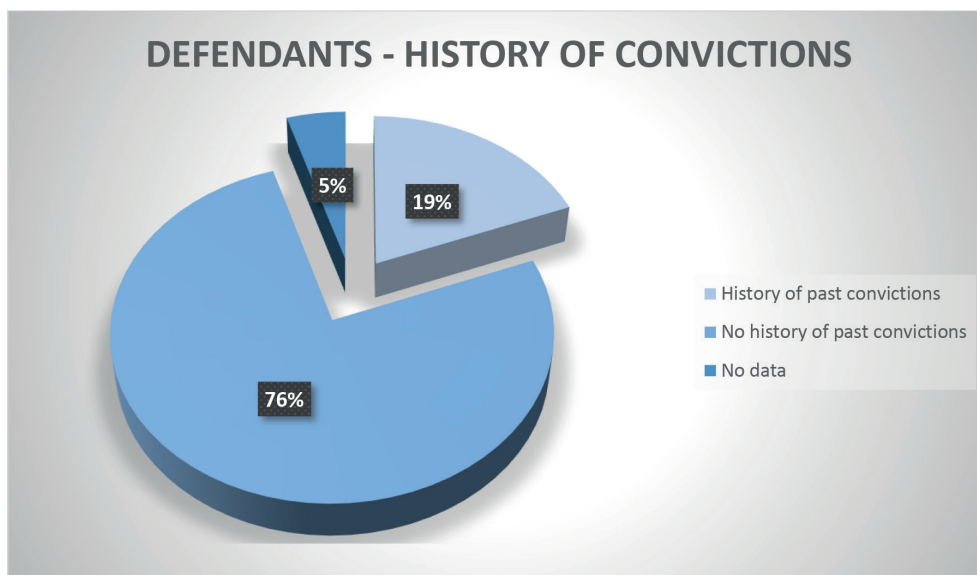
In terms of *employment* of defendants, we found that in 24 cases 25 defendants (68%) were unemployed, in seven cases eight defendants or (20%) had a job, in three cases three defendants (3%) were retired, and in eight cases there were no data about the employment status for 11 defendants (9%). Some sociological researches suggest that long-standing economic crisis, war conflicts in the region, the rise in the unemployment numbers, the influx of refugees, and the like had made “fertile soil” for an increase in domestic violence. This criterion may lead to the conclusion that employment or unemployment may be one of the likely causes of domestic violence or an outlet for offenders.



The analysis of *multiple punishments for the same offense* indicates that in eight cases nine defendants (19%) were punished before, in 32 cases 35 defendants (76%) did not have a history of convictions, while in two cases, there were no data about this criterion i.e. for three defendants (5%). Our sample suggests that there are more persons with no prior convictions among

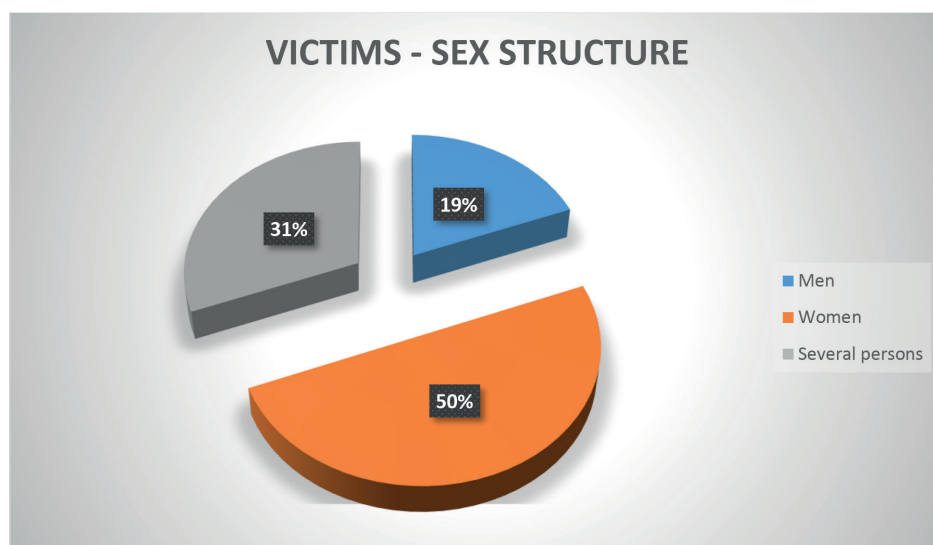


the offenders of misdemeanor acts of domestic violence. That could be a reaction to a mild penalty policy, which is evident especially since the courts took the history of no prior convictions as an extenuating circumstance.



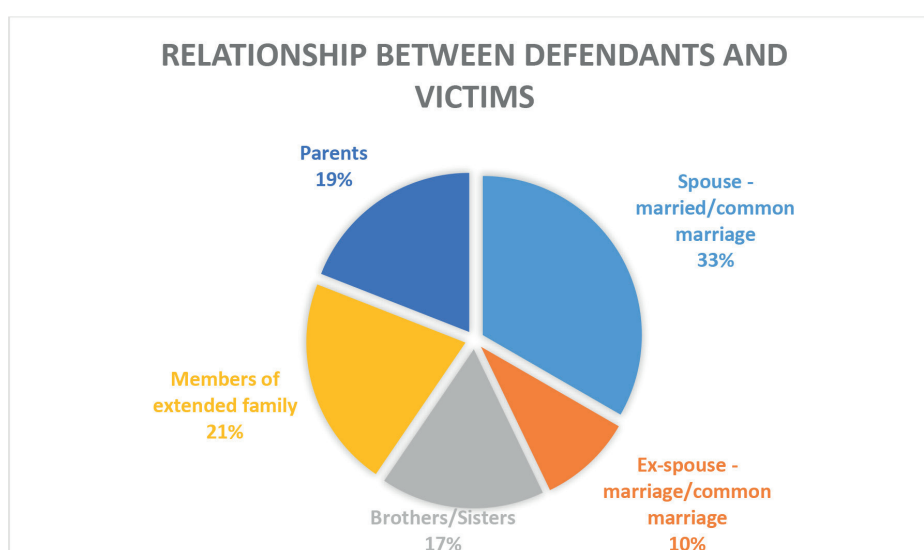
When it comes to the criterion of *characteristics of the victim*, this analysis took into account *sex and the relationship with the defendant*.

In terms of *sex*, of the total number of cases, in eight cases ten victims (19%) were men, in 13 cases (31%) the victims were several persons of different sexes, while in 21 cases, 26 victims (50%) were women. This sample suggests that women make a significantly greater proportion of victims of domestic violence and gender-based violence than men. A dominant impression, as mentioned in the part referring to the sex of offenders, is that men are victims of domestic violence committed by other male family members.





From the aspect of the relationship with the defendant, in 14 cases the victims were spouses (marriage or civil partnership) or 32%, in four cases (9%) the victims were ex-spouse, in eight cases (19%) the victims of violence were parents, in seven cases (19%) the victims were brothers or sisters of defendants, while in nine cases (21%) the victims were members of the defendant's extended family (uncle, aunt, son-in-law, niece). The analysis of this sample indicates that partner violence occurred in a significant number of cases there. Still, the number of cases in which the victims were parents or other family members is great too. Bad and disturbed relationships between victims and offenders were reflected in different ways in physical or psychological violence or both at the same time.



The next criterion that was analyzed is the type of violence which suggests that 28 cases involved gender-based violence, while 14 cases involved domestic violence.

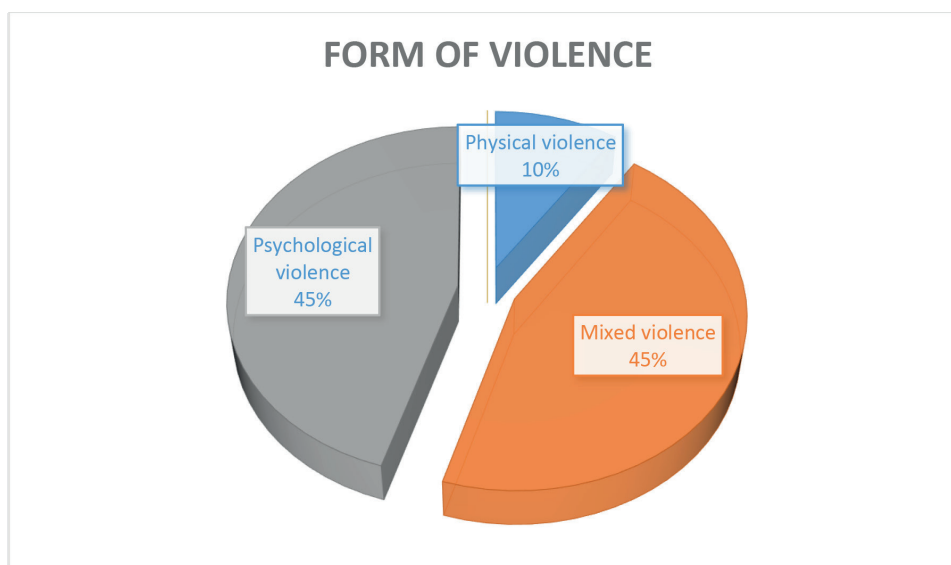
Gender-based violence
67%

Domestic violence
33%

And the last indicator refers to the form of violence. In four cases, only physical violence took place, in 19 cases there was a mixed form of violence with mostly cumulative physical and psychological violence, while in 19 cases there was psychological violence. Evidently, the most

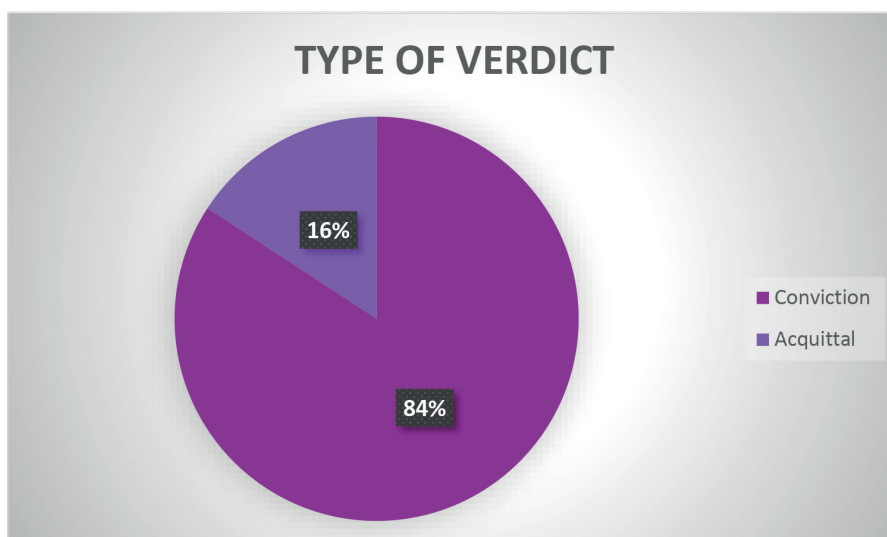


common form of domestic violence and gender-based violence is the mixed violence. During the analysis of all verdicts, there was no indication that a court procedure was conducted due to economic violence in the family. Naturally, it does not mean that economic violence did not take place, but more likely it was either not recognized by the victims or the authorized petitioner.



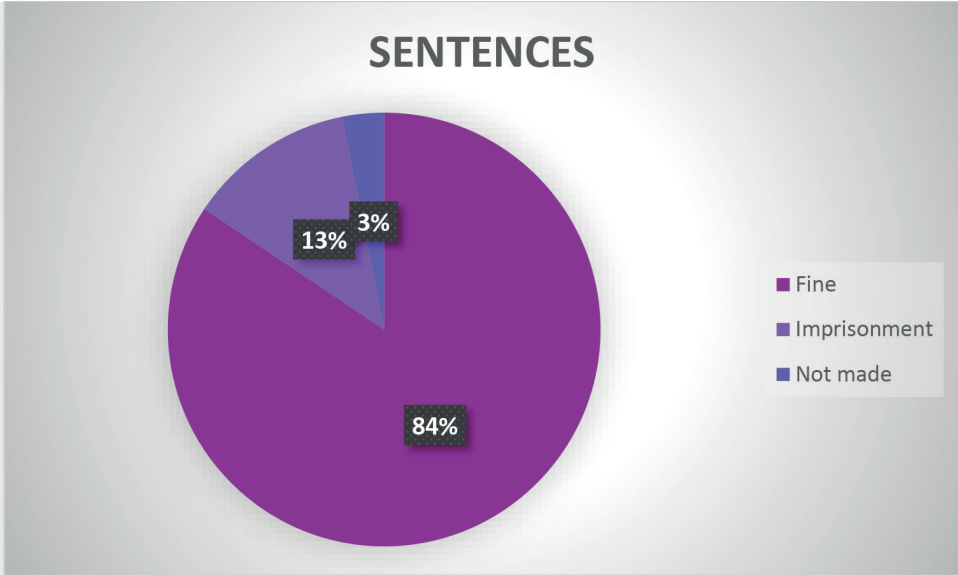
4.2. MISDEMEANOR COURT IN BIJELO POLJE

The Protector analyzed 38 verdicts of this Court. Of that number, convictions were imposed in 32 cases and acquittals in 6 cases.

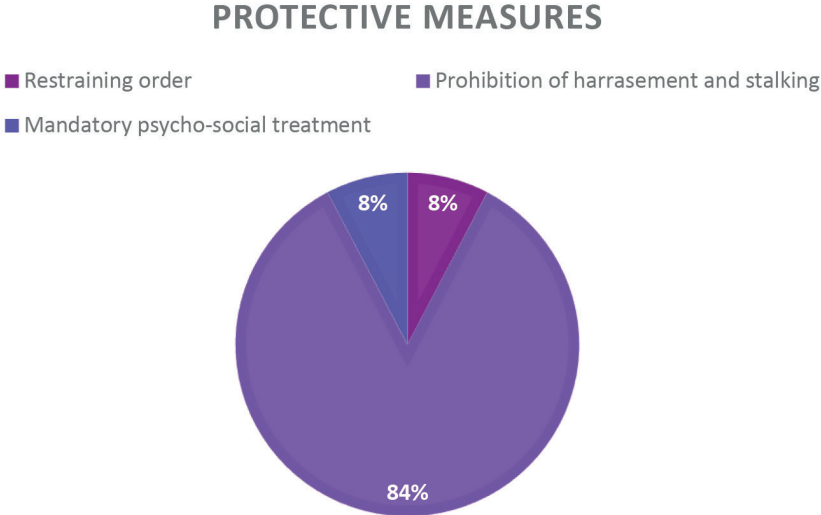




Out of the total number of convictions, prison sentences were imposed in four cases, fines were imposed in 27 cases, while in one case no sentence was imposed.

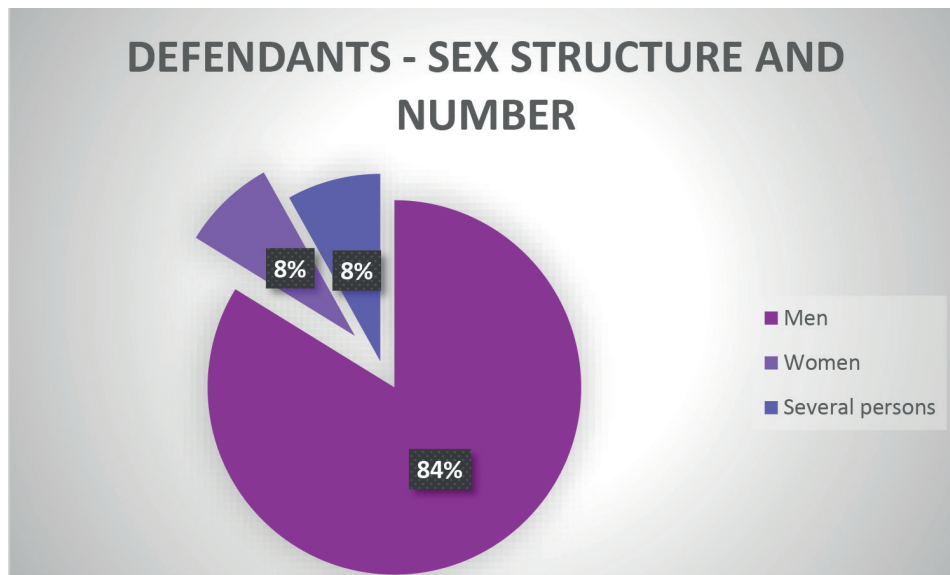


Protective measures were imposed in 12 cases. A total of 13 protective measures were imposed: one restraining order; 11 measures prohibiting harassment and stalking; one measure of mandatory psychosocial treatment;

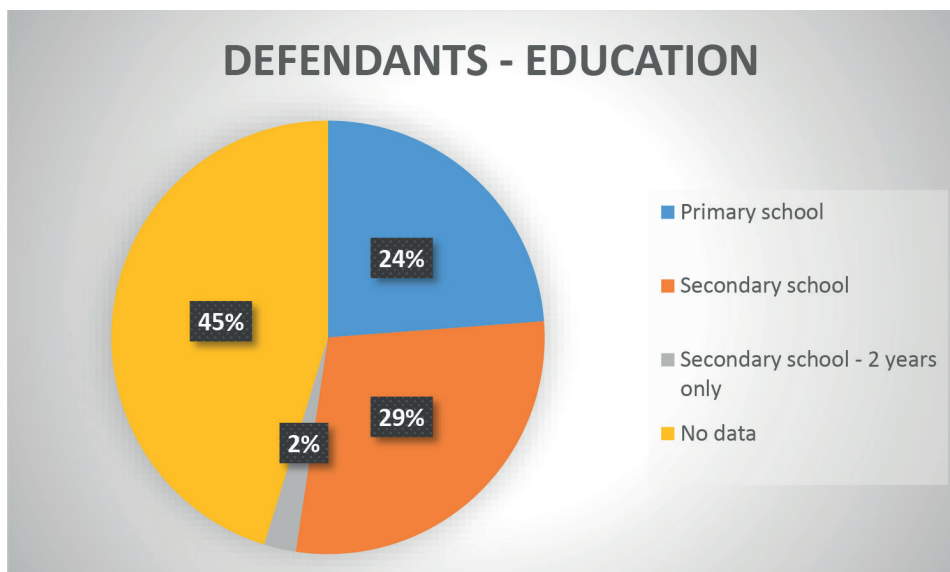




When it comes to the sex and number of defendants, men were defendants in 32 cases. Women were defendants in three cases; in three cases, two or more persons had the status of defendants. These data suggest that men are offenders in most cases, while women, on the other hand, commit an act of violence in rare cases - the exception rather than the rule.



Regarding the above, we should note that women were victims of violence in 17 cases. In seven cases the victims of violence were men, while in 14 cases the status of a victim was assigned to 2 or more persons. The above data suggest that women are a particularly vulnerable category in terms of the risk of gender-based violence. Therefore, all relevant institutions should take measures, within their competence, to minimize the worrying level of violence against women in Montenegro, if it cannot be eradicated.





As for the education level of the defendants, the sample indicated that ten defendants had completed primary school only, 12 defendants had completed secondary school, one defendant had completed two years of secondary school, while there were no data on the education level for 19 defendants.

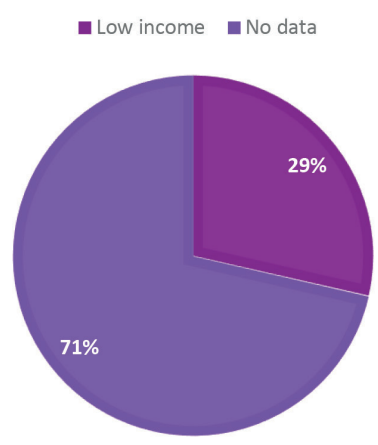


Although at first glance such data could suggest a direct connection between a person's level of education and propensity to violence, this is not the case. As already mentioned, in more than half of the analyzed cases, there were no data on the education level of the defendants, which makes it difficult to draw a precise conclusion in this regard. On the other hand, the data obtained by the Protector from verdicts of the other courts suggest that the offenders are persons with higher education in fewer cases. Still, given that the offenders in most cases are people with a lower level of education, it might be concluded that the education level is an indirect reason that leads to violence. Reasons for this can be multi-fold, such as lower awareness of gender equality, greater attachment to stereotypical gender roles and traditions, lower awareness of the criminality of violence and the like.



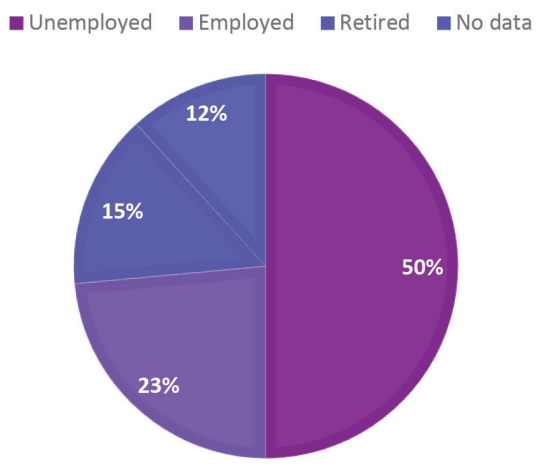
When it comes to the property of the defendants, 12 defendants were persons with low-income, while for as many as 30 defendants there were no data on their property.

