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## **OPINION ON LEGISLATIVE ACTS OF UKRAINE RELEVANT FOR THE ESTABLISHMENT OF A CHILD JUSTICE CENTRE**

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### **UKRAINE**

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The opinion has benefited from consultations with the Office of OSCE Special Representative and Co-ordinator for Combating Trafficking in Human Beings.

Based on an unofficial English translation of selection portions of the Law on Forensics, Criminal Procedure Code, and Forensic Examination Bylaws.

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## EXECUTIVE SUMMARY AND KEY RECOMMENDATIONS

The Commissioner for Children of Ukraine in partnership with the Prosecutor General's Office of Ukraine on 11 February 2021 sent a request to the OSCE Office for Democratic Institutions and Human Rights (hereinafter "OSCE/ODIHR") for legislative and best practice recommendations to establish the first Interview Centre for Child Victims of Trafficking and Sexual Exploitation (hereinafter "CJC").

OSCE/ODIHR is pleased that Ukraine seeks further legal advice after receiving the Opinion on the implementation of the Council of Europe Convention on Protection of Children Against Sexual Exploitation and Sexual Abuse (Lanzarote Convention) in 2020 ("2020 Opinion").<sup>1</sup> While Ukraine has many of the elements required for the creation of a CJC already in its legislation, these resources are not gathered in a single framework, which authorizes information sharing, or gathering evidence for legal proceedings. Moreover, the focus of the current legislation is on achieving justice rather than on holistic care of the child before, during, and after any legal proceeding.

Ukraine has an opportunity to further improve its legislative framework to assist children who have suffered from trafficking, sexual exploitation or abuse, and render the investigation and prosecution of such crimes against children more effective by including provisions from the Lanzarote Convention, other relevant international sources, such as the United Nations Convention on the Rights of the Child (UNCRC), including the Optional Protocol to the UNCRC on the Sale of Children, Child Prostitution and Child Pornography, the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children of 2000 to the UN Convention against Transnational Organised Crime, Council of Europe Convention on Action against Trafficking (the Palermo Protocol), OSCE commitments, as well as regionally, the Council of Europe Convention on Action against Trafficking in Human Beings (2005, CETS 197) and relevant decisions by the European Court of Human Rights.

More specifically, and in addition to request to assist in establishing a CJC, OSCE/ODIHR makes the following recommendations to further enhance child protection and effective investigation in Ukraine's current laws on forensic interviewing, forensic medical examination, and all court proceedings related to child trafficking, exploitation, and abuse:

- A. To open the contemplated CJC to all children (persons who have not yet reached 18 years of age). In case of uncertainty regarding the age, the CJC should provide care until the age can be verified; To offer children under the age of 18 full protective measures before, during, and after criminal proceedings on trafficking, exploitation, and sexual abuse; To amend the Criminal Procedure Code Article 354(1) in order to offer both child witnesses

<sup>1</sup> OSCE/ODIHR - [Legal Opinion on Draft Amendments to Select Legislative Acts of Ukraine Relating to the Implementation of the Council of Europe Convention on Protection of Children Against Sexual Exploitation and Sexual Abuse \(Lanzarote Convention\)](#), 9 September 2020.

and child victims of sexual crimes, or children trafficked for the purpose of sexual exploitation the same protective measures.

- B. To create a one stop-shop holistic care centre, for children to participate in the investigatory and prosecutorial process with maximum resources aimed at avoiding re-traumatisation; To ensure that children who are in immediate danger have emergency homes they may go to for the duration of the trial if they were living with their perpetrator.
- C. To make available a multi-disciplinary team to operate at the new CJC; To provide for in the legislation a requirement for close collaboration between the multi-disciplinary team located at the CJC and the National Referral Mechanism in case other experts need to be brought in to meet the special needs of a child in specific cases; To avoid the need for children to be examined at more than one facility and revise the Rules on Forensic Medical Examination accordingly; to develop and adopt, in addition to the Rules on Forensic Medical Examination, a set of regulations to set up a multidisciplinary response mechanism to child sexual abuse from initial response to medical examination and any possible medical referrals.
- D. To appoint only persons specifically trained in the special needs of and trauma-informed methods of working with children who have been trafficked, sexually abused or exploited, to assist a child in criminal proceedings.
- E. To exclude pre-pubescent children from invasive internal examinations from the Forensic Bylaws, including the use of speculums and digital inspection or anoscopy.
- F. To amend in the Forensic Examination Bylaws the invasive and static anthropomorphic measurements for a non-invasive developmental stage assessment that will be consistent with ethnicities and health statuses; To include in the Forensic Examination Bylaws sub-protocols grouped by the stage of sexual maturity (e.g. the Tanner staging model or a similar model used in Ukraine), with a separate sub-protocol for prepubescent children; To include in the Rules an express provision requiring that children under 18 years of age be examined solely by pediatric medical examiners who have been specifically trained in child sexual abuse.
- G. To include in the Forensic Examination Bylaws, and any other protocols used by the CJC a detailed list of non-ano-genital injuries of significance in child trafficking, sexual exploitation and abuse cases to be included in the detailed report and in the gathering of specimens; To provide for in the Rules on Forensic Medical Examination a clear protocol on documenting the observations made which is developed bearing in mind that documentation serves both evidentiary and medical purposes, and is useful both for the criminal proceedings and for further treatment and referrals of the child victim.

- H. To consider forensic medical expert opinion as one of the types of evidence and not the sole source, and that lack of physical evidence in cases involving allegations of contact sexual abuse be not used to discredit the child's disclosure, if such allegation is presented.
- I. With respect to the medical forensic examination:
  - 1. To ensure that assistance and psychological support supplied by the CJC is available to all children and their families regardless of the extent to which the child does (or does not) consent to participate in the criminal investigation and prosecution.
  - 2. To amend the Criminal Code Articles 241 and 242 (3) so that no child is forced to undergo a forensic physical examination, or any part of an examination, to which the child does not consent.
  - 3. To clarify the Criminal Code Article 242 (3) to state that a forensic (psychiatric) interview should be ended or postponed if it undermines the child's dignity or aggravates the child's trauma.
  - 4. To amend the Rules on Forensic Medical Examination to include provisions on consent to submit to a forensic medical exam, which should include a procedure of determining who should provide consent if the child's parent or legal guardian is suspected of abuse, is absent or seeking consent from the parent/legal guardian is otherwise not in the child's best interest.
  - 5. To add a provision mandating seeking assent or consent from the child in question, in addition to consent by an adult responsible for such.
- J. To ensure that the new CJC provides care to or gathers evidence from a child without undue delay.
- K. With respect to protective services for child victims:
  - 1. To amend the Criminal Procedure Code to exclude law enforcement, child protective services, investigator or prosecutor presence in the forensic medical exam.
  - 2. To include in Article 241 of the Criminal Procedure Code that law enforcement, child protective services, investigator or prosecutor may listen in on the medical history questions before the medical exam, or preferably view a record of the medical history questions.
  - 3. To provide a child with the right to an interpreter if needed. The interpreters must be neutral parties and not have any personal connection to the child or his/her family.
  - 4. To ensure a trained child advocate is in the exam room with the child at all times to chaperone, distract, and ensure that a child is not further traumatized by the forensic medical exam.

5. To include in the Forensic Examination Bylaws Section 1.18 directions to the examiner on the use of photographs and/or physical diagram documentation (if the child has refused photographs) in the final report so that the investigator and/or prosecutor are not violating the child's dignity and privacy by being physically present at the examination of the child's ano-genital region.

L. With respect to the forensic interview of a child victim:

1. To add the forensic interview to the definition of forensics in the Law on Forensic Examination and other relevant legislative acts, including the Criminal Procedure Code.
2. To develop a certification for children's forensic interview intermediaries and ensure that children are interviewed only by individuals certified in child investigative interviewing in order to avoid further trauma to the child and to elicit the most accurate testimony possible.
3. To create a set of standards/methodology by which a child forensic interview would qualify as evidence in court so that the child is less likely to have to retell the story of sexual abuse, exploitation, or trafficking for exploitation in court.
4. To amend the Criminal Procedure Code 224 and 225 so neither the prosecution nor the defence are involved in the initial forensic interview in order for it to remain neutral and be accepted as evidence in court.
5. To consider adapting Criminal Procedure Code Articles 225 and 226 to the Barnahus model, where the questions of both the defence and prosecution are submitted to the forensic interviewer, who then relays the question to the child in an appropriate manner, after the neutral forensic interview has been completed.
6. To include in the Criminal Procedure Code Articles 224, 225, and 226 provisions that same person conduct all interviews with the child and to keep the interviews as limited to the number strictly necessary for the investigation and prosecution of the perpetrator.
7. To amend Criminal Procedure Code 226, para 2 such that the interview will need to be postponed if the child becomes overly distressed, regardless of whether the one hour limit has been reached.
8. To clarify in the Forensic Examination Bylaws rule 1.16.1 to make sure it is understood that the forensic medical examiner is not conducting the forensic interview but gathering information on any current medical complaints and medical history for a forensic physical exam.
9. To clarify in the Forensic Examination Bylaws that the purpose of the forensic medical examination in cases of child trafficking, exploitation, and

abuse is the child's overall health and well-being, as well as collection of forensic evidence.

10. To stipulate that only the specialist in child forensic interviewing can be present in the room for the forensic interview of the child, unless the child wishes otherwise.
  11. To specify that parents who may be implicated in the trafficking, exploitation, or abuse cannot listen in on the interview, but be given a summary afterward.
  12. To ensure that the child has a legal representative appointed as soon as possible, and at least before the forensic interview.
- M. To include in the Criminal Procedure Code the non-punishment and non-prosecution principle for child victims of sexual abuse, exploitation and trafficking; To include in the Criminal Procedure Code Articles 226 and 354 an obligation to inform children that they will not be punished or prosecuted for criminal acts they committed in the course of their trafficking or exploitation.
- N. To offer a heightened level of protection of children-victims' private life, personal information, personal data and identifiable characteristics, both during judicial or quasi-judicial proceedings and en route to recovery, regardless of the level of the child's involvement in the domestic criminal investigation proceedings; To enable the new CJC to have law-enforcement level confidential storage capacity for all information related to a victim's or witness's case.
- O. To include in the Bylaws on Forensic Medical Examination specific provisions for secure storage of documentation and authorized access to it. Any processing of personal data must be in line with CETS 108 (The Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data) and its protocol ETS 181 (Additional protocol to Convention 108 regarding supervisory authorities and transborder data flows).
- P. With respect to judicial proceedings:
1. To specify in the Criminal Procedure Code Article 27 that, in the specific circumstances, entire or part of judicial proceedings related to trafficking, exploitation, and abuse involving a child victim or child witness are held in private.
  2. To amend the Criminal Procedure Code Articles 224 and 226 so that all forensic interviews with child victims or witnesses are audio-visually recorded and preserved according to evidentiary rules for use as evidence in court proceedings so that the child can avoid retelling the story, even if the child has to answer questions in court proceedings about the story.

3. To clarify in the Criminal Procedure Code Article 225 that the alleged perpetrator cannot be in the interrogation room, or, if allowed, that the child may participate through one-way video conferencing so that the child does not have to see the perpetrator. Under no circumstance should the alleged perpetrator be allowed to speak to the child.
  4. To expand Criminal Procedure Code Articles 225 and 354 so that testimony already given by the child during the neutral forensic interview can be submitted as evidence, and questioning on that testimony by the defence, if required, can be accomplished through one-way video conferencing.
  5. To amend the Criminal Procedure Code Articles 225 and 354 so that the child can be located at the CJC for any one-way video conferencing.
  6. To consider adapting Criminal Procedure Code Articles 225, 226 and 354 to the Barnahus model, where the questions of both the defence and prosecution are submitted to the forensic interviewer, who then relays the question to the child in an appropriate manner.
  7. To consider having a trained child advocate who has been on the child's multi-disciplinary team from the beginning of the investigation, rather than a teacher who may or may not have been previously informed about the situation of the child or have any training in how to relate to a sexually traumatized child.
  8. To make explicit in Criminal Procedure Code Article 336 just as in the Criminal Procedure Code Articles 224 and 226 recommended above, that the child victim or witness can participate in any court proceeding via video-conferencing that is one-way so that the victim does not have to see the alleged perpetrator.
- Q. To adopt a code of ethics applicable to all forensic examiners, medical examiners and interviewers , regardless of their status as an employee of a state-operated forensic service provider (“specialized state institution carrying out forensic activities”) or a private sector expert.

Additional recommendations can be found in the text, marked in bold.

***As part of its mandate to assist OSCE participating States in implementing OSCE commitments, the OSCE/ODIHR reviews, upon request, draft and existing legislation to assess their compliance with international human rights standards and OSCE commitments and provides concrete recommendations for improvement.***

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## I. INTRODUCTION

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1. On 11 February 2021, the Commissioner for Children of Ukraine in partnership with the Prosecutor General's Office of Ukraine sent to the OSCE Office for Democratic Institutions and Human Rights (hereinafter "OSCE/ODIHR") a request for a legislative and best practice recommendations to establish the First Interview Centre for Child Victims of Trafficking and Sexual Exploitation (hereinafter CJC).
2. On 16 February 2021 OSCE/ODIHR responded to this request, confirming the Office's readiness to prepare a legal opinion expressed and to provide this review as part of its continuing support to legal reform in Ukraine.
3. This Opinion can be read in conjunction with the Opinion on the implementation of the Council of Europe Convention on Protection of Children Against Sexual Exploitation and Sexual Abuse (Lanzarote Convention).<sup>2</sup>
4. This Opinion was prepared in response to the above request. The OSCE/ODIHR conducted this assessment within its mandate to assist participating States in complying with relevant international standards in rule of law.<sup>3</sup>

## II. SCOPE OF REVIEW

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5. The scope of this Opinion covers only the relevant existing laws submitted for review: Criminal Procedure Code of Ukraine (2013, No 9-10, No 11-12, No 13) and the Law of Ukraine on Forensic Examination (1994, No 28, p. 232) and Bylaws on Forensic Examination in cases of sexual abuse (No 6 of 17.01.95). Thus limited, the Opinion does not constitute a full and comprehensive review of the entire legal and institutional framework regulating protection of children against sexual exploitation and sexual abuse. The Opinion covers also children who have been trafficked, especially for the purposes of exploitation.
6. The Opinion raises key issues and provides indications of areas of concern. In the interest of conciseness, it focuses more on areas that require amendments or improvements than on the positive aspects of the existing laws. The ensuing recommendations are based on international standards, norms and practices as well as relevant OSCE human dimension commitments. The Opinion also highlights, as appropriate, good practices from other OSCE participating States in this field. When referring to national legislation, the OSCE/ODIHR does not advocate for any specific country model; it rather focuses on providing clear information about applicable international standards while illustrating how they are implemented in practice in certain national laws. Any country example should always be approached with caution since it cannot necessarily be replicated in another country and has always to be considered in light of the broader national institutional and legal framework, as well as country context and political culture.

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<sup>2</sup> *Ibid.*

<sup>3</sup> The OSCE/ODIHR conducted this assessment within its mandate as established by the OSCE Action Plan to Combat Trafficking in Human Beings (2003). See pars 9.1 and 15.1 of the Annex to OSCE Ministerial Council Decision 2/03 on Combatting Trafficking in Human Beings (2003), available at <http://www.osce.org/odihr/23866?download=true>.

7. Moreover, in accordance with the 2004 OSCE Action Plan for the Promotion of Gender Equality and commitments to mainstream a gender perspective into OSCE activities, programmes and projects, the Opinion's analysis takes into account the potentially different impact of the law reviewed on girls and boys.<sup>4</sup>
8. This Opinion is based on an unofficial English translation of the relevant laws commissioned by the OSCE/ODIHR, which is attached to this document as an Annex. Errors from translation may result. The opinion will be translated into Ukrainian, but the English version will prevail in case of discrepancies.
9. In view of the above, the OSCE/ODIHR would like to mention that this Opinion does not prevent the OSCE/ODIHR from formulating additional written or oral recommendations or comments on respective legal acts or related legislation pertaining to the legal and institutional framework regulating protection of children in Ukraine in the future.

### III. ANALYSIS

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#### 1. INTERNATIONAL STANDARDS AND OSCE COMMITMENTS ON RESPONSE TO TRAFFICKED, SEXUALLY EXPLOITED, AND SEXUALLY ABUSED CHILDREN

##### 1.1 Relevant sources in international law

10. The international community recognises that sexual exploitation and abuse of children is a particularly heinous human rights violation and a crime from which children need special care and protection to recover and which may take place at home but also outside it. According to UNICEF, approximately 2 million children are exploited by the “sex industry” each year and millions of images of abused children have been posted on the internet through child sexual abuse material.<sup>5</sup> The World Health Organization estimated that of the 204 million children under the age of 18 in the WHO European Region, 9.6 per cent experience sexual abuse.<sup>6</sup> Child survivors, and child who witnessed violence, exploitation, or abuse, face inadequate care and susceptibility to re-traumatization once they enter the legal system, as well as the failure of authorities to appropriately gather and comprehend their stories in a way that leads to convictions of perpetrators. These persistent issues have led the international community to adopt a common and comprehensive approach that emphasizes both criminal prosecution as well as the human rights of child victims and witnesses.
11. The United Nations Convention on the Rights of the Child (UNCRC)<sup>7</sup> recalls the Declaration on the Rights of the Child, and recognizes that “the child, by reason of his

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<sup>4</sup> See par 32 of the [OSCE Action Plan for the Promotion of Gender Equality adopted by Decision No. 14/04, MC.DEC/14/04 \(2004\)](#).

<sup>5</sup> [National Center for Missing and Exploited Children](#). Child sexual abuse material (CSAM) refers to materials depicting acts of sexual abuse and/or focusing on the genitalia of the child. CSAM takes many forms including photos and videos chronicling sexual abuse, live-streaming videos of abuse on-demand, and other “forms of material representing child sex abuse and exploitation, such as audio files, written story lines, or other potential forms of recording.” There is a significant degree of overlap between the markets for CSAM and child sex trafficking; a trafficked child may be exploited not only for direct sale to purchasers, but may also be exploited through the online trade and sale of photos and videos of the child in sexual situations or being sexually abused. Further information on this aspect can be found at: [https://www.icmec.org/csam-model-legislation/#:~:text=150countries%20have%20refined%20or,CSAM\)%20law%20in%20196%20countries.&text=Require%20Internet%20Service%20Providers%20\(ISPs,or%20to%20some%20other%20agency](https://www.icmec.org/csam-model-legislation/#:~:text=150countries%20have%20refined%20or,CSAM)%20law%20in%20196%20countries.&text=Require%20Internet%20Service%20Providers%20(ISPs,or%20to%20some%20other%20agency).

<sup>6</sup> [Violence Against Children: Tackling Hidden Abuse](#), World Health Organization (13 January 2020).

<sup>7</sup> [Ukraine ratified the Convention of the Rights of the Child on 28 August 1991](#)

physical and mental immaturity, needs special safeguards and care”<sup>8</sup>. Article 19, par 2 UNCRC calls for special protective measures for children who have suffered abuse or exploitation, including “identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment...and, as appropriate, for judicial involvement”. Article 39 UNCRC adds that “States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of child victims of any form of neglect, exploitation, or abuse,” and, importantly, that “[s]uch recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.” Children with disabilities, so often targeted for sexual abuse, exploitation, and trafficking,<sup>9</sup> are to receive special consideration, Article 23 UNCRC.