DEFENDANTS - PROPERTY



Regarding the employment status of the defendants, the data suggest as follows: 25 persons were unemployed, eight persons had a job, five persons were retirees, while there were no data on employment status for four persons.

DEFENDANTS - EMPLOYMENT

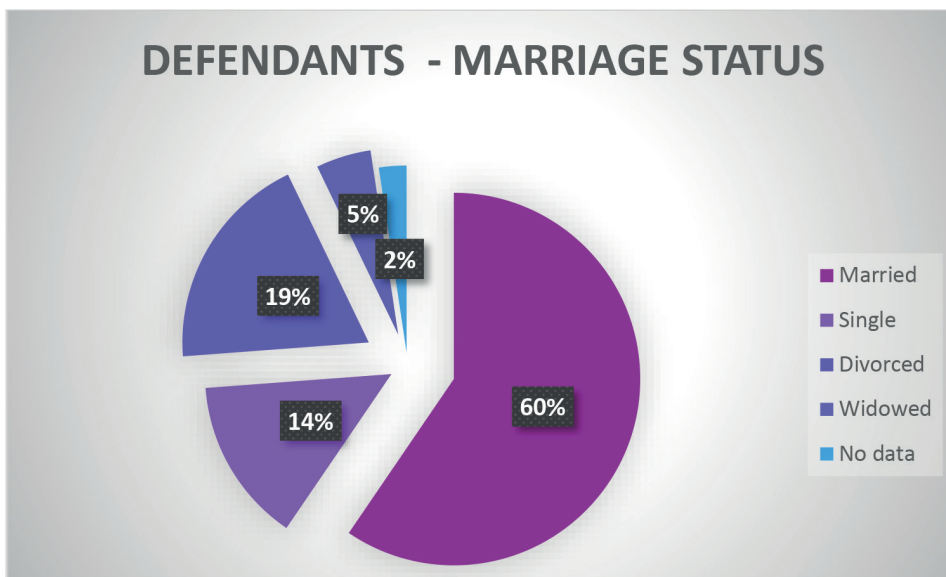


Thus, defendants' property and employment status cannot be considered a direct cause of violence, however, they can be considered an indirect cause that motivates defendants to commit an act of violence. This is based on verdicts of the two other courts, where the Protector concluded that offenders were in the high-income category in few cases. In this court, as in two other courts too, fewer defendants had jobs while several defendants had a relatively high income. The reasons behind the connection of violence and low income can be multi-fold too; the Pro-



tector's opinion is that unemployment and poor financial status might be one of the reasons for men who are unsuccessful in these aspects of life commit violence against women in an attempt to present themselves as successful or as the "head of the family".

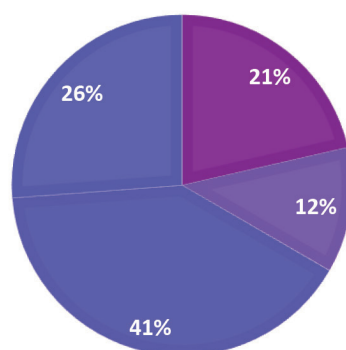
Marital status was one of the criteria we analyzed too. In this regard, we obtained the following data: 25 persons were married, six persons were not married, two persons were widowed, eight persons were divorced, while there were no data on marital status for one person.



The number of children was among the data we took into account too. So, it turned out that nine defendants had one child, five defendants had two children, 17 defendants had three or more children, while for 11 defendants there were no data about this criterion.

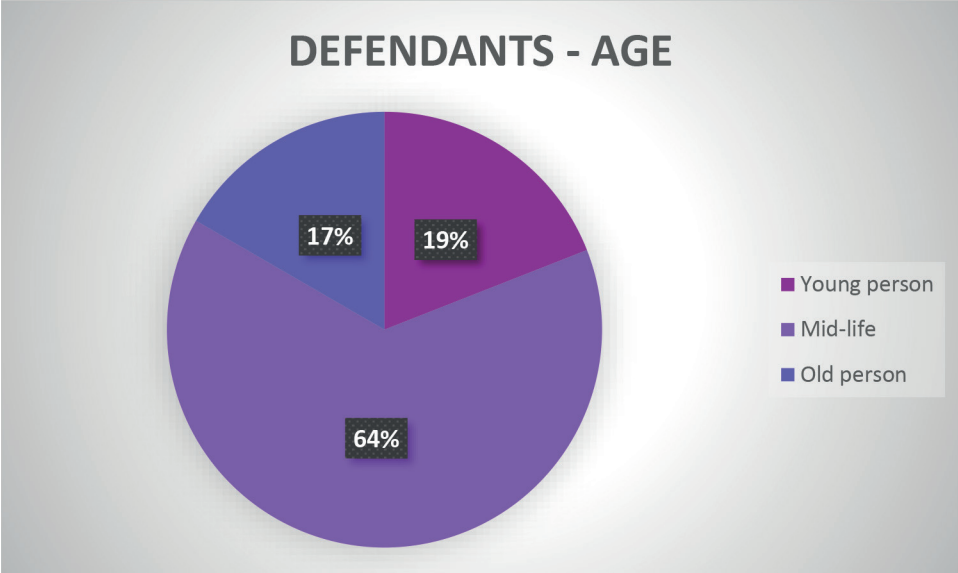
DEFENDANTS AND CHILDREN

■ One child ■ Two children ■ Three or more children ■ No data

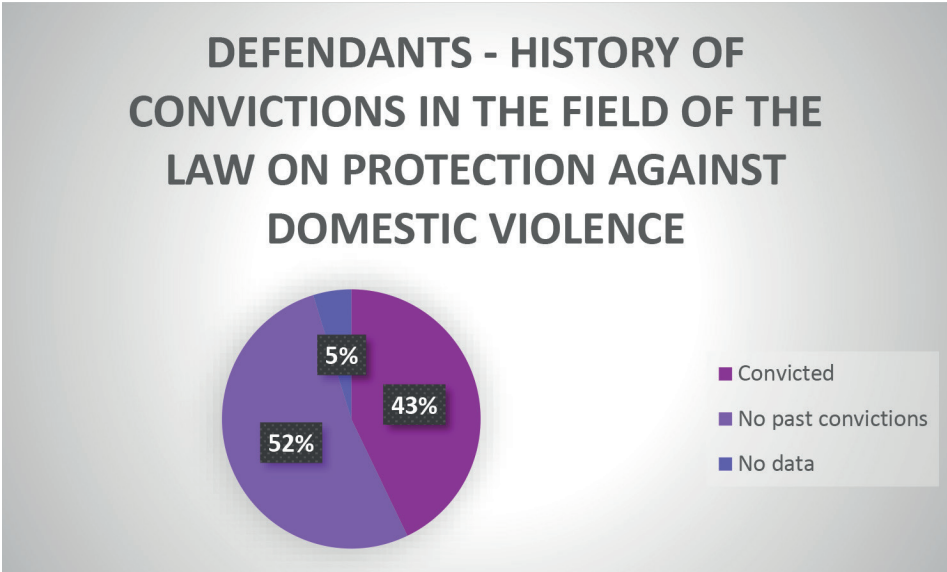




Regarding the age of the defendants, the data are as follows: eight persons were young, 27 persons were in mid-life, while seven persons were older people.

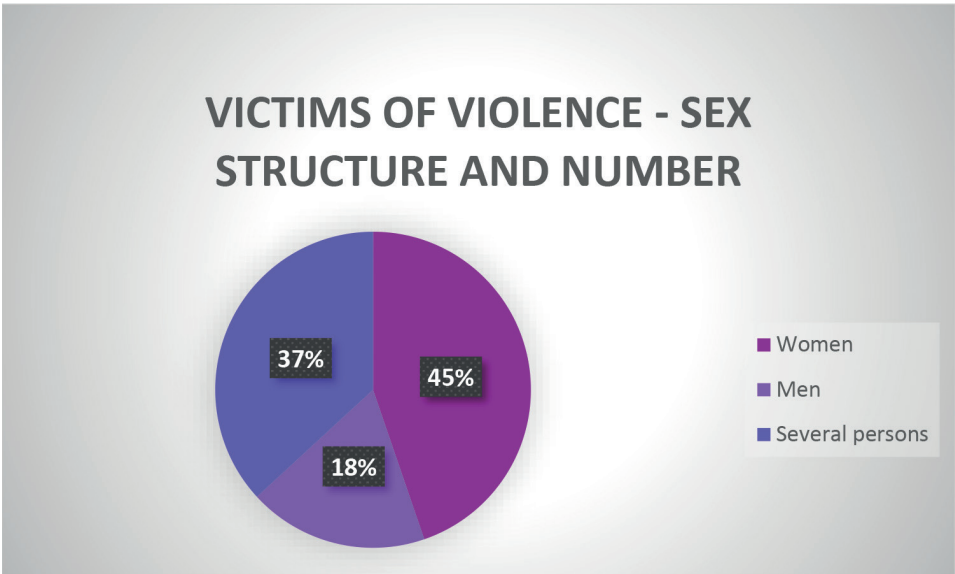


Regarding the multiple convictions of defendants in the area governed by the Law on Protection from Domestic Violence, the verdicts indicated that 22 defendants did not have a history of convictions in that field, 18 persons had a history of past convictions, while for two persons there were no precise data on previous convictions in the area of domestic violence.

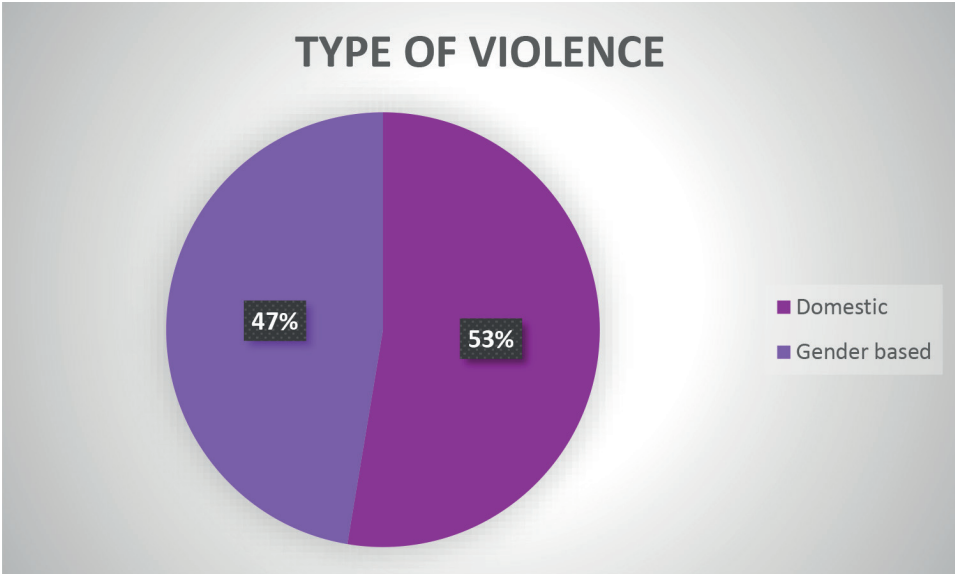




When it comes to the sex and number of victims of violence, women were victims of violence in 17 cases, men were victims in 7 cases, while in 14 cases an act of violence was committed against several persons. These data suggest that women face an increased risk of violence and gender stereotypes are often the direct cause leading to domestic violence.

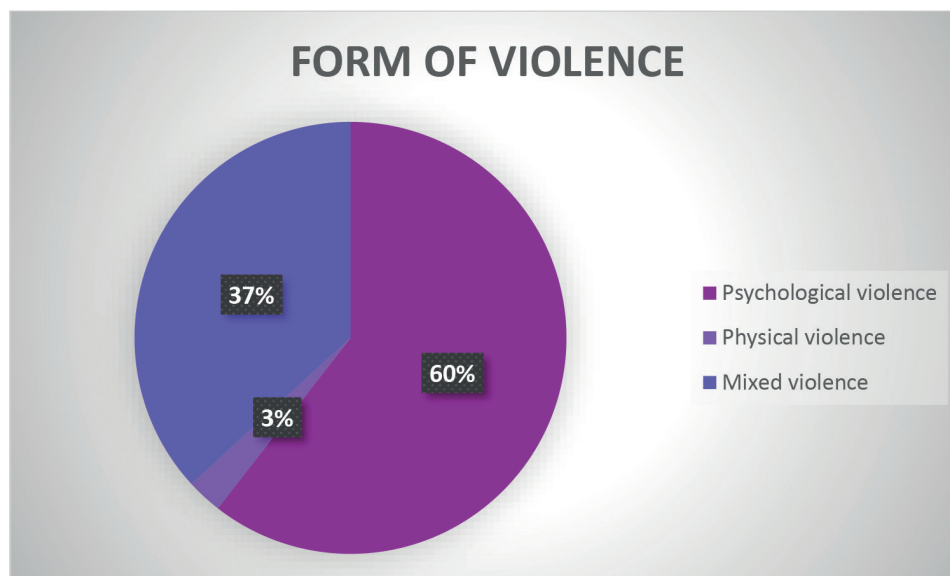


As for the type of violence, our sample suggested that the violence committed in 20 cases was domestic violence, and in 18 cases it was gender-based violence.





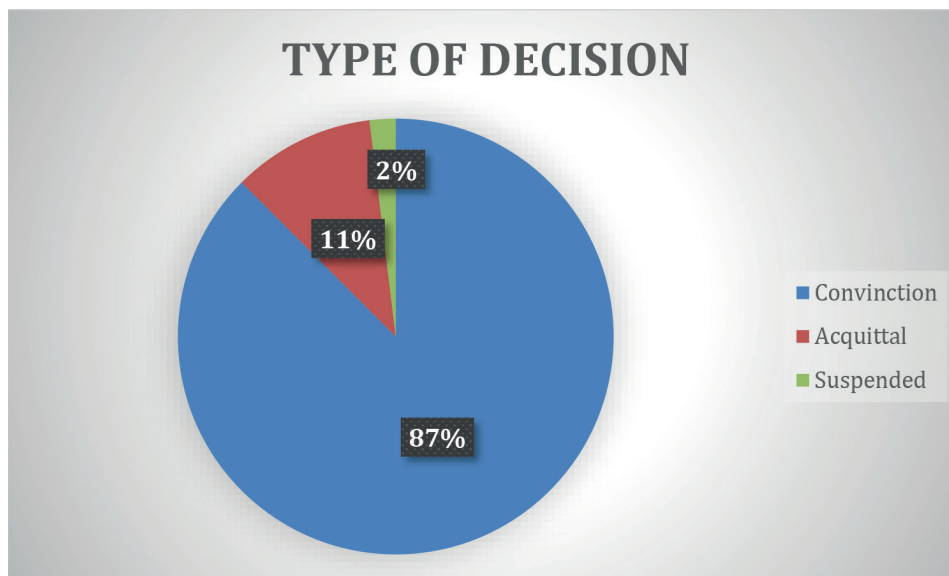
Regarding the forms of violence as a criterion, 23 cases involved psychological violence, one case involved physical violence, while in 14 cases there were several forms of violence committed against the victim at the same time.



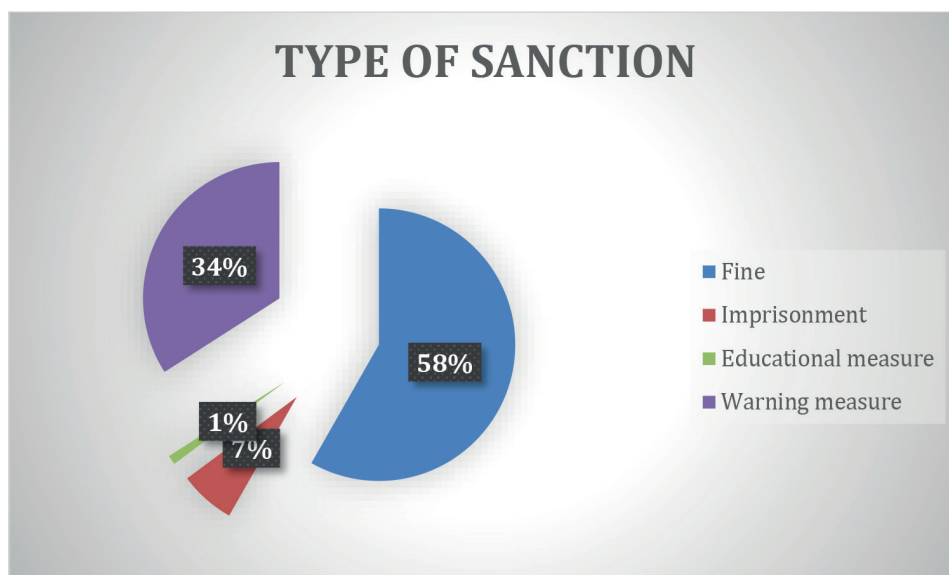


4.3. MISDEMEANOR COURT IN BUDVA

When it comes to this court, we analyzed 104 verdicts. In 91 cases, court verdicts were convictions, 11 verdicts were acquittals, while the proceedings were suspended in two cases.



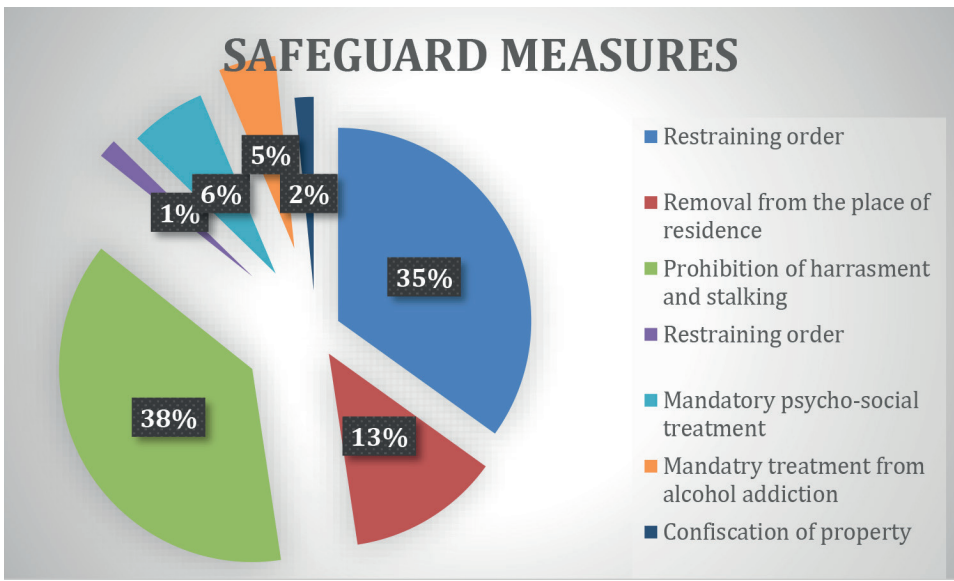
Out of the total number of convictions, fines were imposed in 53 cases, while prison sentences were imposed in 6 cases. In one case, the court imposed an educational measure of intensified supervision by guardianship authority. Warning measures were issued in 31 cases. A total of 33 such measures were imposed, of which 24 suspended sentences and 9 warnings.





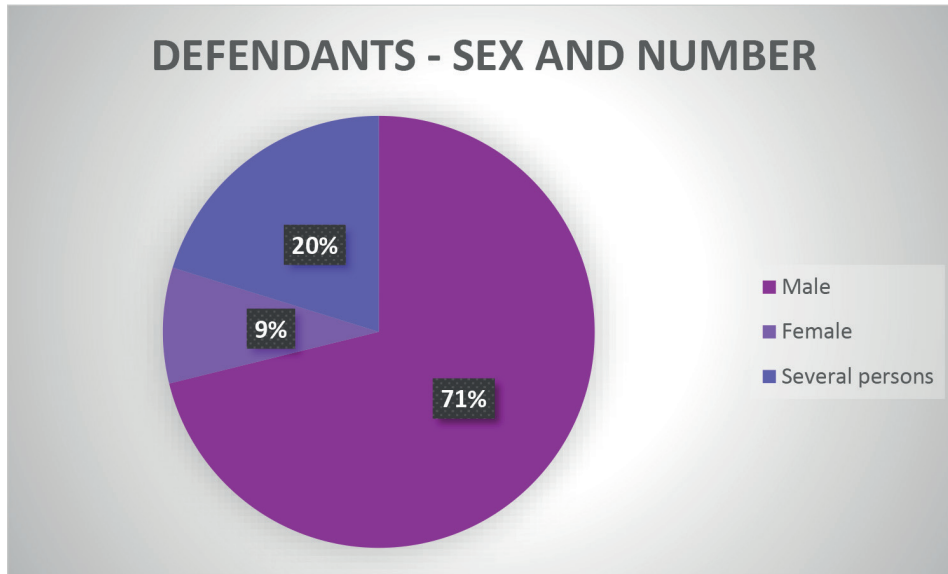
Protective measures were imposed in 50 cases. A total of 61 protective measures were imposed, as follows:

- 22 restraining orders;
- Eight removals from the place of residence;
- 24 bans on harassment and stalking;
- One restraining order;
- Four mandatory psychosocial treatments;
- Three mandatory treatments for alcohol addiction;
- One measure of confiscation of property.

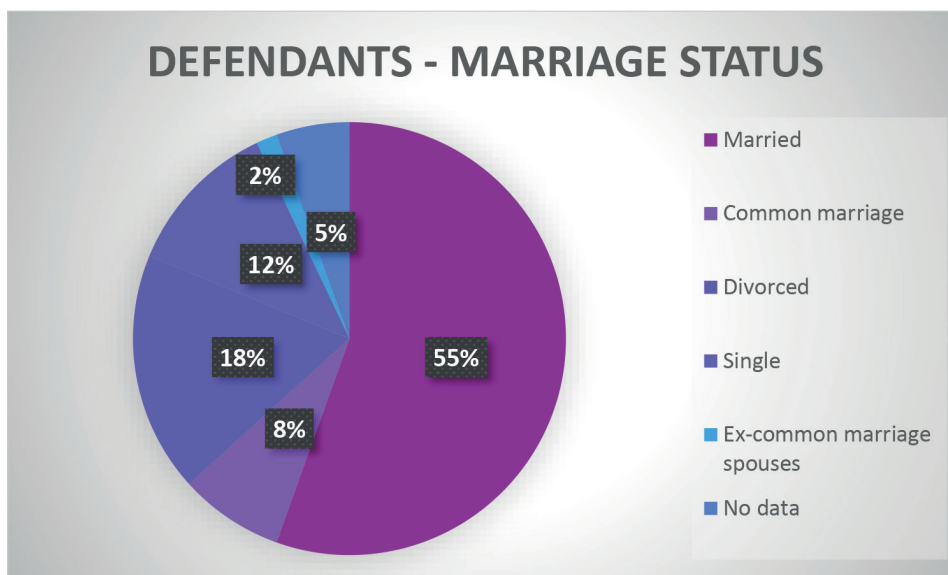




Data related to sex and the number of offenders indicate that the defendants were men in 74 cases, in nine cases they were women, while in 21 cases there were two or more defendants. These numbers regarding the sex of the defendants suggest that men commit violence more often than women. Therefore, the Protector reiterates the importance of work with this category of population in various ways (seminars, training, round tables, etc.) to raise awareness about the unacceptability of domestic violence.

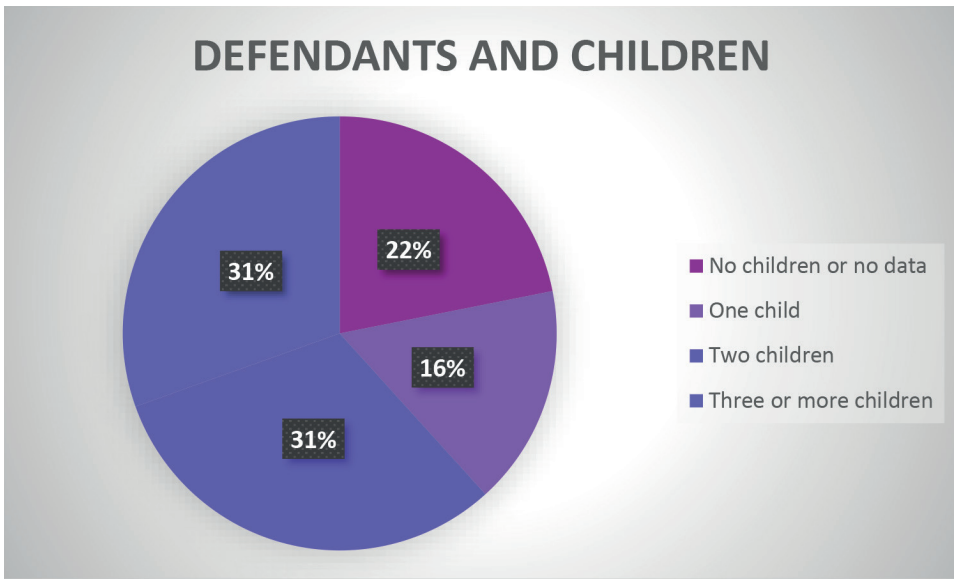


When it comes to the marital status of the defendants, the data are as follows: 23 defendants were divorced, 71 were married, 10 lived in a civil partnership, while 15 defendants were neither married nor living in a civil partnership, two persons were former spouses (civil partnership), and no data on marital status were available for seven defendants.

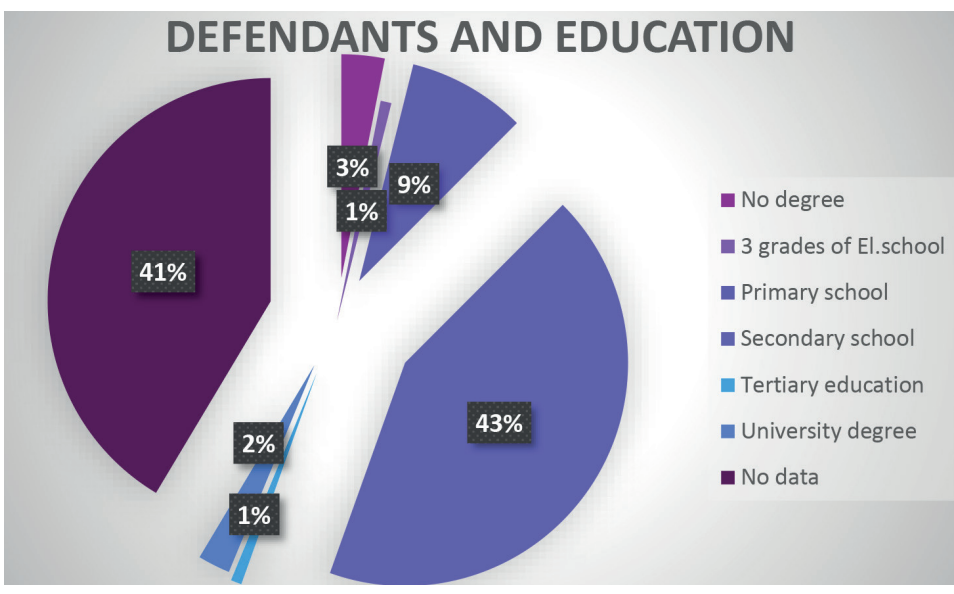




Regarding the children of the defendants, 21 persons had one child, 40 persons had two children, 39 persons had three or more children, while 28 persons did not have children or the Court failed to note such information.

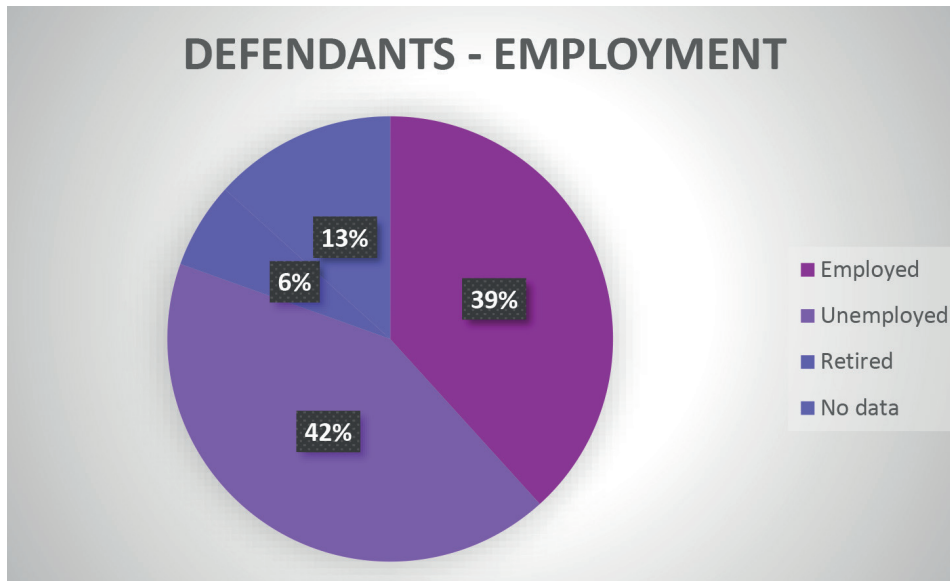


Data related to the level of education of the defendants show that four defendants were without any education, one defendant completed three grades of primary school, 55 defendants had a secondary school diploma, one person graduated from a two-year post-secondary school, three people graduated from university, while there were no data about the education of 53 defendants.

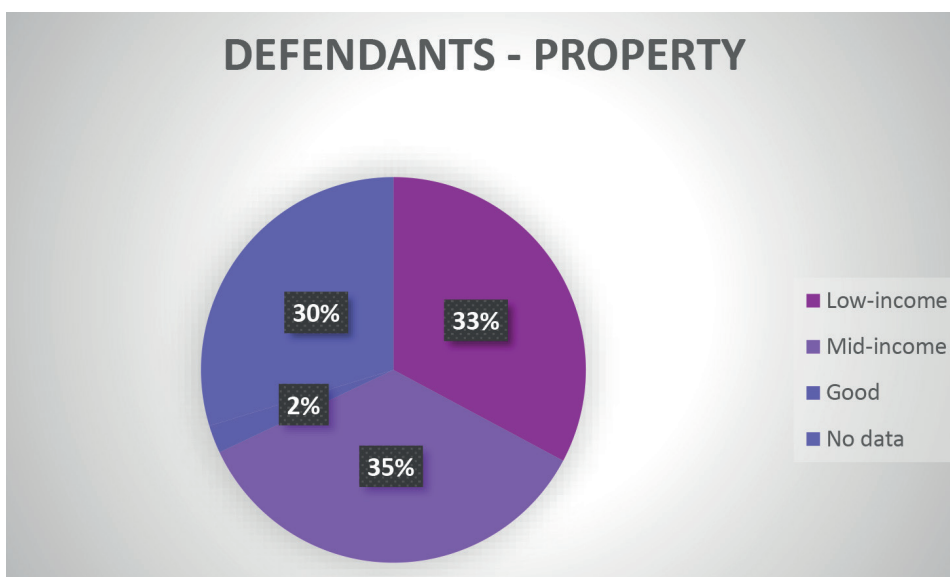




The analysis focused on the employment of the defendants too. The sample suggests that 49 people had a job, 54 people were unemployed, eight people were retirees, while there was not any information on the employment status for 17 people.



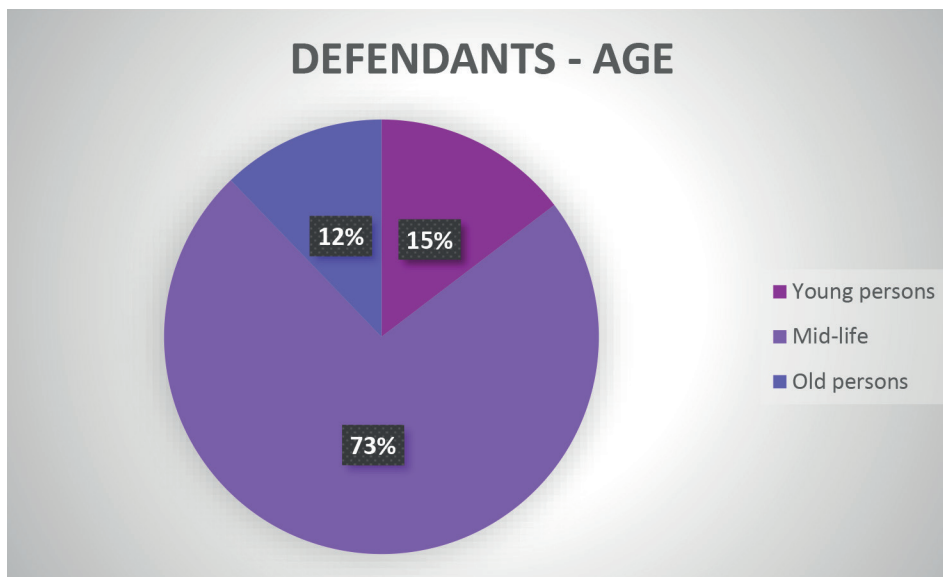
When it comes to the property status of the defendants, the collected data showed that 42 defendants were in the low-income category, 45 persons were in the mid-income category and 3 persons were of good financial status. Again, there were no data on the status of the property for 38 persons.





Given that the number of employed/unemployed offenders and the ones in the low/mid-income category is similar, we cannot establish a direct link between unemployment or low-income and violence, as noted above, but rather that link is indirect. Besides, as there were no data about these characteristics in many cases, it is difficult to draw a more precise conclusion in that regard.

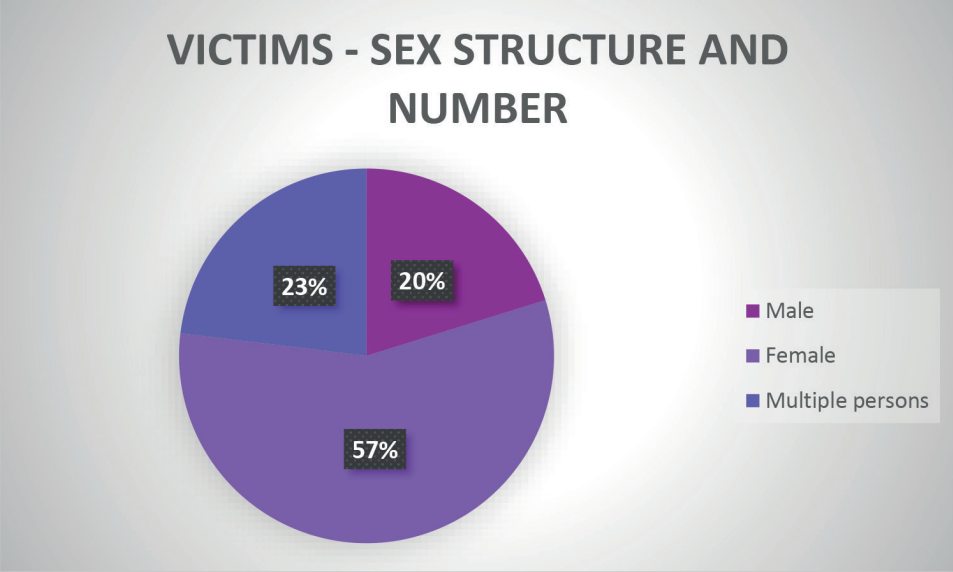
Regarding the age of offenders, the sample showed that 18 defendants were young people, 90 defendants were in the mid-life category, while 15 defendants had a status of the elderly.



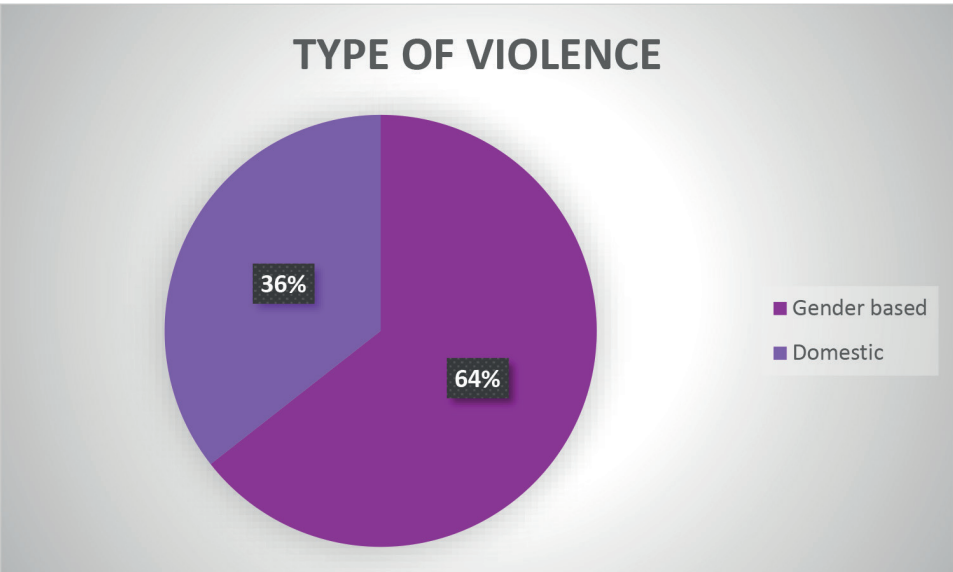
When it comes to the past conviction of defendants in this area, it was not possible to obtain precise data about this criterion as the vast majority of decisions submitted to the Protector did not contain an explanation, in contradiction with Article 129 paragraph 5 of the Law on Misdemeanors.⁴⁵

The focus of this analysis was on the sex and number of victims of violence. Data related to this criterion showed that women had been victims of violence in 59 cases, men in 21 cases, while two or more persons had been victims in 24 cases. Concerning these data, the Protector reiterates that the above analysis regarding verdicts of other courts applies to this court as well, so the Protector will refrain from further comments about the data in this category. According to the Protector's judgment, it is more important to draw special attention to the fact that a child was a victim of violence in one case. Hence, courts and other supervisory bodies' attention to such cases is vital.

⁴⁵ Official Gazette 001/11, 006/11, 039/11, 032/14, 043/17, 051/17

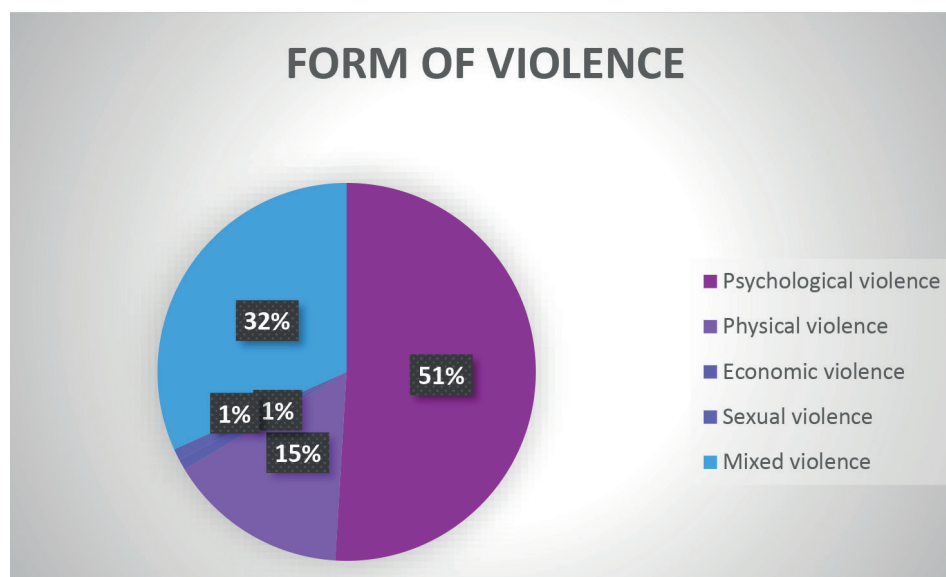


One of the particularly important criteria in the analysis was the type of violence. Concerning this criterion, the Protector points out that gender-based violence occurred in 67 cases and domestic violence occurred in 37 cases. These data are another indicator of the intensity of gender-based violence in Montenegro.





The analysis focused on the form of violence too. Therefore, having analyzed the sample the Protector concluded: psychological violence had been committed in 53 cases, physical violence in 36 cases, in one case the offender had committed economic and sexual violence, while in 33 cases it had been mixed violence.





V THE PROTECTOR'S PRACTICE IN CASES OF GENDER-BASED VIOLENCE AND DOMESTIC VIOLENCE

The actions of the Protector in the field of domestic violence and gender-based violence derive from the provisions of the Law on the Protector of Human Rights and Freedoms of Montenegro⁴⁶ which envisage that The Protector, autonomously and independently, on the principles of justice and fairness, takes measures to protect human rights and freedoms, when they are violated by an act, action, or failure to act of state bodies, state administration bodies, bodies of the local self-administration and local administration, public services and other holders of public powers, as well as competences stipulated by the law according to which the Protector is an institutional mechanism for protection against discrimination.