12. The Optional Protocol to the UN Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (hereinafter “the Optional Protocol”)<sup>10</sup> adds further guidance in Article 8 on providing for the safety of child victims, families, and witnesses. Article 8 takes into consideration the special needs of child victims and witnesses, appropriate training and protection for all who work with the child, and keeping the best interest of the child as the primary consideration in any judicial proceedings. This entails, that such children receive medical care, psychosocial assistance, education and recreational activities. All authorities involved in the justice process, from police officers to judges, should be trained in child rights, child participation and protection. Additionally, children must be given a voice in all matters concerning them, including in judicial proceedings, when relevant and appropriate. They should also be kept fully informed about their cases and their rights. Their views, needs and concerns should be considered in any proceeding that affects their personal interest. The identity and privacy of the judicial system must be protected. Relatives must also be provided with the necessary protection. Unnecessary delays in processing cases and remedies must be avoided.<sup>11</sup>
13. In addition, the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children of 2000 to the UN Convention against Transnational Organised Crime (hereinafter “The Palermo Protocol”)<sup>12</sup> requires in Article 6, par 2 that each State Party ensures its domestic legal system enables the views and concerns of trafficking victims to be presented and considered in a “manner not prejudicial to the rights of the defence”. The Palermo Protocol Article 6, para 3 highlights the importance of “implementing measures to provide for the physical, psychological, and social recovery” of trafficking victims, including “cooperation with non-governmental organizations...” for counselling, information, medical, psychological, and material assistance. In addition, Article 6, par 4 Palermo Protocol calls on each state party to take into account the “age, gender, and special needs of victims of trafficking in persons, in particular the special needs of children...” in applying the above guidance.
14. The overall UN normative framework provides a solid basis for States’ detailed actions to prevent child sexual exploitation, secure children’s recovery from trafficking, exploitation, and abuse as well as to secure justice against their abusers.

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<sup>8</sup> Preamble, the United Nations Declaration on the Rights of the Child, 1959.

<sup>9</sup> Intelligence Briefing 2021 -- The Sexual Exploitation and Abuse of Deaf and Disabled Children Online, We Protect Global Alliance (Feb. 18, 2021) <https://www.weprotect.org/library/sexual-exploitation-abuse-deaf-disabled-children-online/>.

<sup>10</sup> [Optional Protocol to the UN Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, ratified by Ukraine in 2003](https://www.unicef.org/child-rights-convention/strengthening-convention-optional-protocols). Please note that there are three optional protocols to the CRC: <https://www.unicef.org/child-rights-convention/strengthening-convention-optional-protocols>

<sup>11</sup> UNICEF: [Handbook on the Optional Protocol to the UN Convention on the Rights of the Child on the sale of children, child prostitution and child pornography](#), ps 42-43.

<sup>12</sup> [Ukraine Ratified the Palermo Protocol on 21 May 2004](#).

### 1.1.1 Relevant OSCE Sources

15. As an OSCE participating State, Ukraine is committed to follow the main principles of the OSCE Action Plan to Combat Trafficking in Human Beings (hereinafter “the OSCE Action Plan 2003”). The OSCE Action Plan commits States to develop and implement National Referral Mechanisms, defined as national cooperative frameworks, through which state actors, in strategic partnership with civil society, fulfil their obligations to protect and promote the human rights of victims of human trafficking, especially children.<sup>13</sup>
16. The OSCE Action Plan 2003, Chapter III, paras 5.1 and 5.2, also calls for providing or improving training for border officials, law enforcement officials, judges, prosecutors, immigration and other relevant officials in all aspects of trafficking in persons. Giving, in such training programs, consideration to human rights and child and gender-sensitive issues, and encouraging co-operation with non-governmental organizations, other relevant organizations and other elements of civil society. This is reiterated most recently in Ministerial Council Decision 6/18.<sup>14</sup>
17. In addition to the OSCE Action Plan, the Addendum to the Action Plan not only calls for victims to have their human rights respected in the legal process and for access to services, but also for special training of police, social workers, and public authorities likely to come into contact with victimized children, and protection from penalization for children compelled to commit crimes.<sup>15</sup>
18. OSCE Ministerial Council Decision 9/07, par 8 urges states to facilitate legal protection, assistance, appropriate medical care, rehabilitation and integration programmes for child victims and, where appropriate, to ensure safe return of children trafficked internationally.<sup>16</sup> OSCE MC.DEC 7/17, par 2 calls on States to adopt a victim centred and trauma informed approach that takes into account the respective gender specific concerns of boys and girls, in the best interests of the child and fully respects the human rights and fundamental rights and freedoms of children-victims.<sup>17</sup> Several other OSCE decisions and instruments will be referred to throughout the document.<sup>18</sup>

### 1.1.2 Relevant regional sources and pertinent provisions

19. At the regional level, the Council of Europe Convention on Protection of Children against Sexual Exploitation and Sexual Abuse, also known as “the Lanzarote Convention”[2007], requires criminalisation of all kinds of sexual offences against children, as well as trauma-

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<sup>13</sup> [OSCE Action Plan to Combat Trafficking in Human Beings](#), 2 December 2003, Chapter II, referring to the Palermo Protocol.

<sup>14</sup> [DECISION No. 6/18 STRENGTHENING EFFORTS TO PREVENT AND COMBAT CHILD TRAFFICKING, INCLUDING OF UNACCOMPANIED MINORS](#), 7 December 2018, para 3.

<sup>15</sup> [Decision No. 11/07 Addendum to the OSCE Action Plan to Combat Trafficking in Human Beings: One Decade Later](#), 6 December 2013, Chapter IV para 1.5.

<sup>16</sup> [DECISION No.9/07 ON COMBATTING SEXUAL EXPLOITATION OF CHILDREN ON THE INTERNET](#), 30 November 2007,

<sup>17</sup> Guidance As To The Correct Application Of Relevant Legal Standards Can Be Found In The [Trauma Informed Code Of Conduct, Compiled By The Helen Bamber Foundation](#)

<sup>18</sup> [Decision No. 685 Addendum to the OSCE Action Plan to Combat Trafficking in Human Beings: Addressing the Special Needs of Child Victims of Trafficking for Protection and Assistance](#), 7 July 2005;

[Decision No.15/06 on Combatting Of Sexual Exploitation Of Children](#), 5 December 2006;

[Decision No. 13/04 The Special Needs for Child Victims of Trafficking for Protection and Assistance](#), 7 December 2004;

[Decision No. 13/05 Combating Trafficking in Human Beings](#), 6 December 2005;

[Decision No. 5/08: Enhancing Criminal Justice Responses to Trafficking in Human Beings Through a Comprehensive Approach](#), 5 December 2008;

[Decision No. 7/17 Strengthening Efforts To Combat All Forms Of Child Trafficking, Including For Sexual Exploitation, As Well As Other Forms Of Sexual Exploitation Of Children](#), 8 December 2017;

[Decision No. 6/17 Strengthening Efforts to Prevent Trafficking in Human Beings](#), 8 December 2017;

[Decision No. 6/18 Strengthening Efforts to Prevent And Combat Child Trafficking, Including of Unaccompanied Minors](#), 7 December 2018;

[OSCE “Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking](#), 25 June 2013.

informed, wrap-around care for abused children and their families.<sup>19</sup> It is one of the most relevant and comprehensive international legal instruments to the creation of a CJC. It calls on State Parties to adopt specific legislation to prevent sexual violence, to protect child victims and to prosecute perpetrators of all forms of sexual abuse and violence against children, setting up a specific monitoring mechanism, the “Lanzarote Committee.”<sup>20</sup> Importantly, the Lanzarote Convention, Articles 14 and 31, calls on each Party to provide for the short and long-term physical and psychological recovery of victims, to take into account the specific child’s needs and views, and to enlist non-governmental organizations and civil society in the assistance effort, particularly during criminal proceedings.

20. The Lanzarote Convention Article 30 also requires that each “Party shall take the necessary legislative or other measures to ensure that investigations and criminal proceedings are carried out in the best interests and respecting the rights of the child,” that the “investigations and criminal proceedings do not aggravate the trauma experienced by the child and that the criminal justice response is followed by assistance, where appropriate.” In addition, the Lanzarote Convention Article 32 directs states to ensure that the proceedings will continue even if the victim retracts his or her statements.
21. Consistent with the concern for the best interests and rights of the child, the Lanzarote Convention Article 34 calls on States Parties to ensure that “units or services in charge of investigations are specialized in the field of combating sexual exploitation and sexual abuse of children or that persons are trained for this purpose. Such units or services shall have adequate financial resources.” In addition, the Lanzarote Convention in Article 36, para 1 stipulates that training on children’s rights and sexual exploitation and sexual abuse of children to be available for all persons involved in the proceedings, especially judges, prosecutors, and lawyers.
22. The Lanzarote Convention in Article 35, par 1 requires States Parties to ensure that the interviews with the child, whether victim or witness, take place without unjustified delay, in a premises designed for child interviews, by professionals trained for that purpose, with as limited a number of interviews as possible. According to this Convention Article 35, par 2, the interview should be videotaped in such a way that the videotape is accepted as evidence during court proceedings.
23. The Lanzarote Convention Article 36, para 2 calls for hearings to take place without the presence of the public and with the use of communication technologies so that the victim may be heard without being present.
24. Other relevant legal instruments which will be referenced in this review include the Council of Europe Convention on Action Against Trafficking in Human Beings (hereinafter the “CoE Trafficking Convention”).<sup>21</sup> Article 27, para 1 of this Convention, advises states to ensure that prosecution can continue whether or not the victim agrees to participate. Article 28, para 3 of the CoE Trafficking Convention calls on States to provide a child with special protection measures, taking into account the best interest of the child. Article 29 indicates that States should “ensure that persons or entities are specialised in the fight against trafficking and the protection of victims” and that “policies and actions of their governments’ departments and other public agencies against trafficking in human beings” are coordinated, trained, and funded.

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<sup>19</sup> [Council of Europe Convention on Protection of Children against Sexual Exploitation and Sexual Abuse](#), (Lanzarote Convention) (2007), [All council of Europe States have ratified the Lanzarote Convention, Ukraine ratified the Convention on 27 August 2012](#).

<sup>20</sup> Further information can be found at ECPAT, *Strengthening Laws Addressing Child Sexual Exploitation, A Practical Guide* (2008), available at: <https://resourcecentre.savethechildren.net/document/strengthening-laws-addressing-child-sexual-exploitation-a-practical-guide/>

<sup>21</sup> [Council of Europe Convention on Action Against Trafficking in Human Beings, 2005](#).

25. The CoE Trafficking Convention also contains important provisions, such as Article 5 (5) which provides for a protective environment for children to reduce vulnerability to trafficking. Article 6 of the CoE Trafficking Convention, as the Palermo Protocol Article 9 par 5, mentioned above, calls on states to implement measures to prevent trafficking. This can include research on discouragement, awareness raising of the important role of the media and civil society, information campaigns targeting authorities and policy makers, as well as education measures for boys and girls. Article 10 of this Convention calls on States to “provide its competent authorities with persons who are trained and qualified in preventing and combating trafficking in human beings, in identifying and helping victims, including children.” Article 16 obliges the State to provide for a safe return to the country of origin or legal residence, taking into concern the safety of the victim. It is also worth noting that Article 16 para 7 protects the child from return to another country if it is not in the child’s best interests. Article 30 concerns the duty to provide victims of trafficking with: a) the protection of private life and, where appropriate, identity; and b) safety and protection from intimidation. Article 39 underscores that the rights of the victims and the obligations of the States provided for in the Palermo Protocol shall not be affected by the CoE Trafficking Convention.
26. Furthermore, Ukraine is also party to the Convention on Cybercrime of the Council of Europe (hereinafter the “Budapest Convention”).<sup>22</sup> The Convention aims principally at (1) harmonising the domestic criminal substantive law elements of offences and connected provisions in the area of cyber-crime (2) providing for domestic criminal procedural law powers necessary for the investigation and prosecution of such offences as well as other offences committed by means of a computer system or evidence in relation to which is in electronic form (3) setting up a fast and effective regime of international cooperation.<sup>23</sup>
27. Where relevant, the European Union (EU) legal framework will be referenced as a comparative legal analysis tool, as Ukraine is not a Member State. Of particular importance in this regard is the EU Charter of Fundamental Rights (CFR), which expressly prohibits human trafficking under Article 5 para 3 and makes a direct reference to the rights of the child and to protection and care necessary for their well-being in Article 24.<sup>24</sup> Other relevant EU law instruments include the Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography.<sup>25</sup> Importantly, Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime (hereinafter “the Victims’ Directive”)<sup>26</sup> notes the high rate “secondary and repeat victimisation” experience by child victims. It advises in the preamble (para 62) States to ensure personnel serving victims with specific needs to have specialist, including psychological training, and to “consider developing ‘sole points of access’ or ‘one-stop shops’, that address victims’ multiple needs when involved in criminal proceedings, including the need to receive information, assistance, support, protection and compensation.”
28. Reference will also be made, importantly, to the case law of the European Court of Human Rights, which has repeatedly ruled on cases of child exploitation and abuse and has settled jurisprudence on these issues, under Articles 3, 8 and 13 of the European Convention of Human Rights (ECHR). The European Court of Human Rights has also ruled that human trafficking as a crime that falls under the umbrella of violations prohibited in Article 4 of

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<sup>22</sup> [Council of Europe Treaty Office - Ukraine](#)

<sup>23</sup> [Explanatory Report to the Convention on Cybercrime, European Treaty Series 185, p. 16](#)

<sup>24</sup> [Charter of Fundamental Rights of the European Union, Official Journal of the European Union \(2012/C 326/02\)](#)

<sup>25</sup> [Directive 2011/93/EU of the European Parliament and of the Council, 13 December 2011](#)

<sup>26</sup> [Directive 2012/29/EU of the European Parliament and of the Council, 25 October 2012, \(“Victim’s Directive”\).](#)

the ECHR and thus cases of child trafficking with sexual exploitation as the crime's purpose could also trigger a violation of Article 4.<sup>27</sup>

## 1.2 Examples from OSCE Participating States

### 1.2.1 Child Justice Centres/Children's Advocacy Centres

29. The first known “one-stop shop” for child victims of sexual crimes was created in 1985 in the United States. This “Children’s Advocacy Center” brought together a multidisciplinary, coordinated team with the goal of protecting the child from experiencing re-traumatization in the process of seeking help and justice for the abuse suffered.<sup>28</sup> “Re-victimization” can even have more harmful effects on the child than the abuse itself.<sup>29</sup> Since 1985, more than 1000 Children’s Advocacy Centers (also called Child Justice Centres or “CJC’s”) have been created in the United States and 34 countries around the world).<sup>30</sup>
30. A typical multidisciplinary team (MDT) at a CJC includes medical professionals, law enforcement, mental health, prosecution, child protective services, victim advocacy, and other professionals who work together—informed by a single, forensic interview—to make decisions about how to best help the child recover while preserving evidence.<sup>31</sup> CJsCs offer forensic interviews, therapy and medical exams, plus courtroom preparation, victim advocacy, case management, and other services all under one roof.<sup>32</sup> Getting the forensic interview right is critical to a successful prosecution as most child sexual abuse cases do not involve any physical evidence, but have to rely on the testimony provided by the victim.<sup>33</sup> CJsCs provide a nurturing, child-friendly environment for the children to reduce anxiety, provide holistic care, and ensure that the child feels safe to share his or her account of trafficking, sexual exploitation or abuse.
31. The account is videotaped so that the child can avoid having to tell it again—as much as possible. The videotaped accounts are treated as evidence and kept or transferred securely, along with any other forensic evidence the CJC has derived from clothing or the forensic medical exam, for use in the legal process. Ideally, the videotaped interview will be used in court and the child will not have to testify. Although many cases end in a plea deal without a trial, the “Confrontation Clause” of the U.S. Constitution does allow the defence to question a child during court proceedings should the case go to trial.<sup>34</sup>
32. In all cases, but particularly cases of parental exclusion, it is critical that the child has legal representation. Lanzarote Convention Article 35 (1) (f) specifically concerns to interviews, stating, that “the child may be accompanied by his or her legal representative or, where appropriate, an adult of his or her choice, unless a reasoned decision has been made to the contrary in respect of that person.” Directive 2011/93/EU Article 20, para 2, states that in general, “Member States shall ensure that child victims have, without delay, access to legal counselling and, in accordance with the role of victims in the relevant justice system, to

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<sup>27</sup> European Court of Human Rights, *Rantsev v Cyprus and Russia*, (App no 25965/04), judgment 7 January 2021, para 282-288.

<sup>28</sup> [National Children’s Advocacy Center, History](#)

<sup>29</sup> Evgenia Generalova, [What is Barnahus and How it Works](#), Child Protection Hub (2016)

<sup>30</sup> [National Children’s Advocacy Center, History](#)

<sup>31</sup> National Children’s Alliance, [How the CAC Model Works](#)

<sup>32</sup> National Children’s Alliance, [How the CAC Model Works](#)

<sup>33</sup> Children’s Commissioner for England, Barnahus: [Improving the Response to Child Sex Abuse in England \(2015\)](#), p 5, citing Children’s Commissioner for England, [Protecting Children from Harm—A Critical Assessment of Child Sex Abuse in the Family Network \(2015\)](#). See also [A National Protocol for Sexual Abuse Medical Forensic Examinations Pediatric](#), US Department of Justice, Office on Violence Against Women, (April 2016), p. 145.

<sup>34</sup> *Crawford v. Washington*, 541 U.S. 36 (March 8, 2004) <https://supreme.justia.com/cases/federal/us/541/36/>. In a 9-0 opinion, the Court ruled that the Sixth Amendment’s Confrontation Clause gives defendants the right to confront witnesses and cross-examine their testimony.

legal representation, including for the purpose of claiming compensation. Legal counselling and legal representation shall be free of charge where the victim does not have sufficient financial resources.”

33. The presence of an interpreter may be needed if the child and the interviewer do not speak the same language. Sign language interpretation may also be needed for the child and or caregivers. In cases where interpretation is required, the interviewer should explain the role of the interpreter to both the child and the interpreter. Interpreters should be fully vetted for working with children and have their language skills tested. The interpreters must be neutral parties and not have any personal connection to the child or his/her family. Caregivers should under no circumstance be used as interpreters as they could have conflicting interests and it may be challenging to have the interview admitted as evidence in court. It is recommended the legislation on forensics be amended to establish a right to interpretation when necessary.