The Protector's actions in this type of cases that relate to courts are governed by provisions applicable to the work of courts: delay in the proceedings, abuse of procedural authorizations, or failure to execute court decisions.⁴⁷

Ever since the jurisdiction of the Protection was established, the number of complaints in this area has increased year by year. Also, the number of submitted complaints resulted in a large percentage of established violations of rights. In most cases, complaints were submitted by women who claimed that law enforcement agencies had been ineffective in their actions. That reflected in, among other things, the failure to enforce verdicts and maintain contact between a child and a non-resident parent, which was preceded by gender-based violence.

In some proceedings, after the verdict became final and the best interest of a child was established, it was obvious that the guardianship authority or the enforcement court re-established the best interest of the child. In this regard, the Protector stressed that by failing to enforce or by postponing the enforcement of the final verdict, the child is exposed to additional traumatization and manipulation, which might be irreparably damaging to a child's growth and development.

According to sociological research, the phenomenon of domestic violence and violence against women is alarmingly high, and some of the researches suggest that more than one-third of women experience some form of violence in their lifetime. In this sense, the Protector reiterates that domestic violence and violence against women is never a private matter and victims of domestic violence are not to blame for the violence that has been committed against them. Therefore - the offender is responsible for the violence and should always be blamed for it. Under international standards, it does not matter whether the offender and the victim have in a marital, civil partnership, current or past relationship, nor how long it lasted, whether they share or have shared a common residence or not. Violence must be the subject of state intervention i.e. state institutions wherever it occurs, inside or outside the family home, because the injuries and consequences it causes are the same everywhere and can lead to tragic events. To combat domestic violence, everyone who becomes aware of violence must react conscientiously, report such cases and thus contribute to a reduction of that negative social phenomenon.

According to NGOs dealing with this matter, in the period March-June when more than half of the world's population was under special measures due to the COVID-19 pandemic, along with the

46 Official Gazette 042/11 dated 15 August 2011, 032/14 dated 30 July 2014, 021/17 dated 31 March 2017.

47 Law on the Protector of Human Rights and Freedoms of Montenegro (Official Gazette 042/11, 032/14, 21/17) Article 17



adoption of measures to combat the virus such as border closures, unfortunately, there has been an increase in domestic violence. According to the Protector's data on cases of domestic violence and gender-based violence, there was no increase in the number of petitions. However, that does not mean this phenomenon did not have a negative effect on victims, but rather, victims were unable to report domestic violence.

It is worth noting that in 2018, the Protector sent the Initiative to amend the Law on Protection from Domestic Violence. As a reaction, a relevant ministry established a working group to prepare amendments to the law. It is vital, the Protector reiterates, to keep in mind that sanctions for offenders are mild and have failed to send a message clear enough about the policy of zero tolerance for violence. Therefore, it should be emphasized that changes in the legislative framework are not sufficient *per se*. Rather, efficient enforcement of regulations, stronger coordination of bodies and services dealing with cases of violence, as well as penalty policy which, in addition to protective measures, includes proportional and dissuasive sanctions for offenders are vital.

To improve the situation in this field, the Protector believes that it is necessary to ensure a continuous collection of comprehensive statistics on domestic violence and violence against women, disaggregated by sex, age, women with disabilities, women from minority groups (RE population, migrant women, transgender persons, etc.) and the relationship between the victim and the offender. Also, these data should be analyzed thoroughly and its results used to design policies and measures in the future to prevent and combat domestic violence and violence against women.

Furthermore, steps should be taken to improve the coordinated and efficient operation of all institutions in providing protection from domestic violence and other forms of gender-based violence. Moreover, special attention should be paid to providing housing for women victims of domestic violence and gender-based violence and to their economic empowerment.

Also, it would be important to inform the public about the competencies of institutions in protection from domestic violence and violence against women, as defined by the Law on Protection from Domestic Violence and the Protocol on the conduct of institutions in cases of domestic violence. Additionally, the Protector believes that continuous, specialized, and gender-sensitive training is indispensable for representatives of all relevant institutions that would, in addition to raising awareness about legal procedures, provide an understanding of domestic violence and the victim's position and behavior.

Below is an overview of cases from the Protector's extensive practice regarding gender-based violence and domestic violence.

Example No 1

In the initial and accompanying document, the plaintiff stressed that she had been happily married to her husband for many years. They had five children, and one of them had cerebral palsy. She claimed that she had been a victim of violence from her in-laws (her husband's father, mother, brother, and sister) for the past three years, which was confirmed by two verdicts of the Misdemeanor court in Podgorica. She claimed that she had repeatedly reported violence to the Police Directorate and the Center for Social Work in Podgorica, however, the situation with the offenders had grown worse day by day. She explained that the entire family lived in two separate housing units but shared the same yard, and had a lot of contacts.



In this case, three separate proceedings were conducted that focused on the actions of three bodies: *the Police Directorate - Podgorica, Center for Social Work in Podgorica, and the Misdemeanor court in Podgorica*. So, having received statements from all these authorities, the Protector could look at the broader picture and issue an opinion regarding all three bodies.

In a declaration on the allegations from the complaint, the **Center** explains that a two-story family house is located in a joint yard that is occupied by members of the plaintiff's secondary family, i.e. father-in-law, mother-in-law, brother-in-law, sister-in-law, and her daughter. Relationships between family members have been disrupted for many years. The plaintiff told the representatives of the Center that she had suffered violence for a long time but she had not reported it to the police in the past, because her husband's uncle used to come to help them reconcile. In 2018, several mutual complaints took place. The plaintiff reported her sister-in-law and her daughter. In return, they reported her, with the mother-in-law also reporting domestic violence. Several legal proceedings were instituted before the Court with different judges assigned to different proceedings. Verdicts were brought in some proceedings while in others proceedings are still pending. Assistance and support to the plaintiff are provided under the powers and rules of the profession, through interviews and counseling at the Center by telephone and home visits, according to the plaintiff's needs. The plaintiff never expressed dissatisfaction with the work of her case manager.


The Protector does not find any violation of rights that would violate the plaintiff's rights in the actions of the Center for Social Work in this case. Moreover, the plaintiff herself was very cooperative and used multiple services provided by the Center until the end of the pre-trial phase. So, the Protector see that as an example of good practice in working with a victim of domestic violence. However, to combat domestic violence of several offenders against the plaintiff, activities of the Center are not sufficient, as the verdict of the Court suggests, but rather a multisectoral approach with swift and coordinated activities of system institutions.

Also, the Protector believes that services of social protection should continue in this case, both to the plaintiff and to other members of her immediate and extended family, especially because the plaintiff has five children who witness domestic violence and frequent quarrels, as the psychologist's report suggests. Social protection services must be resumed as soon as possible to be efficient. As this case is a complex legal matter, including a victim of domestic violence who is a woman, mother of five of whom one has cerebral palsy and who frequently witness domestic violence committed by several in-laws, the Protector reiterated that measures and actions should continue urgently, as well as the required professional support and assistance, to combat violence against the plaintiff. Therefore, the Protector made the following recommendations to the Center for Social Work⁴⁸:

1. To resume immediately all necessary activities, through intensive counseling and psycho-social activities, with the plaintiff as well as with other members of the family X.
2. To follow-up the case continuously and do mandatory home visits under the Protocol on the treatment, prevention and protection against violence against women and domestic violence.

Furthermore, the Protector made recommendations to the Multidisciplinary team for protection against violence against women and domestic violence, as follows:

48 Available at: https://www.ombudsman.co.me/docs/1549888515_28122018-prpeoruka-csr.pdf

- 
1. To initiate and organize a case conference on this particular case;
 2. That draw up a Protection and security plan with clear responsibilities of all institutions and organizations in the Multidisciplinary team;
 3. To monitor joint activities to combat gender-based violence;
 4. To include a representative of the institution of Protector in the Multidisciplinary team, if necessary;

When it comes to the activities of the **Police Directorate**, the Protector found that the Police acted upon every report of domestic violence in that care, which means that the police initiated misdemeanor proceedings for all misdemeanors. The statement of the Center suggested that the Police Directorate was informed immediately after the plaintiff's first complaint to act within the scope of their competencies. However, the statement of the Police Directorate is such that one cannot conclude whether the police officers went to the house upon learning of the violence i.e. if they sent at least two police officers as stipulated by the Protocol on treatment, prevention and protection from domestic violence.

The actions of police officers are crucial to combat domestic violence. Moreover, the police have a key and binding approach to domestic violence cases and, under their powers, they take appropriate measures to detect, prevent and obtain evidence of crimes or misdemeanors committed by a family member or partner.

Concerning the above, the Protector made a recommendation⁴⁹ to the Police Directorate - Sector for the combat against homicide and domestic violence, as follows:

To fully enforce the Protocol on the procedure, prevention and protection against domestic violence in the future and within the scope of their powers.

In their first statement, the Misdemeanor court in Podgorica pointed out that six proceedings were initiated in 2018, with four still pending as of the date of their statement.

Therefore, the Protector urged the court to send information on the status of the remaining four cases. The Protector received the information that one case was finalized, one was appealed to the Misdemeanor Council, and the remaining two cases were pending in which a verdict would be made as soon as all facts and legal standing have been established.

The Protector referred the Court to consult the case-law of the European Court of Human Rights, which, under Article 6 of the European Convention on Human Rights and Freedoms requires that cases are to be resolved within a reasonable time. The European court noted that the efforts of the judiciary to expedite the proceedings as much as possible played a significant role in providing the applicants with guarantees of the rights from Article 6 of the European Convention on Human Rights and Freedoms. Therefore, domestic courts have a special responsibility to do their utmost to avoid unnecessary delays in proceedings⁵⁰.

On the other hand, the Council of Europe's Convention on Preventing and Combating Violence against Women and Domestic Violence in Article 49 stipulates that the parties are to take the necessary legislative or other measures to ensure that investigations and judicial proceedings

49 Available at: https://www.ombudsman.co.me/docs/1549887907_28122018-preporuka-up.pdf

50 ECtHR, judgment on Vernillo v. France, 20 February 1991, para. 38



concerning all forms of violence covered by the scope of the Convention are carried out without undue delay while taking into consideration the rights of the victim.

Bearing in mind that multiple acts of violence were recorded in this case, the Protector emphasized that, according to the Protocol on domestic violence, that case must be dealt with by the Multidisciplinary team, which is composed of representatives of several institutions. Also, the Protector pointed out that any participation by courts must be limited to advisory function only, so as not to compromise conflicts of interest when these cases are brought before courts for judicial decision-making.

Having in mind the chronology and course of proceedings before the first instance misdemeanor court, contradiction of facts, complexity of family relations, and requests for special attention in proceedings involving domestic violence, the Protector states that they were conducted in a manner, rules, and standards prescribed by the law without undue delays due to which the plaintiff could have suffered further consequences of domestic violence other than those established by the final verdict. The Protector recommends using additional mechanisms, such as the Protocol, under Article 5 of the Law on Protection from Domestic Violence, which prescribes the duty to “provide a victim with full and coordinated protection, within the institution’s respective powers and depending on the severity of the violation”.

Based on the above and the investigation procedure, the Protector could not find a violation of rights by the Court. However, the Protector pointed out to the Court that in situations which are defined in the European court’s case-law as permanent, the courts for misdemeanors are expected to use the protective mechanism - the Multidisciplinary Team referred to in Article 17 of the Law on Protection from Violence, under the Protocol.

After the procedure involving complaints and recommendations in this case ended, they were published on the Protector’s website, in the section Opinions, and published soon after by Montenegrin print and electronic media. After a month, the plaintiff contacted the Protector again and pointed out that the recommendations and public pressure resulted in a complete cessation of gender-based violence. Thus, the recommendations of the Protector were fulfilled.



Example No 2

The complaint was addressed against the **Center for Social Work in Bar**. The plaintiff had been married for about 10 years, and had two minor children, aged eight and ten, with her ex-husband. She left her marriage on 17 June 2015 due to violence committed in front of children on 12 June 2015. After that, she was placed at the shelter of the NGO SOS Hotline for Victims of Domestic Violence in Nikšić. Both children stayed with her ex-husband from 3 August 2015 until 23 February 2016. During that time she met with her children at the premises of the Center for Social Work in Nikšić for one hour per meeting. After that, the children stayed with her. However, her ex-husband took their son from the premises of the Center for Social Work in Nikšić on 13 April 2016 and did not return him; furthermore, the daughter stayed with him from 11 June 2016. Since then, her ex-husband has lived with their children on the territory of the Municipality of Bar.

In their statement, the Center for Social Work stated that the measures and actions had been intensive and always aimed at normalization of relationships in the family, having on mind primarily to re-establish the ties between the children and their mother and maintaining that contact. After children returned to their father, the problems became even more complex, as children refused any contact with the mother, badmouthed, and accused her constantly. Several interviews were held with the children alone, but without any progress - children were explicit in the accusations against the time they had spent with their mother in Nikšić when they had been prevented to contact their father. The Centre suggested the therapy in the Development and Counseling Center at the Clinical Center of Montenegro with experts in psychology and work with children. Attached to the statement were letters about all actions and activities of the Center from 3 November 2016. As for the badmouthing against the mother, the father claimed that such things might have happened in his absence. And, he emphasized, he insisted that children should call the mother and he would never allow them to mistreat her. The fact is that, ever since they returned to their father, the children spoke badly about their mother even in presence of representatives of the Center, mocked her, and refused to talk to her. Father was advised to sanction such behavior to which he (verbally) agreed.

In the final assessment, the Protector noted that the ex-husband had been present at all meetings of mother and children at the Center, as the files of the Centre suggested, under the pretext that “children did not want to be separated from their father.” Still, children should have been informed at the beginning that the father would not be allowed to attend such meetings. At their age, eight and ten, they would be able to understand that explanation. Furthermore, the course of communication between children and the plaintiff should have been directed adequately. According to the records of the Center for social work, the father directed the course of communication at meetings between the plaintiff and children as if he were a social worker. The official records further showed that the Centre suggested sending the entire family to therapy at the Development and Counselling Center (which the Protector will not challenge or discuss its suitability). However, it was evident that such treatment was not suggested to the other parent. Analyzing the frequency of contacts and their duration, the meetings were not as frequent as they should have been to normalize the relationship between the children and the plaintiff.



As an example, the Protection singles out the following fact - from 3 November 2016 until 19 December 2016, where the plaintiff and the children had contact only three times. Having inspected the work and the role of the guardianship authority in the enforcement proceedings before the Basic court in Bar, a passive role and insufficient engagement can be noticed both in the preparatory phase of the procedure, preceding the act of enforcement and in the phase of handing children over. In this case, the Protector made the following recommendations⁵¹ to the Center for Social Work in Bar:

1. To take all measures and actions within their field of competencies without any delay to normalize the relationship both in the preparatory phase and during the phase of handing the children over.

Example No 3

The same plaintiff also filed a complaint against the **Misdemeanor court Podgorica** - Division in Nikšić. In it, she stated that she had submitted an application initiating the misdemeanor proceeding for gender-based violence on 4 March 2016, but as of the day of the complaint, the proceeding was pending. To support her allegations, the plaintiff attached a copy of the application.

In the statement of the Court, the President of the court informed the Protector that she had urged the acting judge to prioritize the case and brought to the judge's attention that hearings in that and similar cases should be scheduled as often as possible without any delays to complete the proceeding as swiftly as possible.

The Protector noted that the case of gender-based violence had been reported (i.e. application for initiating misdemeanor proceeding) to the Court – Division in Nikšić on 4 March 2016 - more than a year before the day of the complaint to the Protector. From the day the complaint was submitted to the Protector, only three hearings were scheduled - 20 May and 3 October 2016 and 24 February 2017, but the first two hearings were not even held.

The actions of the Protector, in this case, derived from the legal provisions that govern the Protector's powers concerning the courts: delays of the procedure, abuse of procedural powers, or failure to enforce court decisions. In this regard, the Protector found that the court had been supposed to act with urgency - it is a known fact that misdemeanor procedure must be efficient in terms of time and have brief periods prescribed for the statute of limitations.

On the one hand, the Protector is confident that special care, sensitivity, speed, and efficiency must be applied to this and similar cases. On the other hand, the Protector believes that correct and complete facts should be established, as the case-law suggests. According to it, requests for protection from domestic violence must be dealt with special urgency - but that does not authorize the court to miss out on a presentation of relevant evidence for decision-making due to the urgency of the matter. There was considerable delay in the proceedings before the Court - Division in Nikšić, which could not be explained by the complexity of the case or by the plaintiff. The

51 Available at: https://www.ombudsman.co.me/docs/1498647315_26062017-preporuka-csr.pdf



case was inactive before the court for almost a year. Having considered all the facts, separately and jointly, the Protector found that the plaintiff's right to a trial within a reasonable time was violated. Therefore, the Protector made a recommendation to the ⁵² Court - Division in Nikšić:

1. Under the principle of urgency, i.e. without further delay, to Court is to take all procedural actions upon the plaintiff's application for initiating the misdemeanor procedure.

Example No 4

The same plaintiff submitted a complaint against the **Basic Court in Nikšić** on the grounds of the delay of the divorce proceeding before the court and for the regulation of parental rights and support.

The statement of the president of the court points out that the allegations of the plaintiff were unfounded. According to the case file, no decision was made in that legal matter. Furthermore, the judge scheduled hearings within the legally prescribed deadlines, and the following hearing had been scheduled for 3 April 2017 when the presentation of evidence by a team of court experts had been supposed to take place. The president of the court was confident that the acting judge acted lawfully and conscientiously in that particular case, complying with all the provisions of the Code of Civil Procedure.

The Protector noted that the lawsuit for the divorce between the plaintiff and her husband had been submitted to the court on 23 June 2015 and the verdict of the first instance in that legal matter had been rendered on 27 May 2016. The High Court in Podgorica rendered a decision on the plaintiff's appeal on 16 September 2016 - by revoking the verdict in paragraphs two, three, four, five, and six of the disposition, and returning the case to the court of the first instance for retrial. As of the day of this opinion, the case was pending in the Basic court in Nikšić. Given the nature of the dispute and the circumstances of the case, it was stated that the first instance court, following the principle of immediacy and based on the direct and public hearing, could and should have known and take into account the following: proceedings against both parents (criminal, misdemeanor, litigation, and enforcement - both their number and duration), the fact that the plaintiff was a victim of violence who had stayed for a while in the shelter of the NGO "SOS Hotline for Victims of Domestic Violence Niksic", the intensity of partner violence that caused such disruption, and that the children were with one parent only since April/June 2016 which caused the alienation of children from the other parent.

It was emphasized that the situation could cause consequences similar to those in the case of *Mijušković v. Montenegro* due to the delayed enforcement of the final custody judgment. In that verdict, the Court took a stand that Article 8 included the right of parents to have the measures taken to help them reunite with their children and the duty of public authorities to take such actions. Child custody procedures must be carried out quickly, as the passage of time may have irreversible consequences for the parent-child relationship as well as in cases involving parental responsibility and the right to meet. Considering all the facts, separately and jointly,

⁵² Available at: https://www.ombudsman.co.me/docs/1495112447_10052017-preporuka-nk.pdf



the Protector found that the plaintiff was at risk of violation of the right to respect for private and family life guaranteed by Article 8 of the European Convention of Human Rights and Freedoms, which relates to family reunification and child custody. Hence, the Protector gave a recommendation⁵³ to the Basic court in Nikšić:

1. The Court is to take all procedural actions to end the civil proceedings while complying with international standards and governing regulations - without further delay.

Example No 5

The same plaintiff also complained to the **Misdemeanor court in Budva - Division in Bar** on the grounds of the delay of court proceedings in the case of gender-based violence.

In its statement, the Court stated that the case had been lodged on 8 November 2016 and a hearing had been scheduled for 7 March 2017. On 18 April 2017, the judge informed the president of the Court that the hearing had been postponed to 25 May 2017 due to an influx of cases.

In the final assessment, the Protector pointed out that the case of gender-based violence was reported/a request for initiating misdemeanor proceedings had been submitted to the Court Budva - Department in Bar on 4 November 2016 - and the main hearing had been scheduled for 7 March 2017 - an only scheduled and held hearing until the day of present opinion.⁵⁴ In that case, the court did not show a willingness to react immediately after the request for misdemeanor proceedings had been submitted, which had to contain a history of convictions of the plaintiff's ex-husband and an indication that the case per se had been a high-risk case. To establish an opinion, the Protector took into account a special circumstance, the negligence of the Court - Division in Bar that the Protector noticed from in the correspondence with them. The protector had to urge the Court to send their statement on the circumstances from the complaint. By doing so, the Court unequivocally showed the Protector that, regardless of the principle of urgency that should be applied in the procedure for protection against violence - it (the Court) failed to act and continued doing so and disregarded the best interests and welfare of the plaintiff.