### *1.2.2. Barnahus Model*

34. Iceland developed the Barnahus model in 1998 to meet similar needs as the CJC for a holistic approach to care, gathering of evidence, and protection of the child from trauma in the judicial process.<sup>35</sup> Sweden, Norway, and Denmark have adapted this model of coordinated and effective response to their own contexts.<sup>36</sup> Lithuania launched the Barnahus Support Centre for Sexually Abused Children in 2016. It is the only service in Lithuania which provides specialized, complex services for sexually abused children and their family members, overnight stays can also be provided if needed.<sup>37</sup> Other countries have also implemented or expressed interests in implementing the Barnahus model.<sup>38</sup> The Barnahus model requires a single, child friendly location in which all services (statutory agencies, law enforcement, therapeutic support, medical examination, and interviews by and through a specially trained forensic interviewer) can be co-located and thus are able to be more effective.<sup>39</sup>
35. Investigations fulfil the following criteria without undue delay: 1) the forensic interview is carried out according to an evidence-based protocol; 2) the evidentiary validity of the child’s statement respects the due process while avoiding a need for the child to repeat their statement during Court proceedings if an indictment is made; 3) a medical evaluation is carried out for forensic investigative purposes and to ensure the child’s physical well-being and recovery; 4) psychological support is available, including shorter and longer term therapeutic services addressing child trauma and non-offending family members and caretakers; and 5) an assessment of protection needs is carried out and followed up concerning the child victim as well as siblings in the family.<sup>40</sup> The Barnahus Model also serves as a hub for co-operation between agencies and as knowledge hubs for information about violence against children or criminal activities targeting them.<sup>41</sup> It should be noted

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<sup>35</sup> [Children’s Commissioner for England, Barnahus: Improving the Response to Child Sex Abuse in England \(2015\)](#), ps. 2 and 7.

<sup>36</sup> [Children’s Commissioner for England, Barnahus: Improving the Response to Child Sex Abuse in England \(2015\)](#), p. 7.

<sup>37</sup> [Promise Barnahus Network: Lithuania](#)

<sup>38</sup> [Promise Barnahus network](#)

<sup>39</sup> [Children’s Commissioner for England, Barnahus: Improving the Response to Child Sex Abuse in England \(2015\)](#), in general and p. 9.

<sup>40</sup> [Barnahus Quality Standards Guidance for Multidisciplinary and Interagency Response to Child Victims](#)

and Witnesses of Violence: See p. 70 for an example of possible measures to protect the child after abuse has been reported, (not only sexual abuse is relevant).

<sup>41</sup> Further information on the Barnahus Model here: Promise Barnahus Network, The Barnahus Quality Standards: [Guidance for Multidisciplinary and Interagency Response to Child Victims and Witnesses of Violence](#) Evgenia Generalova, [What is Barnahus and How it Works, Child Protection Hub \(2016\)](#). Research has shown that repeated interviews by people untrained in forensic interviewing are “likely to distort the child’s account of events by suggestive questioning and have a detrimental effect on criminal investigations, see [Evgenia Generalova, What is Barnahus and How it Works, Child Protection Hub \(2016\)](#). See also, [Children’s Commissioner for England, Barnahus: Improving the Response to Child Sex Abuse in England \(2015\)](#), p 5, In addition, giving repeated accounts of the abuse diminishes the quality of the evidence, see [Children’s Commissioner for England, Barnahus: Improving the Response to Child Sex Abuse in England](#)

though that information exchange must be done in line with the privacy standards of the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CETS No. 108) and its protocols (hereafter “CETS 108”).

36. Both models seek to create the best possible conditions for gaining evidential quality testimony from the child while helping the child to holistically recover and avoid any additional trauma. Positive developments have been documented. In Iceland, “twice as many cases of suspected sexual abuse have been investigated, the number of cases prosecuted has tripled and the same applies to the number of sentences passed on a yearly basis.”<sup>42</sup> The United States reports significantly greater gathering of evidence, case substantiation, and referral to prosecution in cases managed by a CJC compared to those managed by Child Protective Services.<sup>43</sup>
37. It is noteworthy that the herein described Barnahus model also includes, as in Lithuania and Norway, emergency foster homes which can “receive children and young people at short notice as a result of an emergency situation.”<sup>44</sup> It is of course imperative to focus on the examinations and assistance to the child while gathering the evidence on potential perpetrators, but it may be harmful and dangerous for the child to stay together with the potential perpetrator.
38. In both models, the child and their caregivers receive follow-up care and assistance to ensure full healing from the traumas of abuse. These models provide holistic restoration to the child, embedding the legal system in the process, to ensure the best possible chance for conviction of the perpetrators of trafficking, sexual exploitation, and child abuse.

## 2. ANALYSIS OF RELEVANT UKRAINIAN LEGISLATION

39. Ukraine has demonstrated significant commitment to countering child sexual exploitation and abuse (hereinafter referred to as “CSEA”), including online child sexual exploitation and abuse (hereinafter referred to as “OCSEA”), as well as human trafficking. Subsequent references to CSEA/OCSEA also include acts of trafficking. As mentioned Ukraine is a State Party to both the Lanzarote Convention” and the Budapest Convention, and has invested considerable effort into reviewing domestic legislation to ensure better compliance with both Conventions. Bill No 3055 “On amendments to selected laws of Ukraine regarding the implementation of the Council of Europe Convention on Protection of Children against Sexual Exploitation and Sexual Abuse (the Lanzarote Convention),”<sup>45</sup> signed into law on 12 March 2021, in particular became a major milestone in improving

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(2015), p. 5., citing Children’s Commissioner for England, [Protecting Children from Harm—A Critical Assessment of Child Sex Abuse in the Family Network \(2015\)](#)

<sup>42</sup> Children’s Commissioner for England, Barnahus: [Improving the Response to Child Sex Abuse in England](#) (2015). p. 2 quoting Bragi Guðbrandsson, General Director, Barnaverndarstofa/ The Government Agency for Child Protection, Iceland.

<sup>43</sup> “For example, Smith et al. (2006) found that local law enforcement was involved in 71.4% of the CAC cases compared to 32.7% of the CPS cases, a medical examination was included in 57.1% of the CAC cases compared to 12.7% of the CPS cases, and 50% of CAC cases received a forensic interview compared to 13% of CPS cases. Additionally, 47.6% of the CAC cases were substantiated compared to only 12.7% of the CPS cases. Of the substantiated cases, 80% of the CAC cases were referred for prosecution compared to 42.8% of the CPS cases. In sum, these findings suggest that CACs were more likely to uphold the multidisciplinary process and more likely to refer cases for prosecution compared to CPS agencies.” JoAnna Elmquist, Ryan C. Shorey, Jeniimarie Febres, Heather Zapor, Keith Klostermann, Ariane Schratte, Gregory L. Stuart, A review of Children’s Advocacy Centers’ (CACs) response to cases of child maltreatment in the United States, *Journal of Aggression and Violent Behavior* (2015) (<https://www.nationalcac.org/wp-content/uploads/2020/01/A-review-of-Childrens-Advocacy-Centers-response-to-cases-of-child-maltreatment-in-the-United-States.pdf>) p. 6, citing Smith, D.W., Witte, T.H., & Fricker-Elhai, A.E. (2006). Service outcomes in physical and sexual abuse cases: A comparison of child advocacy-based and standard services. *Child Maltreatment*, 11, 354–360.

<sup>44</sup> [https://www.bufdir.no/fosterhjem/Ulike\\_typer\\_fosterhjem/Beredskapshjem/](https://www.bufdir.no/fosterhjem/Ulike_typer_fosterhjem/Beredskapshjem/)

<sup>45</sup> The full-text version of the Bill (in Ukrainian) is available at: [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=68122](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=68122) (last visited on 24 September 2021).

Ukraine's criminal and criminal procedural legislation to more effectively and efficiently prevent and combat CSEA/OCSEA.

40. The Criminal Code of Ukraine<sup>46</sup> has been amended to establish criminal liability for:
  - “Committing actions of sexual nature with a person under the age of sixteen” (Article 155 as amended);
  - “Solicitation of children for sexual purposes” (new Article 156-1);
  - “Knowingly obtaining, acquiring, possessing, producing or distributing child pornography” (new Article 301-1);
  - “Involving a child in pornographic performances” (new Article 301-2).
41. The Criminal Procedure Code<sup>47</sup> has been amended, in particular, to ensure that CSEA/OCSEA cases are fast-tracked as priority. The Criminal Procedure Code, Articles 28 and 224, which is intended to minimize secondary victimization of a child through prolonged exposure to the criminal justice system. It is also welcome that Article 224, par. 9 of the Criminal Procedure Code expressly bans cross-examination of already-interviewed suspects and child victims/witnesses in CSEA cases. Moreover, Article 232 of the Criminal Procedure Code provides for the option of remote interviewing child victims/witnesses via video link. One way video interview (video recording which can be shown later) is not mentioned, see also Section 3.11 below.
42. The types of forensic examination of most relevance to investigations of CSEA/OCSEA are forensic medicine, forensic psychology, and digital forensics (including forensic human image identification).<sup>48</sup> Digital forensics is however, beyond the scope of this legal opinion.
43. While Ukraine has many of the elements required for the creation of a CJC already in its legislation, these resources (such as medical professionals, law enforcement, mental health, prosecution, child protective services, victim advocacy) are not housed under a single, child-friendly roof, not fully funded, and not authorized to share information with each other, or authorized to gather evidence for legal proceedings. Moreover, the focus of the current law is on achieving justice rather than on holistic care of the child before, during, and after any legal proceeding. It has been the experience participating States that the CJC and Barnahus (see sections 1.2.1 and 1.2.2 above) models not only prevent further trauma consistent with international and regional law, but are also much more likely to result in usable evidence and accountability for perpetrators of trafficking, exploitation, and child abuse. The following analysis and recommendations seek to enable Ukraine to respond to the physical, psychological, and justice needs of children in a gender sensitive, age appropriate and trauma informed way, upholding the principles of non-discrimination. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration, in line with Article 3, para 1 of the UNCRC.<sup>49</sup>

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<sup>46</sup> The full-text version of the Code (in Ukrainian) is available at: <https://zakon.rada.gov.ua/laws/show/2341-14?lang=en#Text> (last visited on 24 September 2021).

<sup>47</sup> The full-text version of the Code (in Ukrainian) is available at: <https://zakon.rada.gov.ua/laws/show/4651-17#Text> (last visited on 24 September 2021).

<sup>48</sup> This list may not exactly coincide with the naming convention in Ukraine, which it was not possible to ascertain for the purposes of this analysis due to there being no list of forensic examination available in Ukraine in the Law on Forensics.

<sup>49</sup> The same obligation has been established also by the European Court of Human Rights in the case of *A and B v Croatia* (Application No.7144/15), judgment 20 June 2019, paras 121-128.

## 2.1 Definition of a child

44. As Ukraine does not yet have a specific law on CJs, it is unclear for what ages of children the CJC's would be relevant. Neither the Law on Forensics nor Forensic Examination Bylaws contain a definition of a child, although ages are occasionally mentioned (Article 2.1.1 of the Forensic Examination Bylaws for determining sexual maturity of females 14-18, Article 2.4.1 of the Bylaws mentioning 16 years old; 2.13.1 of the Bylaws mentions sexual maturity in males 14-18). Regarding the age for voluntary sexual acts, please also see the Opinion on the Implementation on the Protection of Children Against Sexual Exploitation And Sexual Abuse (Lanzarote Convention) (2020 Opinion).<sup>50</sup> Criminal Procedure Code Article 242, para 2(4) references age determination for purposes of criminal liability. Criminal Procedure Code Article 52, para 2(1) indicates that a suspect under 18 is "underage" and should have a defence counsel appointed. Article 354, para 2 of the Criminal Procedure Code provides special protection for witnesses under 16 years of age, but appears to leave to the discretion of judges protections for older "underage" children, Article 354, para 1 (See also the 2020 Opinion<sup>51</sup>).
45. The Lanzarote Convention Article 3 (a) refers to children as persons under 18 years old. This is also the case for other relevant sources, including the EU Directive 2011/93/EU, Article 2 (a), the COE Trafficking Convention, Article 4 (d), the Palermo Protocol, and Article 3 (d) as it follows the definition of a child in the UNCRC, Article 1. Importantly, Article 10, para 3 of the CoE Trafficking Convention states "When the age of the victim is uncertain and there are reasons to believe that the victim is a child, he or she shall be presumed to be a child and shall be accorded special protection measures pending verification of his/her age." The Optional Protocol Article 8, para 2 echoes this by stipulating "States Parties shall ensure that uncertainty as to the actual age of the victim shall not prevent the initiation of criminal investigations, including investigations aimed at establishing the age of the victim" to address in a more comprehensive manner the implications that age assessment may have on the investigation and protection procedures.

### RECOMMENDATION A

- **To open the contemplated CJC to all children (persons who have not yet reached 18 years of age). In case uncertainty regarding the age, the CJC should provide care until the age can be verified.**
- **To offer children under the age of 18 full protective measures before, during, and after criminal proceedings on trafficking, exploitation, and sexual abuse.**
- **To amend the Criminal Procedure Code Article 354(1) in order to offer both child witnesses and child victims of sexual crimes, or children trafficked for the purpose of sexual exploitation under the same protective measures.**

<sup>50</sup> OSCE/ODIHR - [Legal Opinion on Draft Amendments to Select Legislative Acts of Ukraine Relating to the Implementation of the Council of Europe Convention on Protection of Children Against Sexual Exploitation and Sexual Abuse \(Lanzarote Convention\)](#), 9 September 2020, para 22

<sup>51</sup> OSCE/ODIHR - [Legal Opinion on Draft Amendments to Select Legislative Acts of Ukraine Relating to the Implementation of the Council of Europe Convention on Protection of Children Against Sexual Exploitation and Sexual Abuse \(Lanzarote Convention\)](#), 9 September 2020, paras 21-23

## 2.2 Premises Designed for Child Interviews

46. Ukraine's Forensic Examination Bylaws in Article 1.6 currently stipulates that forensic medical examinations should take place in a "warm room, usually in normal daylight", but there is not a requirement that it be a child-friendly premise. Moreover, in an effort to ensure the expert attention of specialists (experts in venereal diseases, toxoplasmosis, rhesus conflict, specimens for lab testing, proctologist, etc.), the current legislation (Forensic Examination Bylaws rules 1.9, 2.4.5, 2.8.4, 2.13.5(c), 2.14.5, 2.16.1) require children to go to many locations for services, while few or none of these locations may be child-friendly. Sending a child and their caregiver to various locations and submitting the child to multiple exams at those locations heightens the stress on the child and caregivers. To avoid "secondary and repeat victimisation" experienced by child victims, the Victim's Directive (para 62) advises states to "consider developing 'sole points of access' or 'one-stop shops', that address victims' multiple needs when involved in criminal proceedings, including the need to receive information, assistance, support, protection and compensation." **It is recommended to authorize one, child-friendly, location for all examinations and to send specimens out for testing when needed, or bring in medical experts when needed.**
47. The UNCRC Article 39 highlights the importance of "an environment that fosters the health, self-respect, and dignity of the child" to promote physical and psychological recovery and social reintegration of child victims of any form of neglect, exploitation, or abuse." Moreover, the Lanzarote Convention Article 35, para 1 (b) calls for interviews to take place in a premises designed for child interviews. Currently, there is nothing in the Law on Forensics that would prevent a child from going to a state psychiatric institution to be interviewed by a forensic interviewer.
48. Best practices from existing CJs include environments painted in warm colours with child-sized furniture and artwork of a non-fantasy nature.<sup>52</sup> Younger children may benefit from having access to paper and markers during the forensic interview;<sup>53</sup> however, in order to create an environment of telling the truth, materials that encourage play or fantasy are uniformly discouraged, as is any interpretation by the interviewer of the child's use of media or other products.<sup>54</sup> The forensic interview room should be equipped for audio- and video-recording, and case investigators and other CJC staff should be able to observe from outside the forensic interview.<sup>55</sup>
49. The medical examination room should be similarly designed, have capacity for photographic digital or video recording of the medical examination, and be fully stocked with all items a child paediatric medical examiner will need to care for the health of the

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<sup>52</sup> [Chris Newlin, Linda Cordisco Steele, Andra Chamberlin, Jennifer Anderson, Julie Kenniston, Amy Russell, Heather Stewart, and Viola Vaughan-Eden, Child Forensic Interviewing: Best Practices, Juvenile Justice Bulletin, Office of Justice Programs, US Department of Justice \(September 2015\), p. 6.](#)

<sup>53</sup> [Chris Newlin, Linda Cordisco Steele, Andra Chamberlin, Jennifer Anderson, Julie Kenniston, Amy Russell, Heather Stewart, and Viola Vaughan-Eden, Child Forensic Interviewing: Best Practices, Juvenile Justice Bulletin, Office of Justice Programs, US Department of Justice \(September 2015\), p. 6, citing Poole, D.A., and Dickinson, J.J. 2014. Comfort drawing during investigative interviews: Evidence of the safety of a popular practice. Child Abuse & Neglect 38\(2\):192–201.](#)

<sup>54</sup> [Chris Newlin, Linda Cordisco Steele, Andra Chamberlin, Jennifer Anderson, Julie Kenniston, Amy Russell, Heather Stewart, and Viola Vaughan-Eden, Child Forensic Interviewing: Best Practices, Juvenile Justice Bulletin, Office of Justice Programs, US Department of Justice \(September 2015\), p. 6.](#)

<sup>55</sup> [Chris Newlin, Linda Cordisco Steele, Andra Chamberlin, Jennifer Anderson, Julie Kenniston, Amy Russell, Heather Stewart, and Viola Vaughan-Eden, Child Forensic Interviewing: Best Practices, Juvenile Justice Bulletin, Office of Justice Programs, US Department of Justice \(September 2015\), p. 6 citing National Children's Alliance, 2013. \*Annotated Bibliography of the Empirical and Scholarly Literature Supporting the Ten Standards for Accreditation by the National Children's Alliance\*, 2d ed. Washington, DC: National Children's Alliance, also citing Myers, 2005; NCA, 2013; Pence and Wilson, 1994.](#)

child,<sup>56</sup> as well as to gather and preserve evidence for testing and use in legal proceedings.<sup>57</sup> The examination room should also be fully equipped to accommodate the needs to children with disabilities.<sup>58</sup>

50. Importantly, Barnahus locates their centres in residential neighbourhoods and avoids having any services for adults offered on the premises.<sup>59</sup>

#### RECOMMENDATION B

- **To create a one stop-shop holistic care centre, for children to participate in the investigatory and prosecutorial process with maximum resources aimed at avoiding re-traumatisation.**
- **To ensure that children who are in immediate danger have emergency homes they may go to for the duration of the trial if they were living with their perpetrator.**

51. For a more in-depth analysis of forensic legislation including the forensic interview see section 3 below.

### 2.3 Co-ordinated Care of the Child: The Multi-Disciplinary Team

52. While the Ukrainian legislation under review indicates some direction of the investigation into trafficking, exploitation, or sexual abuse by several stakeholders (the investigator, prosecutor or judge, Criminal Procedure Code Article 56, and the presence of teachers, psychologist, medical practitioner, and legal representatives (Criminal Procedure Code Articles 226 and 227) for the purposes of court proceedings; the goal set out by relevant international law and best practice is a co-ordinated effort of all relevant assistance for the holistic care of the child before, during, and after the legal process. Rule 1.9 of the Rules on Forensic Medical Examinations as they stand now raises concerns in this respect, as it requires to refer “[a] subject [...] suspected of having a sexually transmittable disease or trichomoniasis [...] in the prescribed manner for examination at a dermatologic clinic in order to obtain a written report.” The Rule in question does not make an exemption for children, so in practice this implies subjecting the child to a prolonged and traumatic re-examination at different venues. The examination of child victims requires a coordinated response by a team of all professionals involved. The Barnahus model (similarly to the CJS (currently being piloted in Ukraine (Vinnytsia))<sup>60</sup> can be considered as an example of a good practice in this respect, as it allows to bring together under one roof a multidisciplinary team of practitioners so that in the event of need to obtain an additional opinion or make a referral the child does not have to suffer the potentially traumatic transportation between different venues. The CJC /Advocacy Center model is similar to the Barnahus model in this aspect.