The duration of court proceedings per se and the notion of a reasonable duration of court proceedings are relative categories that may depend on many things. The Protector is aware that they need to be evaluated for each case, including the complexity of facts and other legal matters, the nature of the request, and the importance of rights for the applicant. In that sense, the Protector finds that the request for initiating misdemeanor proceedings per se was without multiple defendants or criminal offenses and did not require long. The proceeding before the Court - Division in Bar, was delayed which could not be explained by the plaintiff. So the Protector took into consideration all facts separately and jointly and found that the plaintiff's right to a trial within a reasonable time had been violated. Therefore, the Protector recommended

53 Available at: https://www.ombudsman.co.me/docs/1497619416_05062017-preporuka-nk.pdf

54 Act of the Misdemeanor Court Budva Su V.192/2017 of 18 April 2017.



to⁵⁵ the Court in Budva - Division in Bar: - The Court is to take all procedural actions in that matter without any delay and following the principle of urgency.

Example No 6

The same plaintiff filed a complaint against the **Basic court in Bar** on the grounds of a delay of the court proceedings in the case of enforcement of temporary measure on entrusting the children to further care, custody, and guardianship, and the failure to enforce the guardianship right under the issued temporary measure. The children were with the plaintiff's ex-husband in the family house in Sutomore until the day of the complaint, while there were four unsuccessful attempts to apply the enforcement procedure.

According to the statement of the Basic court in Bar, the enforcement proceeding had been in progress at the moment the request for a statement was made. The court representatives went to the house several times, along with representatives of the Center for Social Work and members of the police in Bar, and attempted to implement enforcement. But, it was not carried out because the children refused to be separated from their father. Subsequently, a representative of the Center issued an opinion that any separation of children from their father against their will would be a traumatic experience for them. On 7 February the Court made another home visit to enforce the temporary measure in the presence of the legal representative of the civil enforcement creditors, the plaintiff's lawyer, court enforcement officers, representatives of the Center, and with the assistance of the police. However, the enforcement was unsuccessful because the children did not want to approach their mother saying they were afraid of her, refusing to talk to her or to physically distance themselves from their father, which was all recorded in the minutes. Representatives of the Center judged that the attempt to carry out the enforcement - handing the children over to the mother was an additional trauma for children who were in a very bad state, as they complained of vomiting and showed signs of anxiety, which resulted in the suspension of the enforcement at the suggestion of the Center. The case file and the allegations of the legal representative of the civil enforcement creditor suggest that the judge had acted lawfully and within the powers vested to her and had carried out actions to enforce the final decision on temporary measures.

In his final assessment, and based on the minutes from the home at the moment of handing over the children, the Protector is confident that the Basic court in Bar carried out enforcement activities to a certain extent and attempted to enforce the measure as painlessly for children as possible and with as little trauma as possible. However, the court showed inconsistency and was inclined to postponing the handing over indefinitely. Judging by the available documents and the minutes made on the spot, one may conclude that each attempt to take the children was more complex than the previous one. Given the fact that parents exercise parental rights jointly, whether they lived together or separately, and that the temporary measure was rendered in the best interest of children, the very enforcement of the decision, in its nature, means that facts and the legal status should align.

Given the nature of the dispute and the circumstances of the case, it was stated that the first

⁵⁵ Available at: https://www.ombudsman.co.me/docs/1495113034_12052017-preporuka-bd.pdf



instance court, following the principle of immediacy and based on the direct and public hearing, could and should have known the following: proceedings against both parents (criminal, misdemeanor, litigation, and enforcement - both their number and duration), the fact that the plaintiff was a victim of violence and who stayed for a while at the shelter of the NGO “SOS Hotline for Victims of Domestic Violence Niksic”, the intensity of partner violence that caused such disruption, and that the children were staying with one parent only since April/June 2016, which caused the alienation of children from the other parent.

In addition to the above - special emphasis was placed on the fact that the court had to be aware of the lawsuit for the divorce between the plaintiff and her husband that had been submitted to the Court on 23 June 2015, which means the children had been exposed to many visits to the Center for Social Work and contacts with different officials for too long, which indicates that any prolongation of the matter meant further complication of a very complex situation. In the Protector’s opinion, by delaying the proceedings the Court contributed to the alienation of children from their mother, and to the deepening of the conflict between family members, i.e. to a situation that had not existed or had not been recorded before the divorce proceedings began.

In that verdict, the Court took a stand that Article 8 included the right of parents to have the measures taken to help them reunite with their children and the duty of public authorities to take such actions.⁵⁶The Protector held that the plaintiff, a victim of domestic violence, was put in a position where she was not able to exercise the rights prescribed by the law and the temporary measure, finding a violation of her right to respect for private and family life guaranteed by Article 8 of the European Convention for the Protection of Human Rights and Freedoms (Right to respect for private and family life), and a violation of the right from Article 6 of the European Convention for Human Rights and Freedoms due to non-enforcement of the temporary. Therefore, the Protector gave the following recommendation to the Basic court in Bar:⁵⁷

1. The Court is to take urgent measures and actions to complete the proceeding under the temporary measure, without further delays and in coordination with the guardianship authority, while adhering to international standards and governing law.

The protector follows up on each recommendation to see if it has been implemented and to what extent. Following the complaints in the above five proceedings, the recommendations to the Court - Division in Nikšić, the Court - Division in Bar, and the Basic Court in Nikšić were implemented. However, the recommendations to the Basic court and the Center for Social Work in Bar were not implemented, not even as of the day of present analysis which was confirmed by a plaintiff’s confidant.

⁵⁶ Ibid, p. 80

⁵⁷ Available at: https://www.ombudsman.co.me/new2/docs/1498646941_16062017-preporuka-br.pdf



Example No 7

The Protector received a complaint against the **Basic court in Podgorica** on the grounds of the delay of the proceedings. The plaintiff stated she had been married for many years and had experienced all forms of violence from her husband. The marriage was divorced by the final decision of the Basic court in Podgorica. However, as the ex-spouses live in the same house but in different units, the violence never stopped. The ex-husband was convicted several times for criminal acts and misdemeanors, as supported by submitted documents. In May 2018, the plaintiff initiated a proceeding of physical division before that court that is pending, and which, in her opinion, has lasted too long given the frequency and intensity of violence.

The Basic court in Podgorica explained that they acted in the case within reasonable deadlines given the type of the procedure in question (partition in-kind/physical division) and the heavy workload of the Court, with many urgent cases.

According to the Law on Civil Procedure, the preliminary hearing, as a rule, is to be held within 30 days after delivery of the written response to the complaint by the defendant. However, in this particular case, the preliminary hearing was scheduled almost eight months after the proposal for a physical division of property had been submitted by the defendant.

In addition to that fact, the case per se was a high-risk case, because the plaintiff had been a victim of gender-based violence for many years, as known by the Protector from the plaintiff's complaints to the Protector in 2018 against the Police Directorate and the Center for Social Work from Podgorica when the Protector had given his opinion and recommendations to those bodies to combat gender-based violence. Additionally, the Protector reiterates that he is aware of the fact that the plaintiff's ex-husband has been convicted several times, both for misdemeanors and criminal acts, and a protective measure of removal from the place of residence was issued against him. This all speaks for itself - any cohabitation of the plaintiff and her ex-husband is impossible in such circumstances, and for that reason, physical division of property between the ex-spouses must be implemented as soon as possible. Therefore, the Protector made the following recommendation⁵⁸ to the Basic court in Podgorica:

1. The Court is to take all procedural actions without further delay to complete the proceeding and render a decision in case No Rs. 18.

The Court fulfilled the recommendation.

⁵⁸ Available at: https://www.ombudsman.co.me/new2/docs/1561116170_28052019-preporuka-osp.pdf



Example No 8

The Protector initiated the investigation procedure on his initiative after the article “NGO: The murder of XY, a mother of five, is a shot at justice and the system” was published at web portal cdm.me on 12 October 2016. The procedure was directed towards the Center for Social Work and the Police Directorate in Nikšić.

The statement of the Center for Social Work in Nikšić states that the late XY addressed the Center on 15 April 2016 to report domestic violence committed by her husband. She stated that her husband had been a psychiatric patient for many years, who had been treated on several occasions at the psychiatric ward of the Hospital in Nikšić. After the Centre had an interview with her and collected data on circumstances in the family, the Center informed the Police Directorate on the same day about their findings on domestic violence, and the pedagogue at the primary school of the plaintiff’s minor children. On 18 April 2016, the Multidisciplinary Team met to discuss this case. The husband of the late XY was hospitalized in Psychiatric Hospital - Dobrota in Kotor with the assistance of the police. According to the conclusions from the meeting, the Team sent a letter to the Psychiatric Hospital on 27 April 2016 asking to be informed about the patient’s condition and date and time of his discharge, to be able to inform the victim of gender-based violence. The victim rejected the proposal for a home visit considering it unnecessary and she even refused to share her address (in a phone call). Since she felt safe at the time, she did not want to burden her children by visits. After the Psychiatric Hospital sent a letter a month after the offender was discharged the Team informed the victim about that, but she had been aware of the information and refused to discuss her situation any further. The Team attempted to visit the offender after the treatment ended, but did not find anyone at the provided address. Another contact was made with the victim at the Center, on 5 October 2016, when she came for an interview to obtain one-off assistance following her request to the Government of Montenegro. On that occasion, the victim did not want to talk to the person from the Center about the problems she had with her ex-husband, but only about her bad financial situation. After the unfortunate event took place on 14 October 2016, the Center paid a home visit to the family where the children lived. They talked to the victim’s children, her parents and brothers. The family was informed that a guardian should be appointed for her minor children. The family was informed about the process for applying for the right to family accommodation-foster care, and they acted accordingly.

The statement of the Ministry of the Interior - Police Directorate read: officers of the Police Directorate - Nikšić acted on the reports of the late XX against her husband, and on reports submitted by her brother who was very protective from the moment she had left her marriage. The victim reported to the Police in Nikšić that her husband had sent her many threatening and insulting text messages. Acting upon that report, the police officers informed Sofija Lukovac, from the Basic State Prosecution in Nikšić, however, she found no elements of a criminal offense in the submitted report. Therefore, following the Law on Protection from Domestic Violence, police officers filed a misdemeanor report with the Court - Division in Nikšić. Police officers from the Department for the Suppression of Domestic Violence referred the victim to the Center for Social Work in Nikšić and the representatives of the SOS Hotline for Women and Children Victims of Domestic Violence.



To finalize the procedure before this institution, a representative of the National SOS Hotline for Victims of Domestic Violence was contacted by phone, who pointed out that the victim had been assisted by that organization several times.

Therefore, the Protector made a recommendation to the Center for Social Work in - Nikšić:

- The Center is to take all measures and actions provided for by the Protocol on the procedure, prevention and protection against domestic violence in all cases with justified risks for domestic violence, to protect and prepare the identified victim of violence through various types of psychosocial treatments for independent life and empower her to report any suspected recurrence of violence to competent authorities.

A recommendation was given to the Psychiatric Hospital - Dobrota in Kotor

- As a part of the system for the prevention and protection from domestic violence, Psychiatric Hospital must adhere to the rules defined by the Protocol on the procedure, prevention and protection from domestic violence, to prevent that or similar outcomes of violence, i.e. to reduce the risks of lethal violence.



VI STATISTICS ON CASES OF DOMESTIC VIOLENCE AND GENDER-BASED VIOLENCE


According to the Law on Prohibition of Discrimination, courts, the inspection authorities, and misdemeanor authorities have to keep separate electronic records about submitted reports, initiated procedures, and decisions in connection with discrimination.

The number of reported cases of domestic violence and gender-based violence to the misdemeanor courts has increased over the years, which may mean several things. One may be that domestic violence and gender-based violence increased; the other is that the number of reports on domestic violence and gender-based violence increased - which is a result of activism and the promotion of zero tolerance for that social phenomenon.

It should be pointed out that the researches conducted mainly by women's NGOs indicate many unreported cases of domestic violence, due to prejudices that prevent women from reporting domestic violence, the lack of a safe environment, and ineffective care. Besides, some research indicates that victims seek help after they have suffered violence for a long time and only after they are physically injured.

The following is an overview of cases of domestic violence and gender-based violence before courts of general jurisdiction for 2019 and before misdemeanor courts for 2019 and 2020.

As for cases referred to in Article 220 of the Criminal Code of Montenegro (Domestic Violence), there were a total of 253 cases in 2019; in 2018 there were 232 cases, so there is an evident increase. As many as 207 sentences of first-instance and 187 final sentences were imposed. The data about final penalties are as follows: house arrest - four; fines - two; mandatory treatment of alcohol and drug addicts - nine; mandatory treatment of alcohol addicts - four; mandatory treatment of drug addicts - one; mandatory psychiatric treatment at liberty - three; mandatory psychiatric treatment in a health institution - one; confiscation of weapons - one; confiscation of other items - three; other - four; enhanced supervision by guardianship authorities - one; work in the public interest - 15; suspended sentence - 79; imprisonment - 59 and restraining order - one.



In 2019, according to the Annual report on activities of misdemeanor courts in cases referred to in the Law on Protection from Domestic Violence, the courts had 2.059 cases (**1.972 in 2018 and 1.790 in 2017**) - the Court in Podgorica had 1.220 cases, followed by the Court in Budva with 485 and the Court in Bijelo Polje with 354. The cases were completed as follows: 534 fines; 121 imprisonments; 238 suspended sentences; 109 warnings; 15 educational measures; in 13 cases the request was rejected; in 51 cases the proceedings were suspended; 360 cases ended in an acquittal, while 46 cases were resolved otherwise. As many as 438 protective measures were imposed (408 in 2018, and 302 in 2017), as follows: removal from the place of residence - 69; restraining order - 134; prohibition of harassment and stalking - 175; mandatory psychiatric treatment and treatment for addiction - 31 (26 cases referred to alcohol addiction, and 5 cases for drug additions); mandatory psychosocial treatment - four, and referral to a non-institutional educational institution - three.

In 2020, the misdemeanor courts had a total of 2.133 cases in the field of the Law on Protection from Domestic Violence: Court in Podgorica – 1.299, Court in Budva - 450, and Court in Bijelo Polje - 384 cases. A total of 1.449 cases or 67.93% were completed: 784 in the Court in Podgorica, 382 in the Court in Budva, and 283 in the Court in Bijelo Polje.

These cases were completed as follows: fines - 485, imprisonment - 83, suspended sentences - 239, warnings - 126, educational measures - 17; in 12 cases the request was rejected, proceedings were suspended in 71 cases, 361 acquittals were issued, and 55 cases were resolved in another way. Also, a total of 408 protective measures were imposed: removal from the place of residence - 54; restraining order -111; prohibition of harassment and stalking -185; mandatory treatment for addiction - 16; mandatory psychiatric treatment -31, and mandatory psychosocial treatment - 11.



VII DOMESTIC VIOLENCE AGAINST WOMEN - CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

This matter becomes increasingly important in the case law of the European Court of Human Rights. This is evident in the growing number of judgments of this court against many different states, members of the European Convention on Human Rights. These judgments refer to different provisions of the European Convention, most often to Articles 2 and 3, i.e. certain aspects of the right to life and the prohibition of torture, inhuman or degrading treatment or punishment, and to Article 8 i.e. aspects of the right to respect for private and family life. As the Court pointed out in one of the leading cases *Opuz v. Turkey*, "...The issue of domestic violence, which can take various forms ranging from physical to psychological violence or verbal abuse... is a general problem which concerns all member States and which does not always surface since it often takes place within personal relationships or closed circuits and it is not only women who are affected. The Court acknowledges that men may also be the victims of domestic violence and, indeed, that children, too, are often casualties of the phenomenon, whether directly or indirectly..." (*Opuz v. Turkey, Judgment of 9 June 2009, paragraph 132*).

Severe forms of domestic violence are considered under Articles 2 and 3 of the European convention, i.e. in the context of various aspects of the right to life and the prohibition of torture and inhuman treatment.

In case of *Kontrova v. Slovakia*, The court found a violation of Article 2 of the Convention concerning the authorities' failure to protect the lives of applicant's children. On 2 November 2002, the applicant filed a criminal complaint against her husband for assaulting her and beating her with an electric cable. Later, at her husband's urging, she tried to withdraw the complaint and, instead of a criminal one, she filed a misdemeanor report, which resulted in the absence of any action by the state authorities. Shortly afterwards, on 31 December her husband shot dead their daughter and son, born in 1997 and 2001. The police, she stated before the Court, although aware of the violent nature and bullying behavior of her husband, did nothing to protect the lives of her children. Also, she complained that she was unable to obtain any compensation for what had happened and what she had suffered.

Noting the violation of Article 2, the Court noted that the situation in the applicant's family had been known to the local police given the criminal complaint of November 2002 and the emergency phone calls of December 2002, to which no one from the police responded. Under the applicable law of the Slovak Republic, the police had been obliged to: register the applicant's criminal complaint; launch a criminal investigation and criminal proceedings against the applicant's husband immediately; keep a proper record of the emergency calls; and, take action concerning the allegation that the applicant's husband had a shotgun and had threatened to use it. None of this was undertaken; moreover, one of the officers involved had even assisted the applicant and her husband in modifying her criminal complaint so that it could be treated as a minor offence. This resulted in the absence of any investigation and criminal proceeding, which obviously triggered the tragedy that could have been avoided, and which caused Slovakia's responsibility for violating Article 2 of the Convention. The Court further held that there had been a violation of Article 13 of the Convention-right to an effective remedy, as the applicant should have been able to apply for compensation for non-pecuniary damage, but no such remedy had been available to her. Undoubtedly, the reclassification of the obvious criminal offense as a misdemeanor was



the main reason why the police failed to undertake the necessary activities in order to protect the life of the applicant's children and to take measures in the context of protecting the right to life under Article 2 of the Convention.

In above mentioned case *Opuz against Turkey* of 9 June 2009 the Court also found a violation of Article 2 of the Convention, for the murder of the applicant's mother, as well as Article 3 for the State's failure to protect the applicant and her mother from the inhuman and degrading treatment by her husband, which had resulted in the death of her mother and her own ill-treatment. On many instances both the applicant and her mother suffered physical injuries and were subjected to psychological pressure by the applicant's husband. No proceedings against the offender had been conducted except in one case, because the applicant and her mother continuously withdrew criminal and misdemeanor charges against him, even though he constantly threatened to kill them, which the competent police, prosecutorial and judicial authorities knew all about. On one occasion, the husband stabbed the applicant seven times, for which he was fined EUR 385 which he could pay in installments. They constantly filed charges, pointing out that their lives were in danger, but the offender was always released after the interrogation. Finally, when two women tried to escape, he killed his mother-in-law. He was sentenced to life imprisonment but, on appeal, was released pending trial and continued to threaten the applicant.

The Turkish authorities had therefore failed to protect the right to life of the applicant's mother, in violation of Article 2, of the Convention, although all the circumstances were well known to them. Turkey did not established an adequate legal framework to protect victims of domestic violence and punish offenders. This is especially due to the fact that the authorities failed to apply even the existing protection mechanisms, they rejected all the applications under pretext there was no need to interfere in what they perceived to be a "family matter". The Court particularly emphasized the obligation to establish a legal framework in which domestic violence would be prosecuted *ex officio*, regardless of the position of parties to the dispute or the possible withdrawal of criminal or misdemeanor charges. This is by-far the most important message or the standard set by the Court when it comes to the legal framework for combating domestic violence.

In this case, the Court for the first time found a violation of Article 14 of the Convention - prohibition of discrimination, in conjunction with Article 2 and 3 of the European convention on human rights, in the context of combating domestic violence. The Court considers that the domestic violence affected mainly women and that the general and discriminatory judicial passivity in Turkey created a climate that was conducive to domestic violence and made it possible to create such an unfavorable climate to prosecute, sanction and prevent this phenomenon in Turkey. The violence suffered by the applicant and her mother may be regarded as gender-based violence which is a form of discrimination against women. The general passivity of the Turkish legal system and the policy of impunity for offenders, as shown in this case, are the main factors of inadequacy, insufficient training and commitment to the fight against domestic violence.

The court also found a violation of Article 2 Convention in the case *Branko Tomašić and Others v. Croatia* from 15 January 2009, for an act of severe domestic violence, where the father killed the mother and child and himself, one month after being released from prison, where he had been held for making those same death threats. He was originally ordered to undergo compulsory psychiatric treatment after his release, but the appeal court ordered that his treatment be stopped on his release. The applicants (relatives of murdered mother and baby) complained,



in particular that the State had failed to take adequate measures to protect the child and his mother and had not conducted an effective investigation into the possible responsibility of the State for their deaths.

The Court held that there had been a violation of Article 2 of the Convention, on account of the Croatian authorities' lack of appropriate steps to prevent the deaths of the child and his mother. The Court observed in particular that the findings of the domestic courts and the conclusions of the psychiatric examination undoubtedly showed that the authorities had been aware that were serious and that all reasonable steps should have been taken to protect mother and child. The Court further noted several shortcomings in the authorities' conduct in regards of the psychiatric treatment, which resulted in tragedy and the responsibility of the domestic authorities for it. In this case, the Court stressed the importance of preventive actions, including the necessary medical and psychiatric measures as an adequate response to the problem of domestic violence.

The case *Talpis v. Italy* of 2 March 2017 concerned the conjugal violence suffered by the applicant, which resulted in the murder of her son and her own attempted murder. In this case too, the Italian authorities underestimated risks of domestic violence as they ignored the complaint lodged by the applicant and failed to act upon them thus creating a situation of impunity conducive to the recurrence of the acts of violence and the death of her son. In addition to violation of Article 2, the Court found a violation of Article 3 of the Convention on account of the failure of the authorities in their obligation to protect the applicant against acts of domestic violence. The Court noted that the applicant had lived with her children in a climate of violence serious enough to qualify as inhuman and degrading treatment, along with judicial passivity, which was incompatible with Article 3 of the Convention. Lastly, the Court held that there had been a violation of Article 14 (prohibition of discrimination) of the Convention in conjunction with Articles 2 and 3, finding that the applicant had been the victim of discrimination as a woman on account of the inaction of the authorities, which had underestimated the domestic violence. In this case, the Court further elaborated the standards set out in the case *Opuz v. Turkey*, emphasizing the complexity of this phenomenon and extending the scope of application of the Convention to Articles 3 and 14 to the domestic violence, with special emphasis to preventive and positive measures to be taken by the state in order to combat domestic violence. The court especially pointed out the responsibility of the state for underestimating the danger of this phenomenon and creating a climate of impunity, which are the most common sources of domestic violence.

Case *Teršana v. Albania*, of 4 August 2020, concerned an acid attack on the applicant in 2009. The applicant suspected that her former husband, whom she accused of domestic violence, was behind the attack. Furthermore, she pressed criminal charges against him, but to no avail. She alleged in particular that the Albanian authorities had failed to take measures to protect her from the acid attack and to conduct a prompt and effective investigation for the identification, prosecution and punishment of her assailant. The Court held that there had been no violation of Article 2 of the Convention in its substantial aspect, as the national authorities had only found out about the violent behaviour of the applicant's former husband after the incident, and had been unable to take any preventive measures. On the other hand, the Court held that there had been a violation procedural aspect of Article 2 of the Convention, finding that the authorities' response to the acid attack had been ineffective. In this respect, the Court noted in particular that the investigation into the attack, which had had the hallmarks of gender-based



violence and therefore should have incited the authorities to react with special diligence. Unfortunately, the investigation failed to identify the substance used during the attack and was moreover stayed in 2010, without identifying the person responsible, and the applicant had not been given any information about its progress since, despite her repeated enquiries. In this case, the Court emphasized the need for an adequate, prompt and effective investigation into cases of domestic violence under the same conditions and in accordance with the same standards applicable to procedural obligations to conduct investigations in all other cases under Articles 2 and 3 of the Convention.

Some, “easier” cases of domestic violence were considered by the Court under Articles 3 and 8 of the Convention (prohibition of torture, inhuman or degrading treatment; right to respect for private and family life).

In case of *ES and Others v. Slovakia*, from 15 September 2009, the applicant left her husband and lodged a criminal complaint against him for ill-treating her and her three children and sexually abusing one of their daughters. He was convicted of violence and sexual abuse two years later. However, mother’s request for her husband to be ordered to leave their home was dismissed. The applicant and her children were therefore forced to move away from their friends and family and two of the children had to change schools. She complained that the authorities had failed to protect them adequately from domestic violence.

The Court found a violation of Articles 3 and 8 of the Convention, because Slovakia failed to provide immediate protection to the applicants - the mother and her children, from violence committed by their husband and father. Given the nature and severity of the allegations, the applicant and the children had required protection immediately, not one or two years later until her divorce was finalised in May 2002 to apply for her former husband to leave their home. She had therefore been without effective protection for herself and the children during that time. In this case, the Court pointed out the duty and importance of providing material and social conditions by the state as a precondition and one of the standards for protection against domestic violence.

Violation of the procedural aspect of Article 3, the Court also found in the case *EM v. Romania* from 30 October 2009. The applicant alleged in particular that the investigation into her criminal complaint of domestic violence committed in the presence of her daughter, aged one and a half, had not been effective. The Court found that the manner in which the investigation had been conducted had not afforded the applicant the effective protection required by Article 3 of the Convention. When she lodged her first criminal complaint, she requested effective protection for herself and her daughter from her husband’s aggressive conduct. Despite the fact that the statutory framework provided for cooperation between the various authorities and for non-judicial measures to identify and ensure action was taken in respect of domestic violence, and although the medical certificate provided prima facie evidence of the applicant’s allegations, it did not appear from the case file that Romanian authorities had taken any steps to that end. In this case, the Court emphasized the necessity of full and effective application-implementation of applicable regulations and measures that had been adopted to combat and punish domestic violence.

Two judgments against Lithuania also relate to the inadequate and ineffective application of the existing legal framework for combating and sentencing domestic violence. In the judgement *Valiuliene v. Lithuania* from 26 March 2013, the Court held there had been a violation of



Article 3 of the Convention finding that the practices of Lithuanian criminal-law regulations on domestic violence had not provided the applicant adequate protection against acts of domestic violence. In particular, there had been delays in the criminal investigation and the public prosecutor had decided to discontinue the investigation.

In case of *DP v. Lithuania*, from 22 October 2013, the criminal proceedings on the applicant's appeal against the former abusive husband became time-barred due to the inactivity and inefficiency of Lithuanian courts. In a unilateral declaration, Lithuanian Government acknowledged that the manner in which the criminal-law mechanisms had been implemented in the instant case was defective as far as the proceedings were concerned, to the point of constituting a violation of the State's positive obligations under Article 3 of the Conventions in the context of protection against inhuman and degrading treatment. Pursuant to Article 37 of the Convention, the application was ex officio struck out of the list of cases before the Court.

Case *N. v. Sweden*, from 20 July 2010, relates to the risk of domestic violence in the event of deportation. The applicant, an Afghan national, arrived in Sweden with her husband in 2004. Their requests for asylum were refused several times. In 2005 the applicant separated from her husband. Her request for a divorce was refused by the Swedish courts as they had no authority to dissolve the marriage as long as the applicant did not reside legally in the country. Her husband informed the court that he opposed a divorce. In the meantime, the applicant unsuccessfully requested the Swedish Migration Board to reevaluate her case and stop her deportation, claiming that she risked the death penalty in Afghanistan as she had committed adultery by starting a relationship with a Swedish man and that her family had rejected her. The Court held that the applicant's deportation would constitute a violation of Article 3 of the Convention (prohibition of inhuman or degrading treatment or punishment). In the special circumstances of the present case, there were substantial grounds for believing that if deported, she would face various cumulative risks of reprisals from her husband, his family, her own family and from the Afghan society which fell under Article 3 of the Convention. The Court noted in particular that the fact that the applicant wanted to divorce her husband, and did not want to live with him any longer, might result in serious life-threatening repercussions. Indeed, the Court cited the Shiite Personal Status Act from 2009 that required women to obey their husbands' sexual demands and not to leave home without permission. Reports of international agencies had further shown that around 80% of Afghani women were affected by domestic violence, acts which the authorities saw as legitimate and therefore did not prosecute. Lastly, to approach the police or a court, a woman had to overcome the public opprobrium or physical assaults affecting women who left their houses without a male guardian. This judgement is very important because it expands protection against domestic violence outside the territorial jurisdiction of the Council of Europe, and on the other hand expands the content of this concept, it decisively includes sexual violence between spouses, as an important form of domestic violence.

The case of *Wasiewska v. Poland*, from 2 December 2014 (decision on the admissibility), the applicant complains in particular about the authorities' failure to enforce their own judgments ordering the eviction of her former husband from their flat, after their divorce, and she further complains that it is impossible for her to initiate a criminal investigation against her former husband, who made it impossible for her to have access to her belongings left in the flat. The Court considered that the applicant's complaint should be examined under Article 6 of the Convention — right to a fair trial. Finding that the applicant had failed to exhaust domestic remedies in this respect, it declared that complaint inadmissible, in accordance with Article 35 of the



Convention (admissibility criteria). The Court also held the remainder of the application to be inadmissible (manifestly ill-founded) (Article 35§3). Although this appeal was declared inadmissible on two grounds, the Court's judgement is significant because the consideration of certain, "more subtle" forms of domestic violence has been brought into the context of Article 6 of the Convention, by which the domain of legal protection of victims became justifiably expanded.

Case *DMD v. Romania* of 3 October 2017, concerned the proceedings brought by the applicant against his father for domestic abuse. The proceedings in question had lasted over eight years and ended in the father's conviction of physically and mentally abusing his child. The applicant complained that those proceedings had been ineffective and that he had not been awarded damages. In particular, the domestic courts had found at last instance that they did not have to examine the issue of compensation as neither he nor the prosecutor had made such a request before the lower courts.

The Court held that there had been a violation of Article 3 of the Convention because the investigation into the allegations of abuse had lasted too long and had been marred by other serious shortcoming. In this respect, it recalled in particular that contracting states of the Convention should strive to protect children's dignity and that, in practice, this required an adequate legal framework to protect children against domestic violence. In this judgment the Court also held that there had been a violation of Article 6 of the Convention, because the domestic courts had not examined the merits of the applicant's complaint about the failure to award him compensation, despite it being clearly worded in domestic law that they were under an obligation to rule on the matter of compensation in a case concerning a minor, even without a formal request from the victim. This judgment is a step further in the Court's jurisprudence in completing the legal protection of victims of domestic violence, especially when it comes to minors.

The Court discussed many cases of domestic violence under Article 8 of the Convention - the right to respect for private and family life that regards the obligation of states to protect physical and psychological integrity of the individual.

In case of *Bevacqua and S v. Bulgaria*, of 12 June 2008, the applicant, who claimed she was regularly battered by her husband, left him and filed for divorce, taking their three-year-old son (the second applicant) with her. She maintained that her husband continued to beat her so she spent four days in a shelter for abused women with her son. She was warned that she could face prosecution for abducting the boy, leading to a court order for shared custody, which, she stated, her husband did not respect. She pressed charges against her husband for assault and provoked further violence. Her requests for interim custody measures were not treated as priority and she finally obtained custody only when her divorce was pronounced more than a year later. The following year she was again battered by her ex-husband and her requests for a criminal prosecution were rejected on the ground that it was a "private matter" requiring a private prosecution.

The Court held that there had been a violation of Article 8 of the Convention, given the cumulative effects of the domestic courts' failure to adopt interim custody measures without delay in a situation which had affected adversely the applicants and, above all, the well-being of the child and the lack of sufficient measures by the authorities during the same period in reaction to the behavior of the applicant's former husband. In the Court's view, this amounted to a failure of the State under Article 8 of the Convention, to secure respect for the applicants' private and family life. The Court stressed in particular that considering the dispute to be a "private matter" was



incompatible with the authorities' obligation to protect the applicants' family life. This is one of the first cases where the problem of domestic violence has been brought in the context of protection of private and family life, i.e. duties of the state to protect the physical and psychological integrity of a person, especially when specific circumstances of the case and "lower threshold of cruelty" do not allow for protection under Article 3 of the Convention.

Violation of Article 8 of the Convention, due to domestic violence, the Court found in the case *A. v. Croatia*, of 14 October 2014. The applicant's ex-husband, suffering from post-traumatic stress disorder, paranoia, anxiety and epilepsy, subjected her to repeated physical violence and also regularly abused her in front of their young daughter. After going into hiding, the applicant requested an order preventing her ex-husband from stalking or harassing her. It was refused on the ground that she had not shown an immediate risk to her life.

The Court held that the Croatian authorities had failed to implement many of the measures ordered by the courts to protect the applicant or deal with her ex-husband's psychiatric problems, which appeared to be at the root of his violent behavior. The applicant's complaint under Article 14 of the Convention - Prohibition of Discrimination was declared by the Court as inadmissible, on the ground that she had not given sufficient evidence such as reports or statistics, to prove that the measures or practices adopted in Croatia against domestic violence, or the effects of such measures or practices, were discriminatory.

In case of *Hajduova v. Slovakia*, of 30 November 2010, the Court dealt with the failure of authorities to take medical and psychiatric measures against the offender convicted on the grounds of abuse. The applicant complained in particular that the domestic authorities had failed to comply with their statutory obligation to order that her former husband be detained in an institution for psychiatric treatment, following his criminal conviction for having abused and threatened her.

The Court held that the lack of sufficient measures in response to the applicant's former husband's behaviour, and in particular the domestic courts' failure to order his detention for psychiatric treatment following his conviction, had amounted to a breach of the State's positive obligations under Article 8 of the Convention. The Court observed in particular that, even though her former husband's repeated threats had never materialised, they were enough to affect the applicant's psychological integrity and well-being, so as to give rise to the State's positive obligations under Article 8.

This and the previous judgement have established clear and precise standards for domestic judicial and misdemeanor authorities in relation to this specific type of domestic violence, which is widespread and causes tragic consequences. Evidently, the emphasis is on preventive, positive action of state authorities to **protect** physical and psychological integrity of persons.

Violation of positive obligations under Article 8 of the Convention was established in the case *Kaluczka v. Hungary*, of 24 April 2014. The applicant unwillingly shared her apartment with her partner pending numerous civil disputes concerning the ownership of the flat. She alleged in particular that the Hungarian authorities had failed to protect her from constant physical and psychological abuse in her home. The Court found in particular that, even though the applicant had lodged criminal complaints against her partner for assault, had repeatedly requested restraining orders to be brought against him and had brought civil proceedings to order his eviction from the flat, the authorities had not taken sufficient measures for her effective protection.



The case *Levchuk v. Ukraine*, from 3 September 2020 concerned the applicant's complaint that the dismissal of an eviction claim against her ex-husband had exposed her and her children to the risk of domestic violence and harassment. She alleged that the domestic courts had been excessively formalistic in their decisions and had given her ex-husband a sense of impunity which had exposed her and her children to an even greater risk of psychological harassment and assault. The Court held that there had been a violation of Article 8 of the Convention, finding that the response of the civil courts to the applicant's eviction claim against her former husband had not been in compliance with the State's positive obligation to ensure the applicant's effective protection from domestic violence. The domestic judicial authorities had not carried out a comprehensive analysis of the situation and an assessment of the risk of possible, future psychological and physical violence faced by the applicant and her children. The proceedings had lasted over two years at three levels of jurisdiction, during which the applicant and her children remained at risk of further violence. The Court concluded the fair balance between all the competing private interests at stake had not been struck. In this case as well, the Court emphasized the importance of preventive action of state authorities, as well as the necessity of detailed legal and social analysis of all aspects of complex cases in order to strike a fair balance of interests of all parties to the dispute, with the goal to protect from abuse and harassment.

Relationships between parents regarding the custody of children often appear at the root of domestic violence. This is also shown by the case *O.C.I. and Others v. Romania*, from 21 May 2019 - Committee judgment brought by panel of three judges. After spending the summer holidays in Romania in 2015, the first applicant, a Romanian national, decided not to go back to her husband in Italy with their two children. Before the Court, the applicant and her children complained about the order to return the children to Italy. She alleged in particular that the Romanian courts had failed to take into account the grave risk of mistreatment the children faced at the hands of their father. This was one of the exceptions under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction to the principle that children should be returned to their habitual place of residence. The Court held that there had been a violation of Article 8 of the Convention, finding that the Romanian courts had failed to give enough consideration to the grave risk of the children being subjected to domestic violence when ordering their return to their father in Italy, which was one of the exceptions to the principle under international law that children should be returned to their habitual place of residence. The Court noted in particular that, even if there was mutual trust between Romania and Italy's child-protection authorities under EU law, that did not mean that Romania had been obliged to send the children back to an environment where they were at risk of abuse.

The removal of children from a violent environment is also covered by the Court's jurisprudence in the context of Article 8 of the Convention. In case of *YC v. The United Kingdom* from 13 March 2012, the local authority took the applicants' child, the parents, and rendered a decision that a child was to be placed for adoption, due to many incidents of violence that had been fueled by alcohol when one of the children was injured. The applicant complained that the courts' failure to have regard to all relevant considerations when making the placement order had violated her rights under Article 8 of the Convention. The Court held that there had been no violation of Article 8 finding that the UK courts had offered relevant and sufficient reasons in their judgement. The Court found that the parents had been given every opportunity to present their case, and the County Court judge's view was that a life of a child in a violent environment entailed a risk to the child's well-being. The Court also noted it was in the child's best interests to maintain family ties where possible, and it was clear that in the instant case this



consideration had been outweighed by the need to ensure the child's development in a safe and secure environment.

These cases further show the complexity of domestic violence as well as the breadth and depth of consequences that modern society faces, the standards or guiding principles for state bodies how to solve problems through the application of the state's positive obligations in the context of Article 8 of the Convention.

In case of *Eremia and others against the Republic of Moldova* from 28 May 2013, the Court found a violation of Articles 3, 8, and 14 in conjunction with Article 8. The first applicant and her two daughters complained about the Moldovan authorities' failure to protect them from the violent and abusive behavior of their husband and father, a police officer. The Court held that there had been a violation of Article 3 in respect of the first applicant in that, despite their knowledge of the abuse, the authorities had failed to take effective measures against her husband and to protect her from further domestic violence. Furthermore, the Court found a violation of Article 8 of the Convention, in relation to daughters, in respect of the daughters, considering that, despite the detrimental psychological effects of them witnessing their father's violence against their mother in the family home, little or no action had been taken to prevent the recurrence of such behaviour. Lastly, the Court held that there had been a violation of Article 14 in conjunction with Article 3 of the Convention, finding that the authorities' actions had not been a simple failure or delay in dealing with violence against her, but had amounted to repeatedly condoning such violence and reflected a discriminatory attitude towards the applicant as a woman. In this respect, the Court observed that the findings of the United Nations Special Rapporteur on violence against women, its causes and consequences only went to support the impression that the authorities did not fully appreciate the seriousness and extent of the problem of domestic violence in the Republic of Moldova and its discriminatory effect on women.

As can be seen from this judgment, domestic violence, especially against women, is a systemic problem, due to its neglect for various reasons by the authorities, a problem that requires complex and complete action by the judiciary, police and the society as a whole.

The systemic nature of this problem was pointed out by the Court in the case *Halime Kilic v. Turkey* of 28 June 2016. The author of this report took part in discussion about the case too. This case concerned the death of the applicant's daughter, who was killed by her husband despite having lodged several complaints and obtained protection orders and injunctions. The Court held there had been a violation of Articles 2 and 14 in conjunction with Article 2 of the Convention. The domestic proceedings had failed to meet the requirements of Article 2 by providing protection for the applicant's daughter. By failing to punish the failure by the latter's husband to comply with the orders issued against him, the national authorities had deprived the orders of any effectiveness, thus creating a context of impunity enabling him to repeatedly assault his wife without being called to account. The Court also found it unacceptable that the applicant's daughter had been left without protection and that in turning a blind eye to the repeated acts of violence and death threats against the victim, the authorities had created a climate that was conducive to domestic violence.

And in the case *Balsan v. Romania*, from 2 March 2017, the applicant alleged that the authorities had failed to protect her from repeated domestic violence and to hold her husband accountable, despite her numerous complaints. She also submitted that the authorities' toler-



ance of such acts of violence had made her feel debased and helpless. The Court held that there had been a violation of Article 3 because of the authorities' failure to adequately protect the applicant against her husband's violence, and a violation Article 14 read in conjunction with Article 3 because the violence had been gender-based. The Court noted in particular that the applicant's husband had subjected her to violence and that the authorities had to have been well aware of that abuse given her repeated calls for assistance to both the police as well as the courts. Although there was a legal framework in Romania with which to complain about domestic violence and to seek the authorities' protection, which the applicant had made full use of, the authorities had failed to apply the relevant legal provisions in her case. The authorities even found that the applicant had provoked the domestic violence against her and considered that it was not serious enough to fall within the scope of the criminal law. Such an approach, in the opinion of the Court, had deprived the national legal framework of its purpose and was inconsistent with international standards on violence against women. The authorities' passivity in the current case had reflected a discriminatory attitude towards the applicant as a woman and had shown a lack of commitment to address domestic violence in general in Romania. The judgment is particularly significant because it establishes the principle or obligation to interpret and apply the domestic legal framework in this context in accordance with international standards on domestic violence and gender-based violence.

The Russian authorities also failed to protect the applicant from domestic violence in the case *Volodin against Russia* from 9 July 2019. She sought protection from repeated abuse, verbal and psychological assaults, kidnapping, stalking and threats. She also alleged that the current legal regime in Russia was inadequate for dealing with such violence and discriminatory against women. The Court held that there had been a violation of Article 3 of the Convention, finding that the applicant had been both physically and psychologically ill-treated by her former partner and that the Russian authorities had failed to comply with their obligations under Article 3 of the Convention to protect her from it. It also held that there had been a violation of Article 14 taken in conjunction with Article 3, as domestic violence was not recognised in Russian law and that there was no such thing as restraining or protection orders. Those failings clearly demonstrated that the authorities were reluctant to acknowledge the gravity of the problem of domestic violence in Russia and its discriminatory effect on women.