<sup>56</sup> See list of Equipment and Supplies p. 67. [A National Protocol for Sexual Abuse Medical Forensic Examinations Pediatric](#), US Department of Justice, Office on Violence Against Women, (April 2016)

<sup>57</sup> [A National Protocol for Sexual Abuse Medical Forensic Examinations Pediatric](#), US Department of Justice, Office on Violence Against Women, (April 2016), pp. 83 and 89.

<sup>58</sup> [A National Protocol for Sexual Abuse Medical Forensic Examinations Pediatric](#), US Department of Justice, Office on Violence Against Women, (April 2016) pp. 35, 125, 183.

<sup>59</sup> Evgenia Generalova, [What is Barnahus and How it Works](#), [Child Protection Hub](#) (2016)

<sup>60</sup> The Barnahus unit became fully operational in June 2021 (see <https://mobile.twitter.com/PROMISEBarnahus/status/1406877085222703105>).

53. Relevant international and regional law is replete with calls to coordinate care for the child victim or witness and the child's caregiver. The UNCRC Article 19 calls for social programmes to provide necessary support for the child and for those who have care for the child, as well as for, reporting, referral, investigation, treatment, and, as appropriate, judicial involvement. The OSCE Action Plan 2003 (Section III, para 5) calls for training of law enforcement officials, judges, prosecutors, and other relevant officials in all aspects of trafficking in persons, giving special attention to the child and gender-sensitive issues and encouraging co-operation with non-governmental organizations, other relevant organizations and other elements of civil society. OSCE MC.DEC No. 13/05, para 1 recognizes child victims as "the most vulnerable and unprotected victims of trafficking in human beings" and calls for effective response to their needs. OSCE MC.DEC 5/08, para 4 asks participating States "to consider establishing co-operation between law enforcement agencies and civil society organizations" to provide assistance and support of victims of trafficking in criminal proceedings. In addition, in paragraph 5 calls on States, "to provide for special measures of protection and assistance for child victims of human trafficking throughout criminal proceedings, in accordance with the principles of the best interest of the child, non-discrimination, participation and the opportunity for the child to be heard." Finally OSCE MC.DEC No. 6/17, para 5 calls on states to "[t]ake appropriate measures for effectively combating human trafficking, by developing harmonized procedures and training courses, *inter alia* on identification and protection of trafficking victims, including for relevant authorities, civil society organizations, health care and social workers as well as others that may have first contact with victims".
54. The Lanzarote Convention, Article 14, para 2 calls on each Party "to co-operate with non-governmental organisations, other relevant organisations or other elements of civil society engaged in assistance to victims." The Lanzarote Convention Article 30, para 2 stipulates that each Party shall adopt a protective approach towards victims, ensuring that the investigations and criminal proceedings do not aggravate the trauma experienced by the child and that the criminal justice response is followed by assistance, where appropriate. The Lanzarote Convention Article 31, para 5 calls for "the possibility for groups, foundations, associations or governmental or non-governmental organisations, to assist and/or support the victims with their consent during criminal proceedings concerning the offences established in accordance with this Convention." The Palermo Protocol, Article 6 encourages States party to provide for "the physical, psychological and social recovery of victims of trafficking in persons, including, in appropriate cases, in co-operation with non-governmental organizations, other relevant organizations and other elements of civil society, and, in particular, the provision of... (b) Counselling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand; (c) Medical, psychological and material assistance...."
55. The CoE Trafficking Convention, Article 29 requires each Party to "adopt such measures as may be necessary to ensure co-ordination of the policies and actions of their governments' departments and other public agencies against trafficking in human beings, where appropriate, through setting up co-ordinating bodies."
56. Co-ordinated care ensures that the child has access to all he/she needs for complete recovery, prevents further victimization caused by retelling traumatic events, and avoids degradation of evidence through retelling of the story. Co-ordinated care also increases the likelihood that a victim will come forward for assistance. Particularly in the instance of human trafficking, which increases the likelihood that the child will be trafficked again in the future, co-ordinated care for the holistic recovery of the child is critical for the child to resume a normal life.

57. It has been the experience of CJsCs that “coordination and communication among initial responders can also enhance documentation and evidence collected during medical forensic care as well as information gathered during forensic interviews”.<sup>61</sup> This in turn aids law enforcement and child protective services in investigating these cases, keeping children safe, and supporting prosecutors in pursuing perpetrators.<sup>62</sup> Each member of the team supports the others in accomplishing their role. The multidisciplinary team for the typical CJC includes medical professionals, law enforcement, mental health professionals, prosecution, child protective services, victim advocacy, and other professionals as needed.<sup>63</sup> The Barnahus model uses a similar list: social services, police, public prosecutor’s office, forensic medicine, paediatrics and child and adolescent psychiatry (CAP).<sup>64</sup> It is thus recommended to include in the Ukrainian legislation provisions that incorporate the recommendations below.

#### RECOMMENDATION C

- **To make available a multi-disciplinary team to operate at the new CJC;**
- **To provide for in the legislation a requirement for close collaboration between the multi-disciplinary team located at the CJC and the National Referral Mechanism in case other experts need to be brought in to meet the special needs of a child in specific cases;**<sup>65</sup>
- **To avoid the need for children to be examined at more than one facility and revise the Rules on Forensic Medical Examination accordingly;**
- **To develop and adopt, in addition to the Rules on Forensic Medical Examination, a set of regulations to set up a multidisciplinary response mechanism to child sexual abuse from initial response to medical examination and any possible medical referrals.**

58. The inclusion of a forensic medical examiner as a core responder in such a response mechanism allows for a more effective and efficient approach by minimizing the number of decision-making steps involved and making the examination on the multidisciplinary investigative hub’s (e.g. CJC, Barnahus or other similar facility) premises rather than in a hospital setting the default solution.

#### 2.4. Child Specialists and Child Protocols by Developmental Stage

59. A requirement that the individuals providing care, examination, or investigation are specialists in trafficking or even in the care of children is currently missing in the Criminal Procedure Code, Forensic Examination Bylaws, and Law on Forensics. The Forensic Examination Bylaws also do not distinguish between the any differences in examination procedures specific to the developmental stage of the child (Forensic Examination Bylaws

<sup>61</sup> [A National Protocol for Sexual Abuse Medical Forensic Examinations Pediatric](#), US Department of Justice, Office on Violence Against Women, (April 2016) p. 43.

<sup>62</sup> [A National Protocol for Sexual Abuse Medical Forensic Examinations Pediatric](#), US Department of Justice, Office on Violence Against Women, (April 2016), p. 43.

<sup>63</sup> For an example of a multidisciplinary team in law, please see <https://www.leg.state.nv.us/App/NELIS/REL/81st2021/Bill/7667/Text> (Section 4) “Multidisciplinary team” means a team of different types of professionals convened by a children’s advocacy center to respond to the abuse or neglect of a child or develop standards ... of this act. Such a team may include, without limitation, law enforcement officers, representatives of agencies which provide child welfare services, district attorneys or their deputies, providers of health care and advocates for victims of abuse or neglect of children.” See also [National Children’s Alliance, How the CAC Model Works](#)

<sup>64</sup> <https://childhub.org/en/child-protection-multimedia-resources/what-barnahus-and-how-it-works>

<sup>65</sup> For more on National Referral Mechanisms, see [National Referral Mechanisms: Joining Efforts to Protect the Rights of Trafficked Persons](#), Office of Democratic Institutions and Human Rights, OSCE (30 July 2021)

- 1.10, 2.1.5, 2.3.3, 2.3.4, 2.4.3, 2.10.2(b), 2.11.3 for prostate exam, 2.13.3(b), 2.16.4(c)). The general examination protocol is essentially the same for all patients/examination subjects, the only exception being Rule 2.4.1 of the Bylaws, which refers specifically to “persons under 16 years of age.” To avoid the risks of re-traumatizing a child through a painful internal forensic examination, it is suggested to establish special procedure for forensic medical examination with respect to all persons under 18 years of age.
60. In addition, the Criminal Procedure Code Articles 226, 227, and 354 allow a teacher, psychiatrist/psychologist, and medical examiner, to be in the room for interrogations and examinations. It is not clear if these individuals have any expertise in addressing the needs of children who have suffered trafficking, exploitation or abuse. But the child may feel that their presence is comforting, in line with the Optional Protocol, Article 8.
61. The UNCRC states clearly that “the child, by reason of his physical and mental immaturity, needs special safeguards and care.”<sup>66</sup> The UNCRC Article 19 goes on to call for special protective measures for children who have suffered abuse or exploitation, including “identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment...and, as appropriate, for judicial involvement.” The Lanzarote Convention Article 34 calls on States party to ensure that “units or services in charge of investigations are specialized in the field of combating sexual exploitation and sexual abuse of children or that persons are trained for this purpose.” In addition, the Lanzarote Convention Article 36 calls for training on children’s rights and sexual exploitation and sexual abuse of children to be available for all persons involved in the proceedings, especially judges, prosecutors, and lawyers. The Lanzarote Convention Article 35 (1)(c) also requires that interviews of children be carried out by professionals trained for that purpose. **Thus, Ukrainian legislation would benefit from supplementation and the drafting of protocols which would put these principles into practice.**
62. In addition, the Addendum to the OSCE Action Plan not only calls for victims to have their human rights respected in the legal process and for access to services, but also for special training of police, social workers, and public authorities likely to come into contact with victimized children. OSCE MC.DEC 6/18 (para 3) specifically calls on States to, “Provide, as relevant, government service providers and agencies that come into contact with children with adequate guidance and training on how to properly identify, report, assist, and protect child victims of trafficking in an age-appropriate and manner that takes into account the respective gender-specific concerns of girls and boys” and to, “[a]dopt a victim-centred and trauma-informed approach that takes into account the respective gender-specific concerns of girls and boys and the best interests of the child, and fully respects the human rights and fundamental freedoms of children subjected to human trafficking.”<sup>67</sup>
63. Best practices from CJC and Barnabus include forensic interviewers who adapt the interview and expectations to the developmental level of the child<sup>68</sup> and medical examiners who are paediatric child abuse specialists who alter their communication and techniques for the physical and mental developmental stage of the child.<sup>69</sup> Best practices also include prosecutors and judges who understand that a child’s recall of events may not be linear,

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<sup>66</sup> [UNCRC Preamble](#)

<sup>67</sup> [DECISION No. 6/18 STRENGTHENING EFFORTS TO PREVENT AND COMBAT CHILD TRAFFICKING, INCLUDING OF UNACCOMPANIED MINORS](#), 7 December 2018

) para 2 and 3. See also, para 6.

<sup>68</sup> Chris Newlin, Linda Cordisco Steele, Andra Chamberlin, Jennifer Anderson, Julie Kenniston, Amy Russell, Heather Stewart, and Viola Vaughan-Eden, [Child Forensic Interviewing: Best Practices](#), *Juvenile Justice Bulletin*, Office of Justice Programs, US Department of Justice (September 2015), p. 3.

<sup>69</sup> [A National Protocol for Sexual Abuse Medical Forensic Examinations](#) *Pediatric*, US Department of Justice, Office on Violence Against Women, (April 2016), p 23

individuated by instance, or fully descriptive of physical abuse.<sup>70</sup> They also understand that a child's memory of an event may also be clouded by drugs given to achieve the child's passivity.<sup>71</sup> [See also Section 2.10 on Protecting Child Victims and Witnesses from Courtroom Trauma].

#### RECOMMENDATION D

**To appoint only persons specifically trained in the special needs of and trauma-informed methods of working with children who have been trafficked, exploited, or sexually abuse to assist the child in criminal proceedings.**

64. Best practices also require that pre-pubescent children, due to their lack of physical development, are not examined invasively unless under anaesthesia, and only when the anaesthesia is already necessary to treat an injury (such as anogenital bleeding or injury, a mass, or a foreign body (object)).<sup>72</sup> Collection of evidence internally (vaginal and cervical swabs) is both unnecessary and painful for pre-pubescent children.<sup>73</sup> Speculums should not be used on pre-pubescent children.<sup>74</sup> Moreover, female children who are pre-menarchal (pre first menstrual cycle) should also be protected from the use of a speculum; speculums should only be used on post-menarchal females and only when use is without pain.<sup>75</sup> Digital inspection of the anus of boys or girls should only be done where "laxity of the sphincter" is observed.<sup>76</sup> Anoscopy should only be used 1) under sedation or anaesthesia, 2) when there is bleeding from the anus, obvious trauma and/or a mass or foreign body.<sup>77</sup> For all exams of all children, the goal should be to make the exam pain-free in order to avoid re-traumatizing the child.<sup>78</sup>

#### RECOMMENDATION E

**To exclude pre-pubescent children from invasive internal examinations from the Forensic Bylaws, including the use of speculums and digital inspection or anoscopy.**

<sup>70</sup> See Chris Newlin, Linda Cordisco Steele, Andra Chamberlin, Jennifer Anderson, Julie Kenniston, Amy Russell, Heather Stewart, and Viola Vaughan-Eden, Child Forensic Interviewing: [Best Practices, Juvenile Justice Bulletin, Office of Justice Programs](#), US Department of Justice (September 2015), pp. 5 and 8.

<sup>71</sup> [A National Protocol for Sexual Abuse Medical Forensic Examinations Pediatric](#), US Department of Justice, Office on Violence Against Women, (April 2016) p. 159 citing Bechtel, L., & Holstege, C. (2007). Criminal poisoning: Drug-facilitated sexual assault. *Emergency Medicine Clinics of North America*, 25(2), 499–525 and

Spiller, H., Rogers, J., & Sawyer, T. (2007). Drug facilitated sexual assault using an over-the-counter ocular solution containing tetrahydrozoline (Visine). *Legal Medicine*, 9(4), 192–195. doi: 10.1016/j.legalmed.2007.01.005.

<sup>72</sup> [A National Protocol for Sexual Abuse Medical Forensic Examinations Pediatric](#), US Department of Justice, Office on Violence Against Women, (April 2016), p. 68.

<sup>73</sup> See for example, [A National Protocol for Sexual Abuse Medical Forensic Examinations Pediatric](#), US Department of Justice, Office on Violence Against Women, (April 2016), pp. 68.

<sup>74</sup> See for example, [A National Protocol for Sexual Abuse Medical Forensic Examinations Pediatric](#), US Department of Justice, Office on Violence Against Women, (April 2016), pp. 87, 135.

<sup>75</sup> See for example, [A National Protocol for Sexual Abuse Medical Forensic Examinations Pediatric](#), US Department of Justice, Office on Violence Against Women, (April 2016), p. 11.

<sup>76</sup> See for example, [A National Protocol for Sexual Abuse Medical Forensic Examinations Pediatric](#), US Department of Justice, Office on Violence Against Women, (April 2016), p. 144.

<sup>77</sup> See for example, [A National Protocol for Sexual Abuse Medical Forensic Examinations Pediatric](#), US Department of Justice, Office on Violence Against Women, (April 2016), p. 144.

<sup>78</sup> See for example, [A National Protocol for Sexual Abuse Medical Forensic Examinations Pediatric](#), US Department of Justice, Office on Violence Against Women, (April 2016), p. 135.

65. Ukraine's current law to determine the developmental stage of a child relies heavily on body measurements that presume uniformity across ethnicities and health statuses (Forensic Examination Bylaws Rule 2.1.4). The measurements require painful bodily invasion of potentially pre-pubescent or early pubescent children, Forensic Examination Bylaws Rule 2.1.5.
66. Population diversity in Ukraine is such that children presenting for physical exam related to trafficking, exploitation, or child abuse may be from greatly differing ethnicities with accompanying differences in body dimensions at puberty. Health and nutritional status can also affect these dimensions. Best practices indicate that "interventions must be based on population-specific knowledge of development and differences between normal variants."<sup>79</sup>

#### RECOMMENDATION F

- **To amend in the Forensic Examination Bylaws the invasive and static anthropomorphic measurements for a non-invasive developmental stage assessment that will be consistent with ethnicities and health statuses.**
- **To include in the Forensic Examination Bylaws sub-protocols grouped by the stage of sexual maturity (e.g. the Tanner staging model or a similar model used in Ukraine), with a separate sub-protocol for prepubescent children**
- **To include in the Rules an express provision requiring that children under 18 years of age be examined solely by pediatric medical examiners who have been specifically trained in child sexual abuse.**

67. While the Bylaw on Forensic Medical Examinations requires forensic medical examiners to examine the whole body (Rules 1.18.5 and 2.3.6) and to document their observations in detail (e.g. Rule 2.7.3. "During the examination of victims the discovered bodily injuries are described in detail, their character and localization is noted."), there is little guidance on what specifically must be documented, which may result in arbitrariness and lack of consistency across expert opinions. It bears note that while forensic medical examiners are expected to be highly skilled medical practitioners, they are not investigators or lawyers, and **therefore it is recommended that one of the aims of a protocol or standards of practice should be to provide guidance on what observations should be documented to ensure maximum relevance to crime investigation.** For instance, the above-quoted Rule 2.7.3. requires to document all "discovered bodily injuries." It is unclear, for instance, if a tattoo would be considered a bodily injury. The usual standard is not to document tattoos unless they are related to the crime itself (as may be, for instance, in a trafficking in children case where children are tattooed to ensure their belonging to a certain trafficker, for example]). **That said, it is proposed that the protocol should clearly spell out when to document tattoos and when to refrain from documenting them, in order to ensure**

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<sup>79</sup> See for example, [A National Protocol for Sexual Abuse Medical Forensic Examinations Pediatric](#), US Department of Justice, Office on Violence Against Women, (April 2016), p. 10: The sexual characteristic development of prepubescent children is reflected as Tanner stage 1 or stage 2." Please see p. 207 of the National Protocol for Tanner Stages diagrams. "TANNER STAGES detail the physical signs of breast, pubic hair, and male genitalia development for the five sexual maturation stages (Child Growth Foundation, n.d.; Marshall & Tanner, 1969). The sexual characteristic development of prepubescent children is reflected as Tanner stage 1 or stage 2." Please see p. 207 of the National Protocol for Tanner Stages diagrams.