There is a very interesting case *J.D. and A v. The United Kingdom*, from 24 October 2019. The second applicant in this case, being at risk of extreme domestic violence, was included in a "Sanctuary Scheme", which also meant that there were some adaptations to her property (including the installation of a "panic room" in the attic for herself and her son with whom she lived in a three bedroom house). She submitted that new rules on housing benefit in the social housing sector, informally known as "the bedroom tax", discriminated against her because of her particular situation as a victim of gender based violence. The Court held that there had been a violation of Article 14 in conjunction with Article 1 of the Protocol no. 1 - the right to peaceful enjoyment of possessions, in respect of the second applicant. The Court noted in particular that the regulation's aim to encourage people to move was in conflict with the Sanctuary Scheme's goal of allowing victims of gender based violence to stay in their homes. The impact of treating the second applicant in the same way as others subject to the new housing benefit rules was therefore disproportionate as it did not correspond to the legitimate aim of the measure. Moreover, the UK Government had not provided any weighty reasons to justify prioritising the aim of the scheme over that of enabling victims of domestic violence to remain in their homes. This judgement established the standard that victims of domestic violence are



in a specific, less favorable social situation, and as such they should be treated differently, with more benefits than to others who do not have such life situations.

Violence against women is not even closely limited to family, marital, parental and partnership ties, but occurs in a number of different situations which include but are not limited to abuse in detention, police violence, rape and sexual violence, violence in case of risk of expulsion, abuse in trafficking in human beings and in other similar situations, as evidenced by the diverse case-law of the European Court of Human Rights.

In case of *Juhnke v. Turkey*, on 22 July 2003 the applicant, arrested and convicted of membership in an illegal, armed organization (PKK - Kurdistan Workers' Party), alleged that during her detention, she had been subjected to ill-treatment and a gynaecological examination against her will. The Court found no violation of Article 3 of the Convention, because she failed to prove the ill-treatment. The Court further found the applicant's allegation that she had been forced to have a gynaecological examination to be unsubstantiated and therefore held that there had been no violation of Article 3 of the Convention. However, the Court held that there had been a violation of Article 8 of the Convention - the right to respect for private and family life. The Court did find that the applicant had resisted a gynaecological examination until persuaded to agree to it by the detention authorities. Given the vulnerability of a detainee in such circumstances, the applicant could not have been expected to indefinitely resist having such an examination, the Court concluded. It decided to examine that issue from the point of view of Article 8 of the Convention, i.e. the right to respect for private life.

Observing that the gynaecological examination which had been imposed on the applicant without her free and informed consent had not been shown to have been "in accordance with the law" or "necessary in a democratic society", in accordance with the case-law of the Court under Article 8 of the Convention, in the specific circumstances of this case. The examination appeared to have been a discretionary measure taken by the authorities to safeguard those members of the security forces who had arrested and detained the applicant against a false accusation of sexual assault. That safeguard did however not justify seeking to persuade a detainee to agree to such an intrusive and serious interference with her physical integrity, especially given that she had not complained of having been sexually assaulted, and the Court held that there had been a violation of Article 8 of the Convention.

Case *B.S. v. Spain*, of 24 July 2012, concerned a woman of Nigerian origin who was stopped by the police while working as a prostitute on the outskirts of Palma de Mallorca. The applicant complained in particular that the police officers had verbally and physically abused and she alleged that she had been discriminated against because of her profession as a prostitute, her skin colour and her gender.

The Court found that the Spanish State had not conducted an adequate and effective investigation into the applicant's allegations of ill-treatment on two occasions when she was stopped and questioned in the street, in violation of Article 3 of the Convention. It further considered that the domestic courts had not taken into account the applicant's special vulnerability inherent in her situation as an African woman working as a prostitute and had thus failed to satisfy their obligation to take all possible measures to ascertain whether or not a discriminatory attitude might have played a role in the events, in violation of Article 14 in conjunction with Article 3 of the Convention. The Court lastly held that there had been no violation of Article 3 of the Convention as regards the applicant's allegations of ill-treatment.



In these cases, the Court has formulated a standard of obligation to take into account the gender of women and their vulnerability in situations of abuse and harassment by investigative or police authorities. After all, the sex or gender of the victim is one of the main criteria for the application of the so-called “threshold of severity-cruelty” in assessing whether a particular abuse constitutes torture, inhuman or degrading treatment or punishment.

In case of *Izci v. Turkey*, of 23 July 2013, the Court held there had been a double violation of Article 3 of the Convention, both in its substantive and procedural aspect, and a violation of Article 11 - freedom of assembly and association. The applicant, Turkish woman, complained in particular that she had been attacked by the police following her participation in a peaceful demonstration to celebrate Women’s Day in Istanbul and that such police brutality in Turkey was tolerated.

The Court considered in particular that, as in many previous cases against Turkey, the police officers had failed to show a certain degree of tolerance and restraint before attempting to disperse a crowd which had neither been violent nor presented a danger to public order, and that the use of disproportionate force against the demonstrators had resulted in the injuring of the applicant. Moreover, the failure of the Turkish authorities to find and punish the police officers responsible raised serious doubts as to the State’s compliance with its obligation to carry out effective investigations into allegations of ill-treatment in order to comply with Article 3 of the Convention. Finally, the use of excessive violence by the police officers had had a dissuasive effect on people’s willingness to demonstrate under Article 11 of the Convention. Considering the systemic aspect of the problem, the Court therefore requested the Turkish authorities to adopt general measures, in accordance with their obligations under Article 46 of the Convention.

Double violation of Article 3 of the Convention was also established in the case *Afet Sureyya Eren v. Turkey*, of 20 October 2015. The applicant alleged that while in custody on suspicion of being a member of an illegal political organisation she had been subjected to ill-treatment which had amounted to torture. The Court found that the ill-treatment involved very serious and cruel suffering that could only be characterized as torture undertaken to obtain information about the illegal political organization, and the investigation and the ensuing criminal proceedings had been inadequate and therefore in breach of the State’s procedural obligations under Article 3 of the Convention.

The Court did the same in the case *Ebru Dincer v. Turkey*, from 29 January 2019. This case concerned an operation conducted by the security forces in a prison in Istanbul in December 2000, during which the applicant suffered serious burns to various parts of her body, including her face, owing to a fire which broke out in the women’s dormitory. The Court found in particular that only an investigation or an effective procedure could allow the cause of the fire to be determined or how the applicant’s body and face had been burnt. Nearly 18 years after the facts, no light had been shed on the cause of tragic event and the criminal proceedings were still pending. In addition, the domestic proceedings had not shown that the violence which had led to the applicant’s physical and mental suffering had been made inevitable by her own conduct, for which reason the Court held there had been a violation of Article 3 of the Convention.

Violence against women is very often associated with cases of rape and other types of sexual abuse, as indicated by one of the older cases before the European Court, *X and Y v. The Netherlands*, of 26 March 1985.



A girl with a mental handicap (the second applicant) was raped, in the home for children with mental disabilities where she lived, the day after her sixteenth birthday (which was the age of consent for sexual intercourse in the Netherlands) by a relative of the person in charge. She was traumatised by the experience but deemed unfit to sign an official complaint given her low mental age. Her father (the first applicant) signed in her place, but proceedings were not brought against the perpetrator because the girl had to make the complaint herself. The domestic courts recognised that there was a gap in the law.

The Court recalled that although the object of Article 8 - the right to respect private and family life - is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference. In addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. In the present case, the Court found that the protection afforded by the civil law in the case of wrongdoing of the kind inflicted on the second applicant was insufficient. This was a case where fundamental values and essential aspects of private life were at stake. Effective deterrence was indispensable in this area and it could be achieved only by criminal-law provisions. Observing that the Dutch Criminal Code had not provided her with practical and effective protection, the Court therefore concluded, taking account of the nature of the wrongdoing in question, that the second applicant had been the victim of a violation of Article 8 of the Convention.

This is one of the first cases of evolutionary interpretation of the Convention, as a “living instrument” that moves beyond linguistic or authentic interpretation and uses a systematic and teleological method to determine the true content of the Convention, adapts it to changing social circumstances and needs in times when violence against women had not been recognized and acknowledged as a systemic problem of modern societies. In this way, the Court practically “pointed out” and helped the State party to the Convention to fill in a serious legal gap concerning sexual violence against a mentally ill person.

Similar to the previous one, but legally even more significant is the case *MC v. Bulgaria*, of 4 December 2003. The applicant, aged 14 (which was the age of consent for sexual intercourse in Bulgaria), was raped by two men. She cried during and after being raped and was later taken to hospital by her mother, where it was found that her hymen had been torn. Because it could not be established that she had resisted or called for help, the perpetrators were not prosecuted. The court found a violation of Articles 3 and 8 of the Convention, noting in particular the trend towards recognizing lack of consent as the essential element in determining rape and sexual abuse. Victims of sexual abuse, especially young girls, often failed to resist for psychological reasons, out of shame or for fear of further violence. The Court stressed that States had an obligation to prosecute any non-consensual sexual act, even where the victim had not resisted physically. The Court found both the investigation in the case and Bulgaria law to be defective.

Following this judgement, almost all members of the Council of Europe amended their criminal law regulations to criminalize all non-consensual sexual acts. Thus, the essence of rape as a criminal offence is no longer in resistance, but in the lack of consent to intercourse, which significantly expands the circle of protected persons, not only women, from rape and other forms of sexual abuse and harassment.



In case of *Maslov and Nalbandov v. Russia*, on 24 January 2008, the applicant, who had been called in for questioning at her local police station, was coerced by police officers into confessing to involvement in a murder. She was subsequently subjected to severe torture which included beating, suffocation, pushing fingers into intimate parts of the body, multiple rapes by three police officers, running electricity through her body. The applicant filed a complaint alleging that she had been raped and tortured. Several forensic pieces of evidence were obtained that clearly confirmed her allegations, but the competent court found that the evidence collected was inadmissible, as a special procedure for bringing proceedings against prosecution officers had not been followed. The case was finally discontinued for lack of evidence of a crime.

The Court noted that there had been an impressive and unambiguous body of evidence in support of the applicant's version of events. It further reiterated that the rape of a detainee by an official of the State had to be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender could exploit the vulnerability and weakened resistance of his victim. The physical violence, especially the acts of repeated rape, to which the applicant had been subjected had amounted to torture, in violation of Article 3 of the Convention, under its procedural limb, concerning the ineffective investigation.

Case *O'Keeffe v. Ireland*, of 28 January 2014 (Grand Chamber) concerned the question of the responsibility of the State for the sexual abuse of a schoolgirl, aged nine, by a lay teacher in an Irish National School in 1973. The applicant complained in particular that the Irish State had failed both to structure the primary education system so as to protect her and other students from abuse as well as to investigate or provide an appropriate judicial response to her ill-treatment, and to run an effective investigation about it. She also claimed that she had not been able to obtain recognition of, and compensation for, the State's failure to protect her.

The Grand Chamber of the Court, by a majority of 13 to 4 votes, held there had been a violation of Articles 3 and 13 - ineffective remedy, of the Convention, concerning the Irish State's failure to protect the applicant from sexual abuse and her inability to obtain recognition at national level of that failure - to investigate the problem, sanction the offender and provide adequate damages to victims. The case stirred the traditional - Catholic conservative Ireland, but the judgement was met with great general approval. A difficult, systemic problem that had been covered up for decades, due to the inviolability of the Catholic Church in Ireland, finally came to the surface, had an epilogue at court, and, although decades later, brought justice satisfaction and compensation to victims of sexual abuse (during 70s and 80s) who had been mostly underage girls and boys.

Case *W. v. Slovenia*, of 23 January 2014, concerned criminal proceedings before Slovenian national courts against a group of men who had raped the applicant at the beginning of 1990s, when she was 18 years old. The applicant complained in particular about the long delays in the criminal and the awarded compensation of 5.000 euros paid to her could not be regarded as sufficient redress for the suffering she had gone through. The Court held that there had been a procedural violation of Article 3 of the Convention, finding that the criminal proceedings regarding the applicant's rape did not comply with the procedural requirements imposed by Article 3 of the Convention.

In another case, *MA v. Slovenia*, of 15 January 2015, the Court held there had been a procedural violation of Article 3 of the Convention, because the criminal proceedings had lasted some 26 years in the first case and over nine years in the second case and failed to comply with the procedural requirements imposed by Article 3 of the Convention.



The problem of violence against women also arises in situations of risk of abuse and ill-treatment in cases of deportation to countries that are not members of the European Convention on Human Rights, where such procedures and practices apply.

Case *Collins and Akaziebie v. Sweden*, of 8 March 2008 refers to the danger of female genital mutilation of the applicant, a Nigerian national. She alleged that she would be subjected to female genital mutilation if returned to Nigeria, in violation of Article 3 of the Convention. The Swedish Migration Board rejected the applications for asylum, refugee status or a residence permit, stating, inter alia, that female genital mutilation was prohibited by law in Nigeria and that this prohibition was observed in at least six Nigerian states. The applicants appealed unsuccessfully, maintaining that the practice of female genital mutilation persisted despite the law against it and had never been prosecuted or punished.

The Court declared the application inadmissible as being manifestly ill-founded, finding that the applicants had failed to substantiate that they would face a real and concrete risk of being subjected to female genital mutilation, which is an obvious violation of Article 3 of the Convention. It was not in dispute that women in Nigeria had traditionally been subjected to this procedure and that they are still in some parts of Nigeria. However, several states in Nigeria had prohibited female genital mutilation by law, including the state where the applicants came from. Furthermore, the Court found that, while pregnant, the first applicant could have chosen to go to another state within Nigeria or to a neighboring country, in which that practice had not been widespread, instead of going to Sweden.

In some other similar cases against Austria, Belgium and Bulgaria, the Court declared the allegations of female genital mutilation manifestly ill-founded, as the applicants had failed to prove a real and concrete danger that they would be subjected to this procedure if returned to their home countries.

A similar problem occurs in cases of so-called crimes of honor and abuse of women by family and relatives, when they violate traditional rules of conduct and values arising from authority and hierarchy, most often in communities outside Europe.

Case *RD v. France*, of 16 June 2016, concerned the procedure for the applicant's deportation to Guinea, her country of origin. Married to a Christian, she had endured all sorts of violent reprisals on the part of her Muslim father and brothers. Then, she came to France, where her asylum application was denied. The applicant alleged in particular that enforcement of her deportation to Guinea would expose her to a risk of treatment contrary to Article 3 of the Convention, as the Court confirmed in its judgment.

In the aforementioned case *N. v. Sweden*, of 20 July 2010, the applicant, an Afghan national having an affair with a man in Sweden, maintained that she risked social exclusion-boycott, long imprisonment or even death if returned to Afghanistan, because she had left her husband and wanted to divorce him. The Court found that the applicant's deportation from Sweden to Afghanistan would constitute a violation of Article 3 of the Convention, due to the traditionally subordinate and discriminatory position of women in Afghan society based on tradition, customs and cruel Shiite laws.

Case *Rancev v. Russia and Cyprus*, of 7 January 2010, concerned the trafficking in human beings for the purpose of sexual exploitation (prostitution) - trafficking and the responsibility of the States concerned for failing to protect the applicant's daughter from ill-treatment and depri-



vation of life in that context. A girl from Russia, a dancer in a nightclub in Cyprus, was found dead on the sidewalk in front of the luxury hotel where she had been employed. The father complained that the Cypriot police had not done everything possible to protect his daughter from trafficking while she had been alive and to punish those responsible for her death. He also complained about the failure of the Russian authorities to investigate his daughter's trafficking and subsequent death.

The Court found that trafficking in human beings - trafficking for the purpose of sexual exploitation - was subject to Article 4 of the Convention (prohibition of slavery and forced labor) and in that case, Article 4 had been violated. It concluded that there had been a violation by Cyprus of its positive obligations arising under Article 4 of the Convention, because it failed to put in place an appropriate legal and administrative framework to combat trafficking as a result of the existing regime of artiste visas. Furthermore, the Cyprus police failed to take operational measures to protect the applicant's daughter from trafficking, despite circumstances which had given rise to a credible suspicion that she might have been a victim of trafficking. The Court held that there had also been a violation of Article 4 by Russia because of its failure to investigate how and where the applicant's daughter had been recruited and, in particular, to take steps to identify those involved in her recruitment or the methods of recruitment used. The Court further held that there had been a violation of Article 2 of the Convention (right to life) by Cyprus as a result of the failure of the Cypriot authorities to investigate effectively the applicant's daughter's death.

This judgement is very significant because the Court equated trafficking with slavery and forced labor for the first time. Like slavery, trafficking in human beings, by its very nature and aim of exploitation, was based on the exercise of powers attaching to the right of ownership; it treated human beings as commodities to be bought and sold and put to forced labour; it implied close surveillance of the activities of victims, whose movements were often circumscribed; and it involved the use of violence and threats against victims in order to exercise full control on them.

In a similar case of *LE v. Greece*, of 21 January 2016, the Court held that there had been a violation of Article 4 of the Convention, Articles 6 and 1 (right to a fair trial within a reasonable time) and 13 (right to an effective remedy). This case concerned a complaint by a Nigerian national who was forced into prostitution in Greece. Officially recognised as a victim of human trafficking for the purpose of sexual exploitation, the applicant had nonetheless been required to wait more than nine months after informing the authorities of her situation before the justice system granted her that status. In this case the Court also held that there had been a violation of Article 6 and 1 finding that the length of the investigation in question had been delayed excessively and was undertaken with too many shortcomings. The Court held that there had been a violation of Article 13 of the Convention on account of the absence in domestic law of a remedy by which the applicant could have enforced her right to a hearing within a reasonable time.

As this review of case-law has showed, the European Court has paid a thorough attention to the issue of domestic violence and violence against women. Their judgements have encompassed vast number of circumstances and situations, a backdrop for this phenomenon, such as marital relationships, parent-child relationships, matters concerning custody and disputes associated with it, use of shared apartments and premises, detention and imprisonment, expulsion and trafficking. The judgments contain very precise and clear standards, obligations to states on how to legally qualify and treat these phenomena. These standards are mandatory for all state authorities, police, misdemeanor, prosecutorial, judicial, and social and health authorities. The



existence and non-discriminatory application of a clear and precise legal, criminal and misdemeanor framework is an overarching precondition to combat and sanction those phenomena. However, it should be noted that national regulations must be interpreted and applied in accordance with those standards. The legal qualification depends on the circumstances of each particular case, noting that more serious cases of violence should always be treated as criminal offenses and not misdemeanors, because the state acts with more due diligence as some judgments show. Particularly important are the obligations concerning the adequacy, effectiveness and efficiency of investigation, which is especially important for the police and prosecutorial authorities of each state. Authorities that investigate into and sanction offenders in criminal and misdemeanor proceedings must take into account all the circumstances of the particular case, in particular that it is gender-based violence that is committed mostly against the “weaker” sex, or against vulnerable categories, in terms of their position and status. The nature and type of sanctions against offenders, especially returning offenders, and additional security and protection measures for victims are important standards that must be taken into account by judicial and misdemeanor authorities to combat violence and ill-treatment. The existence and application of civil sanctions, such as compensation for damages to victims are obligations arising from the extensive case-law of the European Court of Human Rights. Last but not the least, a systemic coordination and proper connection of all state authorities is another precondition for an effective combat against domestic violence and violence against women.



VIII RECOMMENDATIONS OF THE CEDAW AND GREVIO COMMITTEES ON DOMESTIC VIOLENCE AND GENDER-BASED VIOLENCE

Committee on the Elimination of Discrimination against Women within the Concluding remarks on the second periodic report of Montenegro, identified gender-based violence as one of the main areas of concern. The Committee notes with appreciation the many legislative, policy and awareness-raising and educational measures undertaken by the State party to prevent and combat gender-based violence against women, such as the 2014 amendments to the Law on Protection from Domestic Violence, the Strategy for the protection from family violence, 2016-2020, and the establishment of free legal aid offices attached to all first instance courts of the State party. The Committee, however, notes the following with concern:

- (a) That gender-based violence against women, including gender-based killings, remains prevalent and socially accepted in the State party, in particular among the Roma, Ashkali and Egyptian communities;
- (b) Discriminatory attitudes and/or passiveness continue to be displayed towards victims by judges, prosecutors, police and other law enforcement officers, who often give priority to reconciliation over prosecution in order to preserve the family and consider domestic violence as a private matter;
- (c) The lack of implementation of the legislative framework to prevent and punish gender-based violence against women owing to weak intersectoral cooperation, insufficient human, technical and financial resources, a low level of gender sensitivity among members of the legal profession, the very small number of protection orders issued even after repeated reports of violence and the growing resort to issuing double charges to both spouses in cases of domestic violence;
- (d) The lenient sentences handed down for perpetrators of gender-based violence against women, despite the recent decision by the Judicial Council to implement tougher sentences;
- (e) That victims are reluctant to report gender-based violence against women because of stigma and the social acceptance of family violence, their limited knowledge of how to access protection and services when they are available and the limited number of shelters;
- (f) The fact that marital rape is not specifically criminalized in the Criminal Code;
- (g) That the definition of rape in the Criminal Code of the State party is not based on absence of consent;
- (h) That the Law on the Compensation of Victims of Violent Crimes




will only be applied once the State party has become a member of the European Union; and

- (i) The lack of accurate data on gender-based violence against women, in particular owing to each institution collecting and processing data according to a different methodology.