**that medical examiners do not leave out details of potential significance for the investigation.**

68. Best practices for care of human trafficking victims include examining the child's whole body for a variety of injuries associated with trafficking, including the following: skin under the nails,<sup>80</sup> "pattern injuries" anywhere on the body from blunt force, sharp force and thermal objects (such bruises from strikes with a belt or another object, bruises around the wrists or neck from restrains, burns from curling irons or cigarettes, etc.).<sup>81</sup> In cases where a person may have been held captive for a length of time, the examiner should look for "malnutrition, vitamin deficiency or other alterations due to, for example, inhuman treatment."<sup>82</sup> **Strict Protocols should require that medical examiners should also be looking for more hidden signs of violence, such as:**

- missing hair, loose hair, and bruising on the scalp; bruising around the eyes, conjunctival petechiae or haemorrhage;
- internal or external ear bruising, bleeding, or leakage of cerebrospinal fluid;
- inside the nose for bruising or bleeding;
- injuries in the mouth, including petechiae on the hard/soft palate (oral penetration or strangulation), any bruising, bleeding, broken teeth, or tearing of the frenulum;
- neck for signs of strangulation;
- hands and wrists for any injuries, including signs of restraints;
- upper arms for signs of fingertip bruising and for full range of motion and circulation;
- breasts and trunk for sucking or bite marks (swab for saliva specimens if indicated);
- abdomen and back for bruising and tenderness;
- legs and feet for injury, tenderness, and foreign materials (which should be collected);
- and tattoos, which should be noted as they can be significant in human trafficking cases.<sup>83</sup>

#### RECOMMENDATION G

- **To include in the Forensic Examination Bylaws, and any other protocols used by the CJC a detailed list of non-anogenital injuries of significance in child trafficking, sexual exploitation and abuse cases to be included in the detailed report and in the gathering of specimens;**
- **To provide for in the Rules on Forensic Medical Examination a clear protocol on documenting the observations made which is developed bearing in mind that documentation serves both evidentiary and medical purposes, and is useful both for the criminal proceedings and for further treatment and referrals of the child victim.**

69. Photo-documentation also forms part of documentation and should be covered by the protocol. **It is recommended that the Bylaws be supplemented by provisions on photo-**

<sup>80</sup> See for example, [A National Protocol for Sexual Abuse Medical Forensic Examinations Pediatric](#), US Department of Justice, Office on Violence Against Women, (April 2016) <https://www.ojp.gov/pdffiles1/ovw/249871.pdf>, p. 139.

<sup>81</sup> Djordje Alempijevic, M.D., Ph.D., Dragan Jecmenica, M.D., Ph.D., Snezana Pavlekic, M.D., Ph.D., Slobodan Savic, M.D., Ph.D., Branimir Aleksandric, M.D., [Forensic medical examination of victims of trafficking in human beings Torture](#) Volume 17, Number 2, 2007, p. 119 and 120, citing Pollak S, Saukko P. Clinical forensic medicine – overview. In: Siegel J, Knupfer G, Saukko P, eds. Encyclopedia of forensic sciences. New York: Academic Press, 2000:362-8.

<sup>82</sup> Djordje Alempijevic, M.D., Ph.D., Dragan Jecmenica, M.D., Ph.D., Snezana Pavlekic, M.D., Ph.D., Slobodan Savic, M.D., Ph.D., Branimir Aleksandric, M.D., [Forensic medical examination of victims of trafficking in human beings Torture](#) Volume 17, Number 2, 2007, p. 120.

<sup>83</sup> [A National Protocol for Sexual Abuse Medical Forensic Examinations Pediatric](#), US Department of Justice, Office on Violence Against Women, (April 2016), p. 139.

**documentation, ensuring that these require the medical examiner to precede photo-documentation by an explanation of its purpose and procedure to the child and the adult caregiver in a developmentally and linguistically appropriate manner.** It is essential to remember that photographing children in the aftermath of sexual abuse may be traumatizing and constitute secondary victimization if taking photographic images was part of the abuse. It is therefore the medical examiner's responsibility to make the child feel safe by understanding the difference between forensic photography and photography as part of sexual abuse. **All such images must be stored securely, respecting right to privacy, strictly regulating access to such personal images and date.**

#### 2.4.1 Forensic medical examinations in CSEA/OCSEA cases

70. In general, forensic medical examinations of child victims of sexual abuse are some of the most challenging, not least because of their re-victimization potential, if improperly conducted, and because the criminal justice system's overreliance on definitive medical findings can be especially detrimental in such cases. Investigations and judicial decision-making in CSEA cases often involve a balancing act to minimize both false negative errors (errors of under calling, where a victim may wrongly go unrecognized as such) and false positive errors (errors of overcalling, where an innocent person may be wrongfully convicted). The forensic medical examiner's role is therefore crucial.
71. Overreliance on definitive medical findings is even more dangerous in CSEA cases than in cases involving adult victims of sexual assault primarily for two reasons: a) in most societies there exists a tendency to doubt child disclosures of sexual abuse, and b) even in cases of contact sexual abuse, the victimization tends to be of escalating nature, mostly involving only sexual touching in initial stages, which implies that even though the acts committed constitute a criminal offense, hard medical evidence would be difficult or downright impossible to obtain. Research shows that definitive physical findings of child sexual abuse are uncommon, even when the history is confirmed by a perpetrator's confession.<sup>84</sup> A study by Bowen and Aldous confirms that "the most likely physical finding in nonemergency medical examinations for sexual abuse is normality, followed by nonspecific abnormalities."<sup>85</sup>

#### RECOMMENDATION H

**To consider not placing undue weight on forensic medical expert opinions, but be considered as one of the types of evidence and not the sole source, and that lack of physical evidence in cases involving allegations of contact sexual abuse be not used to discredit the child's disclosure, if such allegation is presented.**

#### 2.5. No Forced Participation in Criminal Investigation: Forensic Medical Exam and Forensic Interview

72. Ukraine's current legislation allows a forensic medical examination to be undertaken regardless of consent of the individual. This risks re-traumatizing the child. The Criminal Procedure Code Article 241(3) indicates that "the individual concerned shall be invited to undergo voluntary examination, and if he/she refuses, forced examination is conducted." Moreover, Criminal Procedure Code Article 241 (2) implies that the prosecutor has the

<sup>84</sup> Adams JA, Harper K, Knudson S, Revilla J Examination findings in legally confirmed child sexual abuse: it's normal to be normal. *Pediatrics*. 1994; pp. 310- 3175

<sup>85</sup> Bowen K, Aldous MB. [Medical Evaluation of Sexual Abuse in Children Without Disclosed or Witnessed Abuse](#). *Arch Pediatr Adolesc Med*. 1999;153(11): 1160–1164.

right to be in the room with the child during the forensic medical examination as long as the child is of the same sex of the prosecutor. The Criminal Procedure Code 241 (5) acknowledges that individuals are forcibly examined medically. The Criminal Procedure Code 242 (3) also mentions that medical and psychiatric interviews are compulsory. In addition, the Forensic Examination Bylaws Rule 1.11 implies that a representative of the inquest body is in the room during the medical examination, which can put pressure on both the child and the examiner.

73. For children, this contradicts international law on forced participation in legal proceedings, not re-traumatizing the child, as well as violates the child's dignity. UNCRC Optional Protocol Article 8 (c) urges consideration of the views, needs, and concerns of the child. The Lanzarote Convention Article 30, para 1 requires each Party to "ensure that investigations and criminal proceedings are carried out in the best interests and respecting the rights of the child." Moreover, that each Party should take a "protective approach towards victims" and not "aggravate the trauma experienced by the child" in the criminal investigation or proceedings (Article 30, para 2). Article 32 admonishes that the criminal investigation and prosecution should not be dependent on report or accusation by a victim and should continue even if the child has withdrawn his or her statement. EU Directive 2011/93 echoes this in Article 15 that the investigation and prosecution should not be dependent on a report or accusation being made by the victim or by his or her representative, and should continue even if the person has withdrawn the statements.. Moreover, Article 19, para 2 adds that the child should receive assistance and support regardless of whether the child is willing to cooperate in the criminal investigation, prosecution, or trial. Finally, the 2013 Addendum to the OSCE Action Plan, Section IV, para 1.1 encourages States to, "[e]nsure that victims of THB are provided with assistance even before the investigation is initiated; ensuring that this assistance is not made conditional on the victim's willingness to participate in legal proceedings."
74. Best practices are such as to never force the child to participate in a forensic medical examination or forensic interview. **Any mandatory provisions forcing a child to undergo forensic examination should be removed from the law. In the case of the forensic interview, the interview is to be ended and postponed if the child becomes overly distressed by the questions.**<sup>86</sup> The child may need additional support and care in order answer non-duplicative forensic interview questions at a later time.<sup>87</sup> In the case of a forensic medical examination, the examiner should understand the child's concerns about the medical examination and try to address them, winning- not forcing - consent (or assent for children too young to consent) to the exam. The Rules on Forensic Medical Examinations are silent on the issue of consent and assent. While not expressly required by any international treaty standard, informed consent in forensic settings is an important corollary of Article 12 of the Convention on the Rights of the Child, which requires that States Parties "assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child." **It is strongly recommended that the Rules on Forensic Medical Examination be amended to include provisions on consent to submit to a forensic medical exam, which should**

<sup>86</sup> Chris Newlin, Linda Cordisco Steele, Andra Chamberlin, Jennifer Anderson, Julie Kenniston, Amy Russell, Heather Stewart, and Viola Vaughan-Eden, [Child Forensic Interviewing: Best Practices](#), *Juvenile Justice Bulletin*, Office of Justice Programs, US Department of Justice (September 2015), p. 5.

<sup>87</sup> Chris Newlin, Linda Cordisco Steele, Andra Chamberlin, Jennifer Anderson, Julie Kenniston, Amy Russell, Heather Stewart, and Viola Vaughan-Eden, [Child Forensic Interviewing: Best Practices](#), *Juvenile Justice Bulletin*, Office of Justice Programs, US Department of Justice (September 2015) <https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/248749.pdf>, p. 5, citing Faller, K.C., Cordisco Steele, L., and Nelson-Gardell, D. 2010. Allegations of sexual abuse of a child: What to do when a single forensic interview isn't enough. *Journal of Child Sexual Abuse* 19(5):572–589; also citing La Rooy, D., Katz, C., Malloy, L., and Lamb, M. 2010. Do we need to rethink guidance on repeated interviews? *Psychology, Public Policy and Law* 16(4):373–392.

**include a procedure of determining who should provide consent if the child’s parent or legal guardian is suspected of abuse, is absent or seeking consent from the parent/legal guardian is otherwise not in the child’s best interest. It is also strongly recommended that a provision be added mandating seeking assent from the child in question, in addition to consent by an adult responsible for such.**

#### **RECOMMENDATION I**

- **To ensure that assistance and psychological support supplied by the new CJC is available to all children and their families regardless of the extent to which the child does (or does not) consent to participate in the criminal investigation and prosecution.**
- **To amend the Criminal Code Articles 241 and 242 (3) so that no child is forced to undergo a forensic physical examination, or any part of an examination, the child does not consent;**
- **To clarify the Criminal Code Article 242 (3) to say that that a forensic (psychiatric) interview should be ended and postponed if it undermines the child’s dignity or aggravates the child’s trauma.**
- **To amend the Rules on Forensic Medical Examinations to include provisions on consent to submit to a forensic medical exam, which should include a procedure of determining who should provide consent if the child’s parent or legal guardian is suspected of abuse, is absent or seeking consent from the parent/legal guardian is otherwise not in the child’s best interest.**
- **To add a provision mandating seeking assent from the child in question, in addition to consent by an adult responsible for such.**

#### **2.6. Interview, Examination, and Assistance without Delay**

75. Although Ukraine’s laws contain the idea of no delay in criminal proceedings in the Criminal Procedure Code Articles 28 para 4 and Article 113, and no delay in delivery of medical examiner’s report in the Forensic Examination Bylaws Rule 1.23, the current organization of the system causes inherent delays. For instance, in the Bylaws Rule 1.2 a medical exam has to be ordered by “warrant or written application of the person conducting the inquest, the investigator, the prosecutor, the judge, as well as by court.” In only “exceptional cases” can a victim secure an official examination on their own, Rule 1.2 of the Bylaws, and it is unclear whether such an exam would qualify as evidence in court. Although the case has to be registered immediately, it is unclear from the legislation under review how long it would take to secure official involvement, paperwork, and permission for forensic and assistance actions, especially if the trafficking, exploitation, or abuse came to light over the weekend or a holiday. Valuable evidence could be lost with any delay.
76. Likewise, although the Law on Forensics does not mention forensic interviews specifically, the bureaucratic structure laid out in the law’s Article 7 para 1. Article 214 of the Criminal Procedure Code requires a quick registration of the case for pre-trial investigation, but it is not clear how quickly orders for forensic interview or examination follows. A victim may not be able to afford private interview or examination—and valuable evidence may be lost by the time official action is taken. Foreign DNA evidence only lasts a few days at most, physical trauma to the ano-genital region lasts a week at

most, and the child's memory of the events may fade or become confused through repeated questions in the waiting time.

77. The Lanzarote Convention speaks directly to the issue of delay. Specifically, Article 30, para 3 calls on "each Party to ensure that the investigations and criminal proceedings are treated as priority and carried out without any unjustified delay" without endangering the defence rights and the requirements to a fair trial. Article 35, para 1 goes on to require that each Party "ensure that: a. interviews with the child take place without unjustified delay after the facts have been reported to the competent authorities." In addition, the Optional Protocol Article 8 (g) calls for "avoiding unnecessary delay in the disposition of cases...."
78. In *C.A.S. and C.S. v Romania*, the European Court of Human Rights reiterated that investigation into allegations as severe as child sexual abuse and exploitation require a speedy investigation, which should be rigorous and child sensitive. Any delay of the proceedings on account of parents' delay to report the incident does not justify delay on the State to take action.<sup>88</sup> In *R.I.P. and D.L.P v Romania*, the Court further added that the investigation should aim to the speedy collection of all available evidence.<sup>89</sup> In *Chowdury and Others v. Greece*, the court reiterated that standard of "promptness and reasonable expedition is implicit in all cases."<sup>90</sup> It should be noted that the Court in the case of *E.S. and Others v Slovakia* the Court found that due to the severity of allegations of child abuse and exploitation crimes the protection afforded to children must be immediate.<sup>91</sup>
79. Finally, MC.DEC No. 685 on the Addendum to the OSCE Action Plan to Combat Trafficking in Human Beings adds that, [a]ny child presumed to be a victim of trafficking shall be referred without delay for appropriate assistance."<sup>92</sup> In addition, MC.DEC No. 5/08 "[e]ncourages the participating States to ensure that victims of human trafficking have access without undue delay to secure accommodation, psychological and medical treatment and counselling regarding their legal rights and the services available to them...."<sup>93</sup>
80. The advantage of a CJC or Barnahus is that the report to the competent authorities, forensic interview of a child, forensic medical exam, and treatment can take place all in one day. In most cases, a report of suspected or actual trafficking, exploitation, or abuse will have been made to law enforcement or child protective services and the child will have been referred to a CJC or Barnahus. In other cases, a child walks in and the CJC will take the report for law enforcement right there, then conduct the forensic interview and exam (or exam first if the situation is acute). The CJC or Barnahus would be already officially authorized and funded to perform these critical functions—eliminating bureaucratic delays due to slow bureaucracy or the victim's lack of funds.

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<sup>88</sup>*C.A.S. and C.S. v Romania*, App. No. 26692/05, para 83 and 73-83.

<sup>89</sup>*R.I.P. and D.L.P v Romania*, App. No. 27782/10, para 56 (In French).

<sup>90</sup>*Chowdury and Others v. Greece*, App. No. [21884/15](#), par 86

<sup>91</sup>*E.S. and Others v Slovakia*, App. No 8227/04, para 43.

<sup>92</sup>[Decision No. 685 Addendum to the OSCE Action Plan to Combat Trafficking in Human Beings Addendum to the OSCE Action Plan to Combat Trafficking in Human Beings: Addressing the Special Needs of Child Victims of Trafficking for Protection and Assistance](#), 7 July 2005, para 5.

<sup>93</sup>Decision NO/ 5/08: Enhancing Criminal Justice Responses to Trafficking in Human Beings through a comprehensive approach No. 5/08:, 5 December 2008, para 6.

## RECOMMENDATION J

**To ensure that the new CJC provides care to or gathering evidence from a child without undue delay.**

### 2.7. Respecting the Child's Rights: Presence in the Room

81. International law contains calls for the State to not only keep the best interest of the child in the forefront of decisions, care, and proceedings at all times, but to take into account the “dignity” of the child. The UNCRC Article 39 indicates that, “States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse.... Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.” The Victim’s Rights Directive (2012/29/EU) Article 18 also calls on States to protect the dignity of the child.
82. International law, while generally being very supportive of parental rights (UNCRC Article 3, para 2, and Articles 9 and 18), also warns that in some cases, the parent may have a conflict of interest with the child and have to be excluded (Lanzarote Convention Article 31, para 4) and Directive 2011/93/EU Article 20).

#### 2.7.1 Forensic Medical Examination: Presence in the room

83. The Criminal Procedure Code currently has the investigator and/or prosecutor in the room for the forensic medical examination (Article 241). The Forensic Examination Bylaws in Rule 1.7 stipulates that the parents or, in their place, a legal representative or a teacher to be in the room for the examination. Forensic Examination Bylaws 1.12 to 1.24 do not proscribe alternative documentation strategies, such as use of photography or body diagrams, which would protect the child’s privacy during the ano-genital exam and give the child freedom to choose who is in the room. Similarly, the Forensic Examination Bylaws do not guide the forensic medical examiner away from investigative interviewing.
84. It is essential that there be an information-sharing mechanism in place, in accordance with CETS 108, to ensure that, in the event the investigative interview with the child occurs before the forensic medical exam, the examiner is briefed on its contents, and vice versa. This is important to prevent secondary victimization of the child by repeat interviewing (see section 2.2 above). At the same time, the protocols for forensic medical examinations should ensure that medical examiners limit the questions related to the child’s medical history to information strictly necessary to address the child’s immediate healthcare needs and to organize the process of examination and forensic sample collection. Forensic medical examiners should be discouraged from questioning the child on issues of purely investigative significance, as this creates a risk of evidence contamination where the interview happens after the forensic medical examination.
85. The child should be able to speak freely with the medical examiner about the medical history including any additional details needed about the exploitation or abuse. Having the parent in the room for these questions, as opposed to the physical exam, may inhibit the child’s responses as the child may not want to make their parent depressed with the facts

or angry if the caregiver is involved in the trafficking, exploitation or abuse. Consequently, both the caregiver and the child should be asked separately about medical history.<sup>94</sup>

86. The investigator or prosecutor may be interested in the child's verbatim answers to these questions of medical history and the answers should be recorded or the investigator/prosecutor be allowed to listen-in from a separate room. **However, it is contrary to best practices and to the child's dignity for law enforcement, child protective services, investigator, or prosecutor to be in the room for the child's medical exam.**<sup>95</sup> **The physical exam should be meticulously recorded either by close photographs or diagrams and written findings. This report will be available to prosecutors/investigators and there is no need for investigators or prosecutors to violate the child's privacy and dignity by being in the room when the child is disrobed and the ano-genital region examined.**<sup>96</sup> A sufficiently trained specialist in forensic medical exams of children should not need oversight to conduct and document a thorough exam from head to toe, as well as to collect appropriate specimens. If the child spontaneously says anything about the trafficking, exploitation, or abuse, in the physical exam the examiner can write it down verbatim and convey it to the prosecutor.<sup>97</sup> Moreover, the exam arguably loses its neutrality if members of the prosecution team are in the room.
87. Best practices also provide the model of the child never being alone with the forensic medical examiner, regardless of whether the child is of the same sex as the medical examiner.<sup>98</sup> **It is recommendable that the child should have a trained child advocate in the room at all times to chaperone the procedure, distract the child, and ensure the child is not traumatized.** Regardless, the child should always have a chaperone, caregiver, child advocate, a health care provider other than the examiner, or another supportive person not suspected of involvement in the abuse.<sup>99</sup> A parent may be too overwhelmed by the implications of the exam to be of much help,<sup>100</sup> or have a conflict with the interests of the child and have to be excluded.
88. A legal representative or teacher will likely not be sufficiently trained to offer the type of support the child will need in order not to be traumatized by the exam—but per international law, a legal representative of the child is welcome for protecting the child's rights.

## RECOMMENDATION K

- **To amend the Criminal Procedure Code to exclude law enforcement, child protective services, investigator or prosecutor presence in the forensic medical exam.**

<sup>94</sup> [A National Protocol for Sexual Abuse Medical Forensic Examinations, \*Pediatric\*](#), US Department of Justice, Office on Violence Against Women, (April 2016), p. 123-124.

<sup>95</sup> [A National Protocol for Sexual Abuse Medical Forensic Examinations, \*Pediatric\*](#), US Department of Justice, Office on Violence Against Women, (April 2016), pp. 40, 123.

<sup>96</sup> [A National Protocol for Sexual Abuse Medical Forensic Examinations, \*Pediatric\*](#), US Department of Justice, Office on Violence Against Women, (April 2016), pp. 123 and 129.

<sup>97</sup> [A National Protocol for Sexual Abuse Medical Forensic Examinations, \*Pediatric\*](#), US Department of Justice, Office on Violence Against Women, (April 2016), pp. 117-118.

<sup>98</sup> Male victims are most likely to have been abused by males. Consequently, it may not help the distress of male victims to have a male prosecutor in the room even though he is of the same sex: see for instance: [Policy and Program Studies Service: Educator Sexual Misconduct: A Synthesis of Existing Literature](#), p24..

<sup>99</sup> [A National Protocol for Sexual Abuse Medical Forensic Examinations, \*Pediatric\*](#), US Department of Justice, Office on Violence Against Women, (April 2016), p. 140 citing Washington [WA] State. (2012). Washington State sexual assault child protocols. Retrieved on December 14, 2015, from [http://www.ofm.wa.gov/SGC/sopb/meetings/board/2012/20120419/SOPB\\_child\\_protocols.pdf](http://www.ofm.wa.gov/SGC/sopb/meetings/board/2012/20120419/SOPB_child_protocols.pdf).

<sup>100</sup> A National Protocol for Sexual Abuse Medical Forensic Examinations, *Pediatric*, US Department of Justice, Office on Violence Against Women, (April 2016) <https://www.ojp.gov/pdffiles1/ovw/249871.pdf>, p. 27

- To include in Article 241 of the Criminal Procedure Code that law enforcement, child protective services, investigator or prosecutor may listen in on the medical history questions before the medical exam, or view a record of the medical history questions.
- To provide the child with the right to an interpreter if needed. The interpreters must be neutral parties and not have any personal connection to the child or his/her family
- To ensure a trained child advocate is in the exam room with the child at all times to chaperone, distract, and ensure that a child is not further traumatized by the forensic medical exam.
- To include in the Forensic Examination Bylaws Section 1.18 directions to the examiner on the use of photographs and/or physical diagram documentation (if the child has refuses photographs) in the final report so that the investigator and/or prosecutor are not violating the child's dignity and privacy by being physically present for the examination of the child's ano-genital region.

### 2.7.2. Forensic Interview

89. **Current Ukrainian legislation does not have a clearly defined forensic interview, this is recommended to be addressed.** However, for the interrogation that is mentioned in Article 224 of the Criminal Procedure Code that the investigator, prosecutor, legal representative, psychologist, medical practitioner, and a teacher (Article 226) could all be in the room. A forensic interview also seems to be contemplated by the Forensic Examination Bylaws (Rule 1.16.1), and could include a parent, legal representative, and teacher in the room (Forensic Examination Bylaws Rule 1.7). Trafficking victims, in particular, should have a child advocate in the room if a family member is not available. It is also important that each step of the interview process is explained to the child. An explanation phase also allows the interviewer to better understand the child's developmental level, linguistic capabilities, legal competency, and other characteristics and may provide the child with opportunities to practice providing narrative information.<sup>101</sup>
90. Best practices by CJC indicate that the forensic interview is typically conducted by a single, highly trained specialist in child forensic interviewing, and observed by others on the child's multidisciplinary team from outside the room. A parent or caregiver who is likely to be a witness in a court case is not permitted to watch the interview as it could confuse their own later testimony. Likewise, a parent or caregiver who is a possibly party to the abuse is not allowed to watch the interview. A legal representative, if there has been one hired or appointed by that time, may listen from inside or outside the room, per the child's wishes.
91. It is the experience of CJs and Barnahus that the forensic interview, consistent with an accepted and prescribed methodology, is very useful for a successful prosecution. The forensic interview can be defined as follows: "A forensic interview of a child is a developmentally sensitive and legally sound method of gathering factual information regarding allegations of abuse or exposure to violence. This interview is conducted by a

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<sup>101</sup> [Forensic Interviewing: A Primer for Child Welfare Professionals](#)

competently trained, neutral professional utilizing research and practice-informed techniques as part of a larger investigative process.”<sup>102</sup>

92. **Ukraine’s current laws concerning the forensic interview require updating with best practices to ensure protection of the child from additional trauma in the criminal proceedings and assurance of the most accurate and complete testimony possible from the child.** Criminal Procedure Code Article 224 covers “interrogation” of a person and indicates that the interrogation may be audio-visually recorded, but is unclear whether the interviewer is following any methodology, has been trained as a children’s forensic interviewer [see Section 2.7], or whether the interview could be used as evidence. Article 224, para 9 also allows the prosecutor to be in the room for the interrogation, which undermines the neutrality of the interview. Article 225 covers interrogation of a victim or witness in a court proceeding, which presumably would be accepted as evidence. Article 226 has some child victim and witness protections for interrogation, but it is unclear if this applies to pre-trial interrogations in Article 224 or just court room proceedings in Article 225. Article 226 allows the child victim or witness to be interrogated for an hour at a time, for two hours total in a day. The protections in Article 226 allow potentially seven people, counting the defence, to be in the room asking the child questions and objecting to questions. It is unclear if the perpetrator would be in the room, or on-screen, if video-conferencing is being used.
93. **Ukraine’s current laws also show heavy reliance on the forensic medical examination as the primary evidence to prosecution of perpetrators of child trafficking,** sexual exploitation and abuse (see 2.4.2, above). For instance, the Forensic Examination Bylaws rule 1.16.1 requires the forensic medical examiner to include “a detailed interview of the subject” in the medical examiner’s report, in addition to the child’s medical history.
94. A methodologically sound children’s forensic interview, whenever the child is willing to participate (see also section 2.7 above), is necessary for the effective investigation and prosecution of perpetrators. All international and regional legal standards highlight the importance of effective investigation and prosecution. The Palermo Protocol Article 6 calls on States to ensure trafficking victims have (b) “Assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defence.” In addition to respecting the rights of the child and not causing the child additional trauma in the investigation, in Article 30 (2), the Lanzarote Convention emphasizes effective investigation in Articles 31, 32 and 34, including opportunity for the child to be heard and supply evidence, Article 31 (1)(c).
95. In addition, the Lanzarote Convention Article 35 gives clear direction on specifics of the interviews:
  - “1. Each Party shall take the necessary legislative or other measures to ensure that:
    - a. interviews with the child take place without unjustified delay after the facts have been reported to the competent authorities;
    - b. interviews with the child take place, where necessary, in premises designed or adapted for this purpose;
    - c. interviews with the child are carried out by professionals trained for this purpose;

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<sup>102</sup> Chris Newlin, Linda Cordisco Steele, Andra Chamberlin, Jennifer Anderson, Julie Kenniston, Amy Russell, Heather Stewart, and Viola Vaughan-Eden, Child Forensic Interviewing: Best Practices, Juvenile Justice Bulletin, Office of Justice Programs, US Department of Justice (September 2015) <https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/248749.pdf>, p. 3.

- d. the same persons, if possible and where appropriate, conduct all interviews with the child;
  - e. the number of interviews is as limited as possible and in so far as strictly necessary for the purpose of criminal proceedings;
  - f. the child may be accompanied by his or her legal representative or, where appropriate, an adult of his or her choice, unless a reasoned decision has been made to the contrary in respect of that person.
96. Each Party shall take the necessary legislative or other measures to ensure that all interviews with the victim or, where appropriate, those with a child witness, may be videotaped and that these videotaped interviews may be accepted as evidence during the court proceedings, according to the rules provided by its internal law.
97. When the age of the victim is uncertain and there are reasons to believe that the victim is a child, the measures established in paragraphs 1 and 2 shall be applied pending verification of his or her age.”
98. OSCE MC.DEC 7/17 (para 6) *inter alia* encourages States to efficiently prosecute sexual exploitation of children.<sup>103</sup> Under the CoE Trafficking Convention, effective investigation and prosecution are included in Article 1, para 1 (b) on the purposes of the Convention. In the EU Anti Trafficking Directive,<sup>104</sup> effective investigation and prosecution of trafficking crimes is emphasized in Article 9. The EU Directive 2011/93/EC Article 15 emphasizes effective investigation as well.
99. The European Court of Human Rights in the recent case of *K.U. v Finland*<sup>105</sup> stressed that mere criminalization of acts of child abuse and exploitation is not enough—in order for State protection to be effective there needs to be investigation and prosecution capable to identify the actual offender and bring him or her to justice. The importance of effective investigation and prosecution has also been highlighted by the recent case of *SM v Croatia (Chamber judgment paras 308-320 -60)* as well as in the previous cases of *inter alia Rantsev v Cyprus and Russia (paras 198-202)*, *Chowdury v Greece (paras 86-91)*, *LE v Greece (paras 83-85)*.
100. Importantly, most children present at a CJC with an account of trafficking, exploitation, or sexual abuse will have no visible, residual genital injuries appearing on a medical exam.<sup>106</sup> This is due to 1) the resilience and quick healing ability of the skin in the ano-genital area (mucosal skin),<sup>107</sup> 2) how penetration is defined (labia penetration vs. hymen penetration), and 3) the dynamics of child sexual abuse, which very often lead to a delay in disclosure of abuse.<sup>108</sup> If the time elapsed since the abuse was more than a week, the expectation

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<sup>103</sup> See also MC.DEC 15/06, para 4.

<sup>104</sup> Directive 2011/36/EU of the European Parliament and of the Council (5 April 2011)

<sup>105</sup> *K.U. v Finland* (App. No. 2872/02), para 49.

<sup>106</sup> If the percentage is calculated by a perpetrator being convicted after a child’s disclosure, less than 10% of children will have physical evidence of abuse (Jim Anderst, Nancy Kellogg and Inkyung Jung, Reports of Repetitive Penile-Genital Penetration Often Have No Definitive Evidence of Penetration, *Pediatrics* 2009;124:e403-e409; originally published online Aug 3, 2009

(<https://pediatrics.aappublications.org/content/124/3/e403.short>.) If the percentage of cases no ano-genital injury is calculated by the number that had other proof of sexual contact (pregnancy, STD, or ID of foreign DNA on the rape kit), and less than 50% of the children who had sexual contact showed any trauma to the ano-genital region (Nancy D. Kellogg, MD; Shirley W. Menard, RN, PhD, CPNP, FAAN<sup>‡</sup>; and Annette Santos, RN, SANE<sup>§</sup>, Genital Anatomy in Pregnant Adolescents: “Normal” Does Not Mean “Nothing Happened”, *PEDIATRICS* Vol. 113 No. 1, January 2004, (<https://pediatrics.aappublications.org/content/113/1/e67.full>)).

<sup>107</sup> Children who have tears in the mucosal skin typically heal without defect or scar formation. Consequently, if a doctor does not see the child within a week of the event, the doctor could miss an injury that was present and then healed, Astrid Heppenstall-Heger, Gina McConnell, Lynne Tison, Lisa Guerra, Julie Lister, and Toni Zaragoza, Healing Patterns in Anogenital Injuries: A Longitudinal Study of Injuries Associated With Sexual Abuse, Accidental Injuries, or Genital Surgery in the Preadolescent Child *Pediatrics* 2003;112:829-837 (<http://www.pediatrics.org/cgi/content/full/112/4/829>).

<sup>108</sup> A National Protocol for Sexual Abuse Medical Forensic Examinations *Pediatric*, US Department of Justice, Office on Violence Against Women, (April 2016) <https://www.ojp.gov/pdffiles1/ovw/249871.pdf>, p. 15. See also Chris Newlin, Linda Cordisco Steele, Andra

should be that any injuries will have healed and the ano-genital skin will appear normal.<sup>109</sup> If the exam is not being conducted within days of the trafficking, exploitation, or abuse, foreign DNA evidence will no longer be available.<sup>110</sup> Only a minority of prosecutions move forward with evidence of trauma to the ano-genital region. If an investigation and prosecution is centred on ano-genital proof of abuse, then prosecution will not be effective on behalf of victimized children—and perpetrators will remain active.

101. Ideally, there will be a single, audio and video-recorded forensic interview to avoid the corruption of evidence and to avoid re-traumatizing the child through multiple interviews.<sup>111</sup> It is recommended that Ukraine adopt a specialized protocol for child investigative interviewing, such as the Revised NICHD Protocol<sup>112</sup> or other similar tools.<sup>113</sup> Where there has to be more than one interview in order to gain rapport with the child, the interviewer does not ask the questions asked previously.<sup>114</sup> The interview should be designed as a developmentally sensitive and legally sound method of gathering factual information regarding allegations of a crime. It should focus on hypothesis-testing rather than hypothesis confirmation, and to this end favour free recall, open-ended questions followed by focused prompts, and never use leading or otherwise suggestive questions that “to one degree or another, [suggest] that the questioner is looking for a particular answer”.<sup>115</sup> Likewise, forced-choice questions should be discouraged. Importantly, questions should not introduce information not already mentioned by the child.<sup>116</sup> Forensic interviewers avoid suggestive questions. The forensic interviewer does not interpret drawings or other art created by the child.<sup>117</sup>

102. It is advised to consider that the role of certified forensic interviewing intermediary be introduced. These professionals would work in tandem with the investigator to help asking questions in a developmentally appropriate manner. Since they are not law enforcement, they should not be vested with investigative powers, but act purely as intermediaries

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Chamberlin, Jennifer Anderson, Julie Kenniston, Amy Russell, Heather Stewart, and Viola Vaughan-Eden, Child Forensic Interviewing: Best Practices, Juvenile Justice Bulletin, Office of Justice Programs, US Department of Justice (September 2015), p. 5.

<sup>109</sup> Children who have tears in the mucosal skin typically heal without defect or scar formation. Consequently, if a doctor does not see the child within a week of the event, the doctor could miss an injury that was present and then healed, Astrid Heppenstall-Heger, Gina McConnell, Lynne Ticson, Lisa Guerra, Julie Lister, and Toni Zaragoza, *Healing Patterns in Anogenital Injuries: A Longitudinal Study of Injuries Associated With Sexual Abuse, Accidental Injuries, or Genital Surgery in the Preadolescent Child Pediatrics* 2003;112:829-837 (<http://www.pediatrics.org/cgi/content/full/112/4/829>).

<sup>110</sup> A National Protocol for Sexual Abuse Medical Forensic Examinations, Pediatric, US Department of Justice, Office on Violence Against Women, (April 2016), p. 87.

<sup>111</sup> Chris Newlin, Linda Cordisco Steele, Andra Chamberlin, Jennifer Anderson, Julie Kenniston, Amy Russell, Heather Stewart, and Viola Vaughan-Eden, Child Forensic Interviewing: Best Practices, Juvenile Justice Bulletin, Office of Justice Programs, US Department of Justice (September 2015)

<sup>112</sup> <https://nichdprotocol.com/>.

<sup>113</sup> Note that currently steps are being made to adapt and introduce the NICHD at the National Police of Ukraine (see <https://www.coe.int/en/web/kyiv/-/the-council-of-europe-project-combating-violence-against-children-in-ukraine-together-with-the-national-police-of-ukraine-conducted-an-online-training->).

<sup>114</sup> Multiple, nonduplicative interviews are most effective when the interviewer uses best practices in forensic interviewing; adapts the interview structure to the developmental, cultural, and emotional needs of the child; and avoids suggestive and coercive approaches, Chris Newlin, Linda Cordisco Steele, Andra Chamberlin, Jennifer Anderson, Julie Kenniston, Amy Russell, Heather Stewart, and Viola Vaughan-Eden, Child Forensic Interviewing: Best Practices, Juvenile Justice Bulletin, Office of Justice Programs, US Department of Justice (September 2015), p. 11 (citing Faller, K.C., Cordisco Steele, L., and Nelson-Gardell, D. 2010. Allegations of sexual abuse of a child: What to do when a single forensic interview isn't enough. *Journal of Child Sexual Abuse* 19(5):572–589; La Rooy, D., Katz, C., Malloy, L., and Lamb, M. 2010. Do we need to rethink guidance on repeated interviews? *Psychology, Public Policy and Law* 16(4):373–392; La Rooy, D., Lamb, M., and Pipe, M.-E. (2009) Repeated interviewing: A critical evaluation of risks and potential benefits. In *The Evaluation of Child Sexual Abuse Allegations*, edited by K. Kuehnle and M. Connell. Hoboken, NJ: Wiley, pp. 327–361.)

<sup>115</sup> Chris Newlin, Linda Cordisco Steele, Andra Chamberlin, Jennifer Anderson, Julie Kenniston, Amy Russell, Heather Stewart, and Viola Vaughan-Eden, Child Forensic Interviewing: Best Practices, Juvenile Justice Bulletin, Office of Justice Programs, US Department of Justice (September 2015), p. 7 citing Myers, J.E.B., Saywitz, K.J., and Goodman, G.S. 1996. Psychological research on children as witnesses: Practical implications for forensic interviews and courtroom testimony. *Pacific Law Journal* 28(1):3–91.

<sup>116</sup> Chris Newlin, Linda Cordisco Steele, Andra Chamberlin, Jennifer Anderson, Julie Kenniston, Amy Russell, Heather Stewart, and Viola Vaughan-Eden, Child Forensic Interviewing: Best Practices, Juvenile Justice Bulletin, Office of Justice Programs, US Department of Justice (September 2015), p. 7.