In line with its general recommendation No. 19 (1992) on violence against women and its general recommendation No. 35 (2017) on gender-based violence against women, and with target 5.2 of the on the elimination of all forms of violence against all women and girls in the public and private spheres, the Committee recommends that the State party:

- (a) Address the underlying causes of gender-based violence against women and develop specific measures to sensitize women and men, including from the Roma, Ashkali and Egyptian communities, on the criminal nature of gender-based violence against women;
- (b) Allocate adequate human, technical and financial resources to combat stereotypical attitudes and tolerance for gender-based violence against women within law enforcement institutions and establish mechanisms for the anonymous reporting of such acts and the punishment of perpetrators;
- (c) Take the necessary awareness-raising measures to combat any approach which gives preference to preserving the family over women's rights, ensure that reconciliation is not given priority over the prosecution of perpetrators and provide redress and reparations, including compensation and rehabilitation, to victims of all forms of gender-based violence against women;
- (d) Continue its efforts to harmonize domestic legislation with the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) and ensure that criminal law provisions punishing gender-based violence against women are strictly enforced, including by providing capacity-building to judges, prosecutors and police and other law enforcement officers on the strict application of those provisions;
- (e) Implement the possibility of issuing protection orders against abusive partners, ensure their enforcement and impose sanctions for non-compliance with protection orders;
- (f) Ensure that perpetrators of gender-based violence against women are prosecuted and adequately punished with sentences that are commensurate with the gravity of their crimes and abolish the possibility of issuing any charges against the victim;
- (g) Encourage the reporting of domestic violence against



women and girls, including by launching awareness-raising campaigns through media and public education campaigns and by increasing the number of well-trained and gender-sensitive judges and law enforcement officials and ensure that reports are effectively investigated and victims provided with adequate assistance and protection;

- (h) Ensure the availability of a sufficient number of adequate shelters in all regions of the State party and that victims of violence receive counseling, rehabilitation and support services for their reintegration into society;
- (i) Amend the relevant laws to specifically criminalize marital rape;
- (j) Speedily adopt the proposed changes to Article 204 (2) of the Criminal Code, with a view to ensuring that the main element of the definition of rape is lack of fully voluntarily given consent by the victim;
- (k) Expedite the entry into force of the law on the compensation of victims of violent crimes and provide for a special fund for the compensation of victims of gender-based violence against women; and
- (l) Align the methodologies for collecting and processing data among the relevant institutions⁵⁹

At this point, it is necessary to recall that within *(Baseline) Report of the GREVIO Committee* on legislative and other measures giving effect to the provisions of the Convention published on 25 October 2018, the Committee made the following recommendations and suggestions in the field of domestic violence:

B. Scope of application of the Convention (Article 2)

1. GREVIO strongly encourages the Montenegrin authorities to step up efforts against violence against women by ensuring that measures taken in accordance with the Istanbul Convention address all forms of violence against women in a holistic and comprehensive manner with due regard to their gendered nature. (p. 10)

C. Definitions (Article 3)

2. GREVIO encourages the Montenegrin authorities to align the definition of gender-based violence in their legislation with the definitions set out in the Istanbul Convention and to ensure its effective application in practice. GREVIO further strongly encourages the Montenegrin authorities to introduce a clear gendered approach to preventing and combating all forms of violence against women, including domestic violence, to fully acknowledge their gendered nature. (p. 14).

⁵⁹ Concluding Observations of the Committee on the Elimination of Discrimination against Women on the Second Periodic Report of Montenegro, p. 5-6



D. Fundamental rights, equality and non-discrimination (Article 4)

2. Intersectional discrimination

3. GREVIO strongly encourages the Montenegrin authorities to eliminate discrimination faced by Roma and Egyptian women, disabled women and women living in rural zones when seeking protection from violence, and hence ensure in this regard the access of all women - on an equal basis - to specialist support services (paragraph 21).

II. Integrated policies and data collection

A. Comprehensive and coordinated policy (Article 7)

4. GREVIO strongly encourages the Montenegrin authorities to develop a long-term coordinated plan/strategy which places the rights of victims at the center of all measures, giving due importance to all forms of violence against women and to its co-ordinated implementation. GREVIO encourages the Montenegrin authorities to ensure that the gendered nature of all forms of violence against women is duly reflected in all policies and approaches. (paragraph 29).

B. Financial resources (Article 8)

5. GREVIO strongly encourages the Montenegrin authorities to ensure appropriate human and financial resources for any policies, measures and legislation aimed at preventing and combating violence against women and the institutions and entities mandated for their implementation. GREVIO furthermore invites the Montenegrin authorities to gradually reduce its dependency on international donors for activities to combat violence against women and ensure a wider share of funding from the Montenegrin state budget to demonstrate financial responsibility and ownership. (paragraph 35).

C. Non-governmental organizations and civil society (Article 9)

6. GREVIO urges the Montenegrin authorities to ensure appropriate funding through suitable funding opportunities such as long-term grants based on transparent procurement procedures to ensure sustainable funding levels for women's NGOs which run specialist support services for women victims of all forms of violence (paragraph 43).

7. GREVIO further strongly encourages the Montenegrin authorities to maintain their efforts in ensuring an independent role for women's NGOs in providing essential services such as counseling, shelter accommodation, advocacy etc. to women victims of domestic violence irrespective of referrals made by Centres for Social Work (p. 44).

D. Coordinating body (Article 10)

8. With a view to ensuring continuous policy setting regarding all forms of violence against women and the effective monitoring of measures taken, GREVIO strongly encourages the Montenegrin authorities to:

- clarify the roles and responsibilities of each of the two national co-ordinating structures;
- fully institutionalize the Co-ordinating Board and ensure continuity in human and financial resources beyond government mandates; and
- set up separate bodies for, on the one hand, the co-ordination and implementation of policies



and measures, and on the other hand for their monitoring and evaluation, in order to ensure objectivity in the evaluation of policies.

E. Data collection and research (Article 11)

1. Administrative data collection

9. GREVIO strongly encourages the Montenegrin authorities to pursue their efforts to introduce harmonized data categories such as sex, age, type of violence and type of relationship of the perpetrator with the victim to be collected at regular intervals by all sectors of the administration, including the law enforcement agencies, the judiciary, the relevant social services, the public health sector and other relevant public services. (p. 58)

2. Population-based surveys

10. GREVIO encourages the Montenegrin authorities 'to carry out prevalence surveys on all forms of violence against women and domestic violence including the (multiple forms of) violence experienced by Roma and Egyptian community and women with disabilities (p. 62).

3. Research

11. GREVIO encourages the Montenegrin authorities to step up efforts to support research into manifestations of violence against women that are not currently explored, including by setting research priorities and offering financial support. GREVIO also encourages the Montenegrin authorities to continue to evaluate existing policies and legislative measures to assess their level of implementation, efficacy, and victim satisfaction. (p. 66).

III. Prevention

A. Awareness raising (Article 13)

12. GREVIO strongly encourages the Montenegrin authorities to:

- carry out long-term and regular awareness-raising campaigns that address the attitudes and perceptions around domestic violence that prevail in Montenegro;
- continue to address, through specific awareness-raising efforts, forms of violence such as rape and particularly vulnerable groups of women who may experience multiple forms of violence and discrimination;
- monitor the impact of any awareness-raising campaign (p. 76).

B. Education (Article 14)

13. While GREVIO recognizes the important steps taken by the Montenegrin authorities in heightening the respect among teachers and students for gender equality, mutual respect in inter-personal relationships, and non-violent conflict resolution, GREVIO encourages the Montenegrin authorities to make the existing teacher training programmes and school subjects mandatory for all teachers and students (p.80).

C. Training of professionals (Article 15)

14. GREVIO urges the Montenegrin authorities to ensure that training for all professional groups that come in contact with victims, in particular law enforcement officials, prosecutors, judges,



social workers, teachers and health professionals, include: a) systematic and compulsory initial training on the different manifestations of violence against women, their detection and root causes, as well as the prevention of secondary victimisation; b) regular in-service training that is mandatory and based on protocols and guidelines for intervention in cases of all forms of violence against women (paragraph 89).

D. Preventive intervention and treatment programs (Article 16) 1

1. Programs for perpetrators of domestic violence

15. GREVIO strongly encourages the Montenegrin authorities to move away from perpetrator programmes based exclusively on medical treatment for substance abuse and mental health problems and to set up mandatory psycho-social treatment programmes as required by Articles 20 and 25 of the LDVP. Moreover, GREVIO encourages Montenegrin authorities to expand their work in also setting up voluntary perpetrator programmes and to ensure that all programmes are in line with the core elements as set out in the Explanatory Report to Article 16 of the Istanbul Convention (p.94)

E. Participation of the private sector and the media (Article 17)

16. GREVIO encourages the Montenegrin authorities to step up efforts that concern trainings on the different forms of violence against women and gender-based violence and how to report on them. GREVIO further encourages the Montenegrin authorities to actively encourage the private sector to take an active part in preventing and combating violence against women in all its forms. (st.100).

IV. Protection and support

A. General obligations (Article 18)

17. GREVIO strongly encourages the Montenegrin authorities to step up efforts to ensure compliance, among all relevant institutions, with the existing obligations to cooperate on domestic violence cases with a view to making interventions more effective and respectful of the rights and needs of victims. Furthermore, GREVIO strongly encourages the Montenegrin authorities to continue to pursue efforts to institutionalise co-operation of all relevant institutions among themselves and with women's support services run by NGOs in relation to cases of rape and sexual violence, forced marriage, stalking, sexual harassment and other forms of violence covered by the Istanbul Convention (p.107)

B. Information (Article 19)

18. GREVIO encourages the Montenegrin authorities to ensure the wider dissemination of information on the support services and legal measures available to victims of domestic and other forms of violence against women. This would include measures such as the dissemination of posters and leaflets as well as the intensification of efforts to ensure that professionals of all relevant institutions take a more pro-active approach towards informing victims of the available legal measures and support (provided by specialist support services or statutory agencies) (p. 110).

C. General support services (Article 20)

19. GREVIO strongly encourages the Montenegrin authorities to provide adequate resources



to enable the Centers for Social Work to perform their duties effectively. It further invites the authorities to provide training for the social workers specifically on the gendered nature of violence against women, including domestic violence, and to appoint specialised social workers in this field (p.119).

D. Specialist support services (Article 22)

20. Recalling the importance of specialist support and counselling for women who have experienced any of the forms of violence covered by the Istanbul Convention, GREVIO urges the Montenegrin authorities to expedite work on the national plan for the improvement of specialist support services for victims of violence against women and to ensure counselling and support exists throughout the country and in relation to all forms of violence covered by the Istanbul Convention. (p.125)

E. Shelters (Article 23)

21. GREVIO strongly encourages the Montenegrin authorities to ensure that the introduction of the licensing scheme for service providers does not affect the quality of the services currently provided to victims of domestic violence. To this end, GREVIO strongly encourages the Montenegrin authorities to include in the accreditation the requirement to ensure all services are carried out on the basis of a gendered understanding of domestic violence and with a view to empowering women victims and their children. (p.131)

F. Telephone helplines (Article 24)

22. GREVIO encourages the Montenegrin authorities to provide resources for and promote an agreement between the existing help-lines to work in unity, ensuring consistency and to expand their remit to all forms of violence covered by the Convention. (paragraph 134).

G. Support for victims of sexual violence (Article 25)

23. GREVIO urges the Montenegrin authorities to set up rape crisis and/or sexual violence referral centres, ensuring a sensitive response by trained and specialised staff, in sufficient numbers, recalling that one such centre should be available per every 200.000 inhabitants and that their geographic spread should make them accessible to victims in rural areas as much as in cities. (paragraph 137).

H. Protection and support for child witnesses (art. 26)

24. GREVIO urges the Montenegrin authorities to step up measures to ensure wider levels of awareness of the harmful effects of witnessing domestic violence on children and to provide adequate resources for psycho-social counselling for these children. (paragraph 144).

I. Reporting (Article 28)

25. GREVIO encourages the Montenegrin authorities to ensure that the duty to report is tempered by full and sensitive information being provided to the victim to allow her to make an informed decision herself and maintain autonomy, whilst also ensuring the safety of all, especially minors. (p. 151).

V. Substantive law

A. Civil law



1. Civil remedies against the state - ensuring due diligence (Article 29)

26. GREVIO strongly encourages the Montenegrin authorities to ensure the full use of disciplinary measures as well as misdemeanour and criminal offences in relation to cases of misconduct or failure of state officials to take appropriate action in relation to cases of domestic violence with the aim of ending impunity for officials who fail to carry out their duties. (p. 159)

2. Compensation (Article 30)

27. GREVIO strongly encourages the Montenegrin authorities to introduce a state compensation scheme as envisaged by the Law on Compensation for Damages to Victims of Violent Crimes irrespective of its accession to the EU. (paragraph 162).

3. Custody, visitation rights and security (Article 31)

28. GREVIO strongly encourages the Montenegrin authorities to make more use of and professionalise the supervised visitation scheme for children who have witnessed or experienced domestic violence. Recalling the importance of Article 31 of the Istanbul Convention, GREVIO also strongly encourages the Montenegrin authorities to step up measures to ensure that the safety and needs of child victims and witnesses of domestic violence are guaranteed in all child custody and visitation decisions. To that end:

a. all applications to family courts should include a mandatory question on whether violence has been an issue in the relationship and whether it has been reported to law-enforcement officials or Centres for Social Work;

b. where violence has been reported, family courts should ask for the disclosure of the risk assessment and safety plans drawn up by law-enforcement agencies and/or Centres for Social Work and take them into account when determining any issue involving a party who has alleged violence;

c. where there is an ongoing criminal investigation and/or where a protection order has been issued, family courts should seek the opinion of law-enforcement agencies and the prosecution, and give reasons as to why they choose to either follow or disregard those opinions;

d. if the criminal investigation is closed or suspended, family courts must conduct their own investigation as to whether violence occurred and what effect the violence has had on the child;

e. safeguards should be built into the procedures, such as offering the parents separate appointments and creating separate waiting areas in courts, to take into account the imbalance of power between the victim and the perpetrator and to prevent the risk of revictimisation.

Such measures should be accompanied by the provision of appropriate training and the development of professional guidelines, aimed at raising awareness among the professionals concerned as to the harmful effects of violence on children, including child witnesses, and at familiarising them with the requirements of the Istanbul Convention related to the settlement of custody and visitation rights. (paragraph 169)

B. Criminal law

1. Domestic violence

29. GREVIO urges the Montenegrin authorities to ensure, through all available means such as



protocols, training of professionals and legislative change, more operational clarity between the misdemeanour offence of domestic violence and that of a criminal law nature. In addition, GREVIO urges the Montenegrin authorities to ensure more dissuasive sanctions for the misdemeanour offence of domestic violence. (paragraph 178)

2. Sexual violence, including rape (Article 36)

31. GREVIO invites the Montenegrin authorities to introduce criminal legislation that would cover the intentional conduct set out in Article 36, paragraph 1 c of the Istanbul Convention. (p. 181).

3. Forced marriage (Article 37)

32. GREVIO encourages the Montenegrin authorities to: a) remove procedural obstacles and limitations to the criminal prosecution of acts of forced marriage (in particular the requirement to first seek the annulment of a forced marriage under Article 214 and the time limit placed on the possibility of having a forced marriage annulled under Article 216); b) criminalise the intentional conduct of forcing an adult to enter into a customary union; c) criminalise the intentional conduct of luring an adult or a child to the territory of another state with the purpose of forcing this person into a marriage as required by Article 37, paragraph 2. (paragraph 192)

4. Sexual harassment (Article 40)

33. GREVIO encourages the Montenegrin authorities to ensure that sexual harassment experienced in all areas of life is subject to a legal sanction. GREVIO further encourages the Montenegrin authorities to increase their efforts in ensuring higher levels of awareness of sexual harassment as opposed to sexual violence among the general public and professionals concerned. (p. 197).

5. Sanctions and measures (Article 45)

34. GREVIO strongly encourages the Montenegrin authorities to ensure - through legislative measures and the effective training of members of the judiciary and prosecution services - that sentences and measures imposed for domestic violence offences are effective, proportionate and dissuasive and that they do not harm victims and their children. (paragraph 201)

7. Prohibition of mandatory alternative dispute resolution processes or sentencing (Article 48)

35. GREVIO strongly encourages the Montenegrin authorities to ensure that mediators and judges are fully aware of the prohibition of mediation in domestic violence cases as set out in Article 328 of the Family Law and to end the practice of mediation in family disputes and divorce proceedings where there is a history of domestic violence. (p. 208)

VI. Investigation, prosecution, procedural law and protective measures

A. Immediate response, prevention and protection (Article 50)

1. Reporting to and investigations by law enforcement agencies

36. GREVIO urges the Montenegrin authorities to ensure the swift and impartial response of all law enforcement officials to cases of domestic and other forms of violence against women on the basis of full respect for women's right to life and physical integrity. GREVIO further urges



the Montenegrin authorities to take practical steps such as on-the-job training and mentoring schemes to actively overcome persisting attitudes, beliefs and practices that stand in the way of a law enforcement response to domestic violence which focuses on the victim's safety, the collection of evidence and the full accountability of the perpetrator. (p. 214)

2. The role of the prosecution and the conviction rate

37. GREVIO strongly encourages the Montenegrin authorities to increase the level of awareness among all professionals involved, including judges and prosecutors, of all the forms of violence covered by the Istanbul Convention, in order to diligently prevent, investigate, punish and provide reparation for all acts of violence covered by the scope of this Convention. (paragraph 222).

B. Risk assessment and risk management (Article 51)

38. GREVIO strongly encourages the Montenegrin authorities to introduce comprehensive and mandatory risk assessment and management, in co-operation with relevant women's specialist support services, for all institutions handling cases of violence against women, including domestic violence. (p. 227).

C. Emergency barring and protection order (Art. 52 and 53)

39. GREVIO urges the Montenegrin authorities to make protection orders available for immediate protection to all victims of domestic violence, irrespective of charging decisions by prosecution services or the institution of misdemeanour proceedings by victims. (paragraph 233)

40. GREVIO strongly encourages the Montenegrin authorities to ensure that emergency barring and protection orders are effectively applied by all relevant authorities. (paragraph 238)

D. Measures of protection during investigations and judicial proceedings (Article 56)

41. GREVIO strongly encourages the Montenegrin authorities to ensure that more effective use is made of existing victim protection measures and to introduce the obligation of law enforcement, prosecution services and the judiciary to inform victims of follow-up given and outcomes of their case. (paragraph 245)

E. Legal aid (Article 57)

42. GREVIO urges the Montenegrin authorities to ensure access to free legal aid for victims of all forms of violence against women as provided for in the Law on Free Legal Aid, in particular by taking active measures to ensure victims' awareness of this right. (paragraph 248).

VII. Migration and asylum

A. Residence status (Article 59)

43. GREVIO invites the Montenegrin authorities: a. to ensure that the practical application of Article 52 of the Law on the Foreigners allows migrant women victims of gender-based violence to receive, on humanitarian grounds, an autonomous residence permit irrespective of the duration of the marriage on the basis of standards of proof that they are able to meet; b) to ensure that migrant women victims of gender-based violence have the right to be granted an autonomous residence permit in the event of expulsion of the abusive spouse or partner; c) to ensure that women and girls who lost their residence status in Montenegro as a result of being forced into marriage abroad may regain their residence status.



B. Gender-based asylum claims (Article 60)

44. GREVIO invites the Montenegrin authorities to develop gender-sensitive guidelines intended to enhance relevant actors' awareness of special protection needs for women asylum-seekers who have been victims or are at risk of gender-based violence. GREVIO invites the Montenegrin authorities to continue the efforts made to identify women asylum-seekers who have experienced or are at risk of gender-based violence by developing and disseminating gender guidelines for refugee status determination. (p. 260).⁶⁰

⁶⁰ (Baseline) Report of the GREVIO Committee on Legislative and Other Measures giving effect to the Provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention), p. 72-80