<sup>117</sup> Chris Newlin, Linda Cordisco Steele, Andra Chamberlin, Jennifer Anderson, Julie Kenniston, Amy Russell, Heather Stewart, and Viola Vaughan-Eden, Child Forensic Interviewing: Best Practices, Juvenile Justice Bulletin, Office of Justice Programs, US Department of Justice (September 2015), p. 6.

between the investigator and the child. This figure should ideally replace the role of psychologist or teacher currently provided for by Ukraine's Criminal Procedure Code. It is important that intermediaries be certified or licensed, and their functions strictly regulated to prevent conflict of interest (such as when the same individual provides therapy to the child and acts as forensic interview intermediary, which should not be permissible), and to put in place highest standards of ethical conduct, including to prevent coached testimony. **Training in child centred forensic worked is also recommended.**

103. Other expertise required by a children's forensic interviewer includes a strong grasp of developmental capability of the child and how that capability effects the child's ability to store and retrieve memories<sup>118</sup> (see also section 2.7.2 on forensic interview). A forensic interviewer needs to be aware of how a child's culture affects "perception of experiences, memory formation, language, linguistic style, comfort with talking to strangers in a formal setting, and values about family loyalty and privacy when questioning children and evaluating their statements".<sup>119</sup> The forensic interviewer, which has the most direct contact with the child during the investigation also needs to understand how trauma—especially severe trauma—affects the way that a child recalls events and modify expectations accordingly.<sup>120</sup> If the child becomes overly distressed, the interview should be reconvened later rather than risk re-victimizing the child.<sup>121</sup>
104. In the CJC model, neither the prosecution nor the defence asks questions in the forensic interview as this would undermine the neutrality of the interview and potentially introduce leading questions.<sup>122</sup> Rather, the prosecutor views the interview from another room and the defence views the recording of the interview at a later time. In the Barnahus model, the interview is conducted in two sessions, with the prosecution and defence both allowed to submit questions through the interviewer (who may adapt them for appropriateness) during the second session even though they are not in the room.<sup>123</sup>
105. It is the experience of CJsCs that the forensic medical examiner, whose specialty and focus is diagnosis of physical illness and pursuit of the child's physical health, should ask only such questions of the child's medical history and sexual abuse experience required to carry out a holistic medical exam of the child, create a treatment plan,<sup>124</sup> and determine which forensic evidence collection procedures are necessary.<sup>125</sup>

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<sup>118</sup> Chris Newlin, Linda Cordisco Steele, Andra Chamberlin, Jennifer Anderson, Julie Kenniston, Amy Russell, Heather Stewart, and Viola Vaughan-Eden, [Child Forensic Interviewing: Best Practices, Juvenile Justice Bulletin](#), Office of Justice Programs, US Department of Justice (September 2015), p. 3 and 4.

<sup>119</sup> Chris Newlin, Linda Cordisco Steele, Andra Chamberlin, Jennifer Anderson, Julie Kenniston, Amy Russell, Heather Stewart, and Viola Vaughan-Eden, [Child Forensic Interviewing: Best Practices, Juvenile Justice Bulletin](#), Office of Justice Programs, US Department of Justice (September 2015), p. 4, quoting Fontes, L.A. 2008. *Interviewing Clients Across Cultures: A Practitioner's Guide*. New York, NY: Guilford Press and Perona, A.R., Bottoms, B.L., and Sorenson, E. 2006. Researchbased guidelines for child forensic interviews. *Journal of Aggression, Maltreatment & Trauma* 12(3):81–130.

<sup>120</sup> Chris Newlin, Linda Cordisco Steele, Andra Chamberlin, Jennifer Anderson, Julie Kenniston, Amy Russell, Heather Stewart, and Viola Vaughan-Eden, [Child Forensic Interviewing: Best Practices, Juvenile Justice Bulletin](#), Office of Justice Programs, US Department of Justice (September 2015), p. 5.

<sup>121</sup> Chris Newlin, Linda Cordisco Steele, Andra Chamberlin, Jennifer Anderson, Julie Kenniston, Amy Russell, Heather Stewart, and Viola Vaughan-Eden, [Child Forensic Interviewing: Best Practices, Juvenile Justice Bulletin](#), Office of Justice Programs, US Department of Justice (September 2015), p. 5.

<sup>122</sup> Teresa Huizar, Executive Director, National Children's Alliance, "Because it is neutral and non-leading, the interview cannot be conducted by the prosecutor or defense counsel." Email, August 10, 2021.

<sup>123</sup> Children's Commissioner for England, Barnahus: [Improving the Response to Child Sex Abuse in England](#) (2015), p. 5.

<sup>124</sup> See [DECISION No.9/07 ON COMBATting SEXUAL EXPLOITATION OF CHILDREN ON THE INTERNET](#), para 8 calling for States to facilitate "appropriate medical care" and "rehabilitation" for child victims of exploitation.

<sup>125</sup> [A National Protocol for Sexual Abuse Medical Forensic Examinations, Pediatric](#), US Department of Justice, Office on Violence Against Women, (April 2016), pp. 121-122 citing Adams, J., Kellogg, N., Farst, K., Harper, N., Palusci, V., Frasier, L., ... Starling, S. (2015). Updated guidelines for the medical assessment and care of children who may have been sexually abused. *Journal of Pediatric and Adolescent Gynecology* [In press, corrected proof, February 12]. doi: 10.1016/j.jpjg.2015.01.007; Day, K., & Pierce-Weeks, J. (2013). The clinical management of children and adolescents who have experienced sexual violence: Technical considerations for PEPFAR programs. Arlington, VA: USAID's AIDS Support & Technical Assistance Resources, AIDSTAR-One, Task Order 1. Retrieved on December 18, 2015 (<http://www.jsi.com/JSIInternet/Resources/publication/display.cfm?txtGeoArea=INTL&id=13938&thisSection=Resources>), etc.

106. The medical history sought should include: chief complaint/history of present illness; review of systems; and medical, family, and psychosocial history.<sup>126</sup> Where there has been time for a forensic interview to take place before the forensic medical examination (non-acute situation), the forensic medical examiner may review the details of the forensic interview.<sup>127</sup> The medical history may provide information useful to the investigation,<sup>128</sup> but is not, itself, the forensic interview. The forensic medical examiner is not the appropriate person to conduct the forensic interview, which will likely become the central evidence in the prosecution (see Section 2.7).

#### RECOMMENDATION L

- **To add the forensic interview to the definition of forensics in the Law on Forensic Examination and other relevant legislative acts, including the Criminal Procedure Code.**
- **To develop a certification for children’s forensic interview intermediaries and that children are interviewed only by individuals certified in child investigative interviewing in order to avoid further trauma to the child and to elicit the most accurate testimony possible.**
- **To create a set of standards/methodology by which a child forensic interview would qualify as evidence in court so that the child is less likely to have to retell of the exploitation and abuse in court.**
- **To amend the Criminal Procedure Code 224 and 225 so neither the prosecution nor the defence are involved in the initial forensic interview in order for it to remain neutral and be accepted as evidence in court.**
- **To consider adapting Criminal Procedure Code Articles 225 and 226 to the Barnahus model, where the questions of both the defence and prosecution are submitted to the forensic interviewer, who then relays the question to the child in an appropriate manner, after the neutral forensic interview has been completed.**
- **To include in the Criminal Procedure Code Articles 224, 225, and 226 provisions that same person conduct all interviews with the child and to keep the interviews as limited to the number strictly necessary for the investigation and prosecution of the perpetrator.**
- **To amend Criminal Procedure Code 226, para 2 such that the interview will need to be postponed if the child becomes overly distressed, regardless of whether the one hour limit has been reached.**
- **To clarify in the Forensic Examination Bylaws rule 1.16.1 that the forensic medical examiner is not conducting the forensic interview but gathering information on any current medical complaints and medical history for a forensic physical exam.**

<sup>126</sup> [A National Protocol for Sexual Abuse Medical Forensic Examinations, Pediatric](#), US Department of Justice, Office on Violence Against Women, (April 2016), p 122.

<sup>127</sup> [A National Protocol for Sexual Abuse Medical Forensic Examinations, Pediatric](#), US Department of Justice, Office on Violence Against Women, (April 2016), p. 122.

<sup>128</sup> [A National Protocol for Sexual Abuse Medical Forensic Examinations, Pediatric](#), US Department of Justice, Office on Violence Against Women, (April 2016), p. 121-122 citing Adams, J., Kellogg, N., Farst, K., Harper, N., Palusci, V., Frasier, L., ... Starling, S. (2015). Updated guidelines for the medical assessment and care of children who may have been sexually abused. *Journal of Pediatric and Adolescent Gynecology* [In press, corrected proof, February 12]. doi: 10.1016/j.jpag.2015.01.007.

- **To clarify in the Forensic Examination Bylaws that the purpose of the forensic medical examination in cases of child trafficking, exploitation, and abuse is the child’s overall health and well-being, as well as collection of forensic evidence.**
- **To stipulate that only the specialist in child forensic interviewing can be present in the room for the forensic interview of the child, unless the child wishes otherwise.**
- **To specify that parents who may be implicated in the trafficking, exploitation, or abuse cannot listen in on the interview but be given a summary afterward.**
- **To ensure that the child has a legal representative appointed as soon as possible, and if that has taken place before the forensic interview.**

## 2.8 Non-punishment and Non-prosecution of Child Victims

107. While Ukraine instructs children under 18 years old to be truthful during interrogation and examination in court, and imposes on children, 16 to 18 years old, penalties for not being truthful Criminal Procedure Code Articles 226 and 354, it is not clear from the laws under review that the children have the protection of the non-punishment and non-prosecution principle. This is particularly important for child trafficking and exploitation victims, but would also benefit child sex-abuse victims who do not realize that they are victims.

108. The non-punishment and non-prosecution principle is a key legal requirement under EU law, and the Anti-Trafficking Convention (Article 26) that ensures child victims of sexual abuse or exploitation are not penalised for actions that they did not voluntarily commit. According to this principle, the voluntary nature of crimes committed in the process of human trafficking or abuse should be irrelevant. It is crucial to recognise that sexually exploited minors are victims—not perpetrators—of crimes. The importance of implementation of the non-punishment principle has recently been highlighted by the UN Special Rapporteur on Trafficking in Persons, especially women and children.<sup>129</sup> Guideline 8 of the OHCHR Principles on Trafficking recommends States to consider “ensuring that children who are victims of trafficking are not subjected to criminal procedures or sanctions for offences related to their situation as trafficked persons.”<sup>130</sup>

109. The EU Directive 2011/93 Article 14 is unique amongst the legal instruments dealing exclusively with child exploitation and abuse, establishing a non-punishment principle for child victims.

110. With particular reference to child victims of human trafficking, the OSCE Policy and Legislative Recommendations Towards the Effective Implementation of the Non-punishment Provision with Regard to Child Victims of Trafficking aims to promote better understanding by the 57 OSCE States of the non-punishment principle and to encourage a more even application of its use, contain valuable guidance.<sup>131</sup>

<sup>129</sup> Giammarinaro, M. G., [The importance of implementing the non-punishment provision: the obligation to protect victims](#).

<sup>130</sup> Office of the High Commissioner for Human Rights, [Principles and Guidelines for Human Rights and Human Trafficking](#) (2002), Guideline 8, para 3.

<sup>131</sup> [OSCE Policy and Legislative Recommendations Towards the Effective Implementation of the Non-punishment Provision with Regard to Victims of Trafficking](#), 25 June 2013 (available here:) [41]. *In the case of children, therefore, no means at all, including coercion, deception or threat, are required to establish the victim status of the child. Children cannot in law consent to being trafficked nor can trafficked persons validly consent to their exploitation. “Even if a child is not threatened, no force is used against him or her, or he or she is not coerced, abducted or deceived, the child cannot give consent to the act of trafficking for the purpose of exploitation.” The EU Directive on trafficking also reiterates the prime importance of this: “when a child is concerned, no possible consent should ever be considered valid.” Hence, when non-punishment provisions are being applied to the case of a child, States should adopt a broad, not literal, interpretation of the word “compelled” which appears in both Article 26 of the CoE Convention and Article 8 of the EU Directive on trafficking. This would*

111. **In line with international standards pertaining to [...]the Criminal Procedure Code should include in its wording the non-punishment and non-prosecution principle for child victims of sexual abuse, exploitation and trafficking.** This wider interpretation of Ukraine's obligations under regional law should include an obligation to take necessary measures to ensure that competent national authorities have the discretion not to prosecute or impose penalties on victims of trafficking in human beings for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to any of the acts referred to under the umbrella of crimes covered under the Lanzarote Convention. **It is thus recommended that concrete wording be adopted so that criminalisation of child victims of sexual abuse and exploitation is effectively prevented.**

112. **The Criminal Procedure Code Articles 226 and 354 should also contain an obligation to inform children that they will not be punished or prosecuted for acts they committed in the course of their trafficking or exploitation.** This will potentially cut down on the child's anxiety during interview and testimony and provide a more truthful picture of what occurred.

#### RECOMMENDATION M

- **To include in the Criminal Procedure Code the non-punishment and non-prosecution principle for child victims of sexual abuse, exploitation and trafficking;**
- **To include in the Criminal Procedure Code Articles 226 and 354 an obligation to inform children that they will not be punished or prosecuted for criminal acts they committed in the course of their trafficking or exploitation.**

## 2.9 Data Privacy

113. Data privacy is particularly important in cases of trafficking, exploitation and child abuse, as release of information and facial photos could endanger the child and his or her family. Inappropriate release of information could also publicly associate a child victim or witness with the trauma and violence for the rest of their lives and result in stigmatization and potential re-traumatization and re-victimization. Protection of images is particularly important, as there may be photographic images of injuries to the child, including of the ano-genital region, created in the investigation. Ukraine's Criminal Procedure Code Article 241.4 recognizes that these images need to be sealed and stored for trial. However, little else is said about storage or sharing of personal information in the investigation and criminal proceedings.

114. Both the Optional Protocol Article 8, para 1 (e) and the Lanzarote Convention Article 31(1)(e) stress the need to protect the privacy and identity (including image) of victims.

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*involve a consideration of whether the offence committed by the child was related to the trafficking. In cases where this link is present, the prosecution should not be brought or it should be discontinued at an early stage or an appeal against conviction should be allowed; and [42] The Special Representative takes the view that in cases involving children, the need for a broad application of compulsion needs to be understood in light of the child's vulnerability on account of their age alone, and of the irrelevance of consent in the legal definition of child trafficking. More specifically, where there is evidence of abuse and/or exploitation and/or trafficking of a child, from a legal perspective it should be understood that in such circumstances a child has no autonomy, is not free to make clear or informed choices such as regarding opportunities for escape and may have access to very limited, if any, alternative options. Thus, where a child is exploited and/or trafficked, and is used by a trafficker for an illegal purpose, or the child commits a criminal act related to their trafficked status, the application of the non-punishment provision is crucial, not only from a child safeguarding perspective but also to prevent the risk of secondary traumatization to the child at the hands of the State."*

The Lanzarote Convention urges State Parties, in accordance with their domestic legislation, to take measures to prevent the public dissemination of any information that could lead to identification of the child victims (e), and connected with this, ensure that any contact with the perpetrator is avoided (g) and their physical safety is guaranteed (f).<sup>132</sup> Ukraine is also bound by CETS 108 and its protocols, as mentioned about to secure the processing of data within and between different agencies

115. In the EU legal realm, the EU Victims Directive dedicates Article 21 to the protection of personal data making it mandatory for the State to take measures to protect a victim (especially a child victim) from the inappropriate dissemination of their personal characteristics. Directive 2011/93 makes a reference to the importance of data protection in preamble para (50).

116. To be effective, the new CJC must keep meticulous records on the child's case as well as have the ability to securely store all information—written, digital, photographic, and audio-visually recorded—related to the child's trafficking, exploitation or abuse. The CJC should also have secure storage for specimens collected from the child's forensic medical exam. The retention period can vary, but it is recommended this is based on judicial standards and not medical standards, due to cases of delayed reporting, cold cases, and appeals processes.<sup>133</sup> The victims and caregivers should not have access to the information till the case is closed.<sup>134</sup>

#### RECOMMENDATION N

- **To offer a heightened level of protection of children-victims' private life, personal information, personal data and identifiable, both during judicial or quasi-judicial proceedings and *en route* to recovery, regardless of the level of the child's involvement in the domestic criminal investigation proceedings.**
- **To enable the new CJC to have law-enforcement level confidential storage capacity for all information related to a victim's or witness's case.**

117. While all medical records constitute sensitive information and are protected by privacy safeguards, documentation in CSEA and trafficking cases is especially sensitive. For example, the National Protocol for Sexual Abuse Medical Forensic Examinations (Pediatric) of the U.S. Department of Justice Office on Violence Against Women recommends having in place mechanisms to track information shared from the medical forensic examination in individual investigations.<sup>135</sup> As per Section A5b of the National Protocol, information to track “includes but is not limited to: mandatory reports, to whom case information has been released, and communication related to case investigation.”

118. Some good practice examples that Ukrainian authorities may wish to consider also include a practice whereby the forensic regulations ban including the child's face in photographic

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<sup>132</sup> See also within the anti-trafficking legal framework, similar obligations in Article 6, para 1 of the Palermo Protocol, CoE Anti-Trafficking Convention, especially Article 11 which stipulates that personal data should be stored and used in conformity with the conditions provided by the CoE Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data. Relevant provisions are also included in preamble 33 of the EU Anti-Trafficking Directive and Article 4 para 2 of the CIS Model Law.

<sup>133</sup> [A National Protocol for Sexual Abuse Medical Forensic Examinations, Pediatric](#), US Department of Justice, Office on Violence Against Women, (April 2016), ps 119 and-132

<sup>134</sup> [A National Protocol for Sexual Abuse Medical Forensic Examinations, Pediatric](#), US Department of Justice, Office on Violence Against Women, (April 2016), p. 28

<sup>135</sup> U.S. Department of Justice, Office on Violence Against Women, *A National Protocol for Sexual Abuse Medical Forensic Examinations: Pediatric* (April 2016), p. 69

images where genitalia is exposed.<sup>136</sup> At the same time, to ensure identification for investigative purposes, the regulations may call for the inclusion of a separate photograph of the child's face for identification. This, *inter alia*, may help show the child as he/she was when the incident of sexual abuse or exploitation occurred.

### RECOMMENDATION O

**To include in the Bylaws on Forensic Medical Examinations specific provisions for secure storage of documentation and authorized access to it. Any processing of personal data must be in line with CETS 108 (The Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data) and its protocol ETS 181 (Additional protocol to Convention 108 regarding supervisory authorities and trans-border data flows).**

## 2.10 Protecting Child Victims and Witnesses from Courtroom Trauma

119. Ukraine's current law allows for some court proceedings to be conducted in private, the Criminal Procedure Code Articles 27(2) and 27(7), if the case is a "trial of a criminal offence against sexual freedom or security of a person." It is unclear if this exemption to a public trial would be applied to any or all child trafficking, exploitation, or sexual abuse cases. The exemption also is permissive, not mandatory; using "may" instead of "shall", and leaving the openness of trials involving sexual offences against minors to the judge's discretion.
120. The Criminal Procedure Code Article 225, para 1 allows the child victim or witness to be interrogated in court during pre-trial investigation, "in the presence of parties to criminal proceedings", perhaps including the presence of the alleged perpetrator. This pre-trial interrogation in court is offered when the "existence of other circumstances that may make interviewing them in court impossible or affect the completeness or reliability of testimony." The Criminal Procedure Code Article 226 provides some safeguards for children, but does not say whether the alleged perpetrator is present in the courtroom interrogation. It also allows at least five (maybe seven) people in room to ask the child questions. The Criminal Procedure Code Articles 336 and 354, para 4 allow video-conferencing for court proceedings, including interrogation, but it is not clear if the conferencing can be one-way so that the child does not experience the trauma of seeing the alleged perpetrator.
121. International law is replete with calls not only to protect the child victim (or child witness) from additional trauma during court proceedings, but also specifically to use closed court proceedings and communication technology to do so. The Lanzarote Convention Article 35, para 2 calls on each party to ensure that, "all interviews with the victim or, where appropriate, those with a child witness, may be videotaped and that these videotaped interviews may be accepted as evidence during the court proceedings, according to the rules provided by its internal law."<sup>137</sup> Moreover, the Lanzarote Convention Article 36 calls on each party "to ensure, according to the rules provided by its internal law, that: a) the

<sup>136</sup> U.S. Department of Justice, Office on Violence Against Women, A National Protocol for Sexual Abuse Medical Forensic Examinations: Pediatric (April 2016), p. 69.

<sup>137</sup> See also EU Directive 2011/93 (Art. 20 para 5.(b)), which calls on States to audio-visually record interviews with child victims and witnesses of sex crimes, and (Article 20 para 4) to use these recordings as evidence in criminal court proceedings. Moreover, the Directive calls on States to allow cases of child trafficking, exploitation, or abuse to take place without the presence of the public, and that "the child victim be heard in the courtroom without being present, in particular through the use of appropriate communication technologies."

judge may order the hearing to take place without the presence of the public; b) the victim may be heard in the courtroom without being present, notably through the use of appropriate communication technologies.” In addition, the EU Victim’s Directive Article 23 calls on States to make available to children the following:

- (a) measures to avoid visual contact between victims and offenders including during the giving of evidence, by appropriate means including the use of communication technology;
- (b) measures to ensure that the victim may be heard in the courtroom without being present, in particular through the use of appropriate communication technology;
- (c) measures to avoid unnecessary questioning concerning the victim's private life not related to the criminal offence;
- (d) measures allowing a hearing to take place without the presence of the public.”

122. EU Directive 2011/93 Article 20, para 5 calls for closed court proceedings for sexual offences against children. Article 8 (a) of the Optional Protocol to the UN Convention on the Rights of the Child underscores that both child victims and child witnesses are vulnerable and need protection of their special needs.

123. Finally, the European Court of Human Rights in *G.U. v Turkey* found that Court proceedings in cases of child sexual exploitation and abuse need to pay particular attention to requirements for a closed hearing requirement of the child to be interviewed in a gender-sensitive way with due regard to the victim’s needs for psychological assistance throughout the proceedings.<sup>138</sup>

124. This special protection for child victims and witnesses must be balanced against the defence’s right to a fair trial. Lanzarote Convention Article 30, para 4 states that “Each Party shall ensure that the measures applicable under the current chapter are not prejudicial to the rights of the defence and the requirements of a fair and impartial trial, in conformity with Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms.” The Lanzarote Convention Article 31(g) also calls on States to ensure that “contact between victims and perpetrators within court and law enforcement agency premises is avoided, unless the competent authorities establish otherwise in the best interests of the child or when the investigations or proceedings require such contact.”

125. Ideally, the audio-visually recorded and neutral forensic interview will be used in court and the child will not have to testify.

126. The single forensic interview still guides the multi-disciplinary team’s care of the child and informs direction of the investigation, without the child having to retell the story to everyone on his/her team and risk re-traumatization or corruption of details.

127. In the Barnahus model, the same judge who will be adjudicating the case also oversees the audio-visual interview.<sup>139</sup> The judge will allow the prosecution and defence to submit questions from the listening room at the Barnahus, which are relayed to the forensic interviewer through and earpiece.<sup>140</sup> The forensic interviewer then asks the child the

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<sup>138</sup> *G.U. v Turkey*, App.No. 16143/10, paras 71-72. (in French)

<sup>139</sup> Children’s Commissioner for England, Barnahus: [Improving the Response to Child Sex Abuse in England](#) (2015), p. 5.

<sup>140</sup> Children’s Commissioner for England, Barnahus: [Improving the Response to Child Sex Abuse in England](#) (2015), p. 5.

question in a way that is appropriate.<sup>141</sup> While the U.S. CJC model would consider this a tainted forensic interview,<sup>142</sup> the Barnahus model allows the child to avoid the trauma of testimony and cross-examination in court as the defence has already asked questions.<sup>143</sup> Victims of sexual abuse have repeatedly highlighted that cross-examination by defence barristers is extremely traumatic.<sup>144</sup>

128. The downside of the Barnahus model is that it requires at least two interviews, which can also cause trauma to the child. For instance, in Norway, the forensic interview takes place in two stages—an exploratory interview to establish the allegation of abuse, and a more in-depth investigative interview after the prosecution, defence, and judge have become involved and developed questions.<sup>145</sup>

#### RECOMMENDATION P

- **To specify in the Criminal Procedure Code Article 27 that, in the specific circumstances, entire or part of judicial proceedings related to trafficking, exploitation, and abuse involving a child victim or child witness are held in private.**
- **To amend the Criminal Procedure Code Articles 224 and 226 so that all forensic interviews with child victims or witnesses be audio-visually recorded and preserved according to evidentiary rules for use as evidence in court proceedings so that the child can avoid retelling the story, even if the child has to answer questions in court proceedings about the story.**
- **To clarify in Criminal Procedure Code Article 225 that the alleged perpetrator cannot be in the interrogation room, or, if allowed, that the child may participate through one-way video conferencing so that the child does not have to see the perpetrator. Under no circumstance should the alleged perpetrator be allowed to speak to the child.**
- **To expand Criminal Procedure Code Articles 225 and 354 so that testimony already given by the child during the neutral forensic interview can be submitted as evidence, and questioning on that testimony by the defence, if required, can be accomplished through one-way video conferencing.**
- **To amend the Criminal Procedure Code Articles 225 and 354 so that the child can be located at the CJC for any one-way video conferencing.**
- **To consider adapting Criminal Procedure Code Articles 225, 226 and 354 to the Barnahus model, where the questions of both the defence and prosecution are submitted to the forensic interviewer, who then relays the question to the child in an appropriate manner.**
- **To consider having a trained child advocate who has been on the child’s multi-disciplinary team from the beginning of the investigation, rather than a teacher who may or may not have been previously informed about the**

<sup>141</sup> Evgenia Generalova, [What is Barnahus and How it Works](#), Child Protection Hub (2016).

<sup>142</sup> Teresa Huizar, Executive Director, National Children’s Alliance, Phone Interview, August 17, 2021.

<sup>143</sup> “Victims of sexual abuse have repeatedly highlighted that cross examination by defence barristers is extremely traumatic. Pre-recorded testimony is a considerable advantage in this regard.” Children’s Commissioner for England, Barnahus: [Improving the Response to Child Sex Abuse in England](#) (2015) p p.5-6, citing “Child Sexual Exploitation and the Response to Localized Grooming, 2<sup>nd</sup> Report of the Session (2013-2014), House of Commons Home Affairs Committee.

<sup>144</sup> Children’s Commissioner for England, Barnahus: [Improving the Response to Child Sex Abuse in England](#) (2015) <https://www.childrenscommissioner.gov.uk/wp-content/uploads/2017/06/Barnahus-Improving-the-response-to-child-sexual-abuse-in-England.pdf>, p. 6 citing <https://publications.parliament.uk/pa/cm201314/cmselect/cmhaff/68/68i.pdf>.

<sup>145</sup> Children’s Commissioner for England, Barnahus: [Improving the Response to Child Sex Abuse in England](#) (2015), p. 7.

**situation of the child or have any training in how to relate to a sexually traumatized child.**

- **To make explicit in Criminal Procedure Code Article 336 just as in Criminal Procedure Code Articles 224 and 226 recommended above, that the child victim or witness can participate in any court proceeding via video-conferencing that is one-way so that the victim does not have to see the alleged perpetrator.**

## 2.11 Provision of Physical Protection at the New CJC

129. The new CJC will need adequate security measures for child victims and witnesses as the centre will be a target for traffickers (or other perpetrators) who want to avoid accountability and who wish to harm or otherwise intimidate witnesses. Traffickers may also attempt to steal or tamper with evidence collected by the new CJC. The new CJC may also encounter a situation where it becomes apparent on site that the caregiver accompanying the child is involved in the trafficking, exploitation, or abuse and the caregiver will need to be removed from the child or arrested.
130. While Article 19 of the Law on Forensics discusses security at state institutions where psychiatric examinations are currently performed, and security for the interviewer seems to be the primary concern. The Criminal Procedure Code Article 56 guarantees the victim “in the presence of legitimate grounds, to ensuring the security of himself/herself, his/her close relatives or family members, property and home,” although the victim may have to make a motion for such protections. The Criminal Procedure Code Article 352 provides comprehensively for the security of witnesses.
131. The Optional Protocol in Article 8 (f) makes a specific reference to the safety of the child victims, as well as of their families and witnesses on their behalf. The Lanzarote Convention includes general provisions on practical protection in Article 31, para 1(f) and special measures in Article 14, para 3 where exploitation or abuse comes from the family environment of the child (including removal of the child from the family environment or removal of the perpetrator).
132. As an examples, the EU Directive 2011/93 Article 19, para 1 highlights the importance of assistance and support during and for a period after criminal proceedings, while para 2 emphasises that this support should be unconditional and not dependent on the child’s willingness to cooperate in the criminal investigation, prosecution or trial. Similarly, the EU Victims Directive stipulates in Article 18 “right to protection” that Member States shall ensure that measures are available to protect victims and their family members from secondary and repeat victimisation, from intimidation and from retaliation, including against the risk of emotional and psychological harm (...). Relevant international and European human legal standards against human trafficking also include provisions for such unconditional protection.<sup>146</sup>

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<sup>146</sup> Both the Palermo Protocol and the CoE Trafficking Convention stress that victims’ safety and protection needs shall duly be taken into account (Article 6 para 5 and Article. 12 para 2 respectively). Article 28 of the CoE Convention specifically stipulates that states shall provide effective and appropriate protection from potential retaliation or intimidation during and after investigation and prosecution of perpetrators for victims, persons reporting criminal offences or otherwise cooperating with the investigating or prosecuting authorities, witnesses and, where necessary, family members of victims and witnesses. Such protection may include physical protection, relocation, identity change and assistance in obtaining jobs. According to Article 28 para 4, protection shall be extended as necessary to members of groups, foundations, associations, or non-governmental organizations which aim at fighting trafficking in human beings or protecting human rights if they assist or support victims during criminal proceedings concerning the offence of trafficking. The two international legislative instruments do not refer to any “conditions” for the provision of such assistance.

133. **In line with international and regional legal standards, it is recommended that the State be proactive in ensuring that physical, psychological and emotional protection is available to the victim, free of charge,** throughout the full duration of criminal proceedings to ensure that the victim will not be intimidated, suffer retaliation or other related damage as well as safeguard their dignity.<sup>147</sup>
134. **In line with the above, it is recommended that the new CJC be fully equipped with security to protect the multi-disciplinary team, child victims and witnesses, their caregivers, and any evidence gathered.**

### 3. FURTHER ANALYSIS OF FORENSIC LEGISLATION

#### 3.1. General remarks on forensic legislation

135. Even if the request concerns legislation relevant to a CJC, it is deemed necessary to also include general remarks on legislation on forensics, not only applicable to children. The Law on Forensics as it stands now is of rather general nature. While it addresses a number of overarching issues such as the safeguards of forensic examiners' independence, eligibility to serve as a forensic examiner and bars to serving in a forensic examiner's capacity, forensic examiner's certification and rostering, and the like, the law lacks in specific detail (see the subsections below for more in-depth analysis of specific provisions). Moreover, the Law does not provide for a definitional framework, choosing to define only the concept of "forensic examination," but omitting to define a number of key concepts that the Law routinely refers to, such as forensic expert, forensic examination object, expert opinion, etc.
136. Of especial concern is the absence of a typology of forensic examinations in the Law on Forensics, considering that the Law is the key specialized legislative act on the issue of forensics and the Criminal Procedure Code does not address forensic examination typology either. Failure to provide for a typology of forensic examinations results in an unnecessary fragmentation of the applicable normative framework and poses a concern in terms of clarity and foreseeability in the application of legislation on forensics. **In view of the above, it is recommended that the Law on Forensics be revised to include a list of key definitions and a provision specifying the types of forensic examinations potentially conductible in Ukraine.**

#### 3.2. Independence of forensic service providers - ethical safeguards

137. Article 4 of the Law on Forensics provides for a number of independence safeguards, including "the existence of forensic institutions, independent of the bodies carrying out operational and investigative activities, pre-trial investigation bodies and the court." While it is laudable that the bodies vested with forensic examination functions (forensic service providers), are independent of law enforcement bodies and the judiciary, most of them still fall under the regulatory remit of the Ministry of Justice. This is contravening any international standards as there are no binding international standards on forensics, including governance in this area, however, **a better practice to shield the forensics from any potential political interference would be to have an independent forensic science institute, possibly reporting to the Ministry of Justice but with viable supplementary safeguards of operational independence.** For instance, in the UK there exists a figure of

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<sup>147</sup> As above, see *G.U. v Turkey*, App. No. 16143/10, paras 71-72.

the Forensic Science Regulator,<sup>148</sup> who, although sponsored by the Home Office, is a public appointee that operates independently of the Home Office, on behalf of the criminal justice system as a whole.

138. An important aspect of independence is a functioning liability mechanism. This is acknowledged by Article 4 of the Law on Forensics, which lists “criminal liability of a forensic expert for issuing knowingly false findings and refusal without valid reasons to perform his/her duties” as a key safeguard. The Law further includes an article on the liability of forensic examiners in Article 14, however, the article is limited to stating that “A forensic expert may be prosecuted on the grounds and in the manner prescribed by law.”
139. The fact that the Law on Forensics focuses solely on criminal liability and is silent on disciplinary liability poses a concern. A vast share of potentially problematic conduct may not amount to a crime yet be damaging to the quality and impartiality of forensic examinations. **It is therefore strongly recommended that the Law on Forensics be amended to include a set of provisions detailing the disciplinary liability mechanism for forensic service providers.**
140. The documentation reviewed for this opinion did not include a code of ethics or a similar document applicable to the forensic examiner profession, and the relevant legislation and regulations do not mention such as code.

#### RECOMMENDATION Q

**To adopt a code of ethics applicable to all forensic examiners, medical examiners and interviewers, regardless of their status as an employee of a state-operated forensic service provider (“specialized state institution carrying out forensic activities”) or a private sector expert.**

### 3.3. Certification and accreditation. Standards of practice

141. The Law on Forensics specifies the criteria for eligibility to serve as forensic examiner, bars to serving as forensic examiner, and the certification procedure in detail, which is welcome. In particular, Article 16 provides that “[t]he procedure for certification and assignment or deprivation of qualification classes of a forensic expert is determined by the ministries and other central executive bodies, the management of which includes specialized state institutions carrying out forensic activities.” Further, Article 17 details the procedure of certification of non-state-employed forensic examiners and provides for the establishment of expert qualification commissions under “ministries and other central executive bodies, the management of which includes specialized state institutions carrying out forensic activities.” It further specifies that “[t]he procedure for qualifying or disqualifying a forensic expert from among specialists who are not employees of specialized state institutions shall be determined by the Ministry of Justice of Ukraine. To this end, the Central Expert Qualification Commission is established under the Ministry of Justice of Ukraine, which operates in accordance with the respective regulations approved by the Ministry of Justice of Ukraine. Qualification and disqualification of a forensic expert and assignment and deprivation of qualification classes to forensic medical and psychiatric experts shall be carried out in accordance with the procedure established by the Ministry of Health of Ukraine.”

<sup>148</sup> [The Forensic Science Regulator.](#)

142. Ukraine's Law on Forensics does not mention forensic interview certification or methodology for trafficking, exploitation, and abuse of children. Ukraine's Law on Forensics does mention the existence "psychiatric examinations at specialized state institutions", Article 7, see also Article 15, but "psychiatric examination" is not included in the definition of forensic examination, Article 1. Moreover, it is not clear if psychiatric examination includes paediatric forensic interviews for cases of trafficking, exploitation, and abuse. The term seems to be related to individuals who are in custody, Article 19. The Ministry of Health of Ukraine oversees the qualification of medical and psychiatric experts, Article 17, but it is not clear what entity oversees the methods, Article 8.
143. To ensure consistency across the forensic science field and ensure that all forensic examiners, be they state-employed or privately employed, meet the same standard of competence, **it is recommended that the legislator consider introducing a uniform consolidated system of forensic examiner certification, which would involve certification and regular re-certification of all forensic examiners by a central-level qualification commission with sub-commissions for each forensic science discipline, which may operate under the auspices of the Ministry of Justice but be balanced in its composition including representatives of criminal justice chain partners and independent academic institutions.** For example, the Latvian Law on Forensic Experts,<sup>149</sup> which may serve as a source of inspiration in this area, provides for the following model in Section 7 of the Forensic Bylaws:

"The commission for examination of forensic experts shall include:

- 1) a person authorized by the director of a forensic expert-examination institution;
- 2) a judge of a regional court;
- 3) a prosecutor;
- 4) an investigator;
- 5) a representative of the Ministry of Justice;
- 6) a representative of the academic staff of institutions of higher education".

144. Closely linked to the issue of ensuring a due standard of competence of forensic examiners through certification is the issue of upholding a due standard of practice in each forensic science discipline to ensure that the examination methods employed are universally acceptable and scientifically reliable. Ukraine does not have a nationwide code of practice, nor does it have an accreditation procedure for forensic laboratories. **It is recommended that the relevant authorities support the initiative to set up a technical committee for standardization "Forensic Sciences" to develop national standards and a code of practice in this area.**

## 4. FINAL COMMENTS

### 4.1. Gender-neutral Legal Drafting

145. Established international practice requires legislation to be drafted in a gender neutral manner.<sup>150</sup> It is recommended that, whenever possible, the reference to post-holders or

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<sup>149</sup> [Law On Forensic Experts of Latvia, adopted 11 February 2016](#)

<sup>150</sup> See e.g., the UN Economic and Social Commission for Western Asia (ESCWA), Gender-Sensitive Language (2013), <[https://unswap.unwomen.org/UNEntity/ViewDocument?FileName=Annex16\\_\\_23201435437.pdf](https://unswap.unwomen.org/UNEntity/ViewDocument?FileName=Annex16__23201435437.pdf) [copy and paste weblink in the browser]>.

certain categories of individuals be adapted to use a gender neutral word. Alternatively, the plural form of the respective noun could be used instead of the singular (e.g., [doctors...]) or it is recommended to use both male and female words.<sup>151</sup>

## 4.2 Impact Assessment and Participatory Approach

146. OSCE commitments require legislation to be adopted “as the result of an open process reflecting the will of the people, either directly or through their elected representatives” (Moscow Document of 1991, par 18.1).
147. In any case, consultations on draft legislation and policies, in order to be effective, need to be inclusive and to provide sufficient time to prepare and submit recommendations on draft legislation; the State should also provide for an adequate and timely feedback mechanism whereby public authorities should acknowledge and respond to contributions.<sup>152</sup> According to recommendations issued by international and regional bodies and good practices within the OSCE area, public consultations generally last from a minimum of 15 days to two or three months, although this should be extended as necessary, taking into account, inter alia, the nature, complexity and size of the proposed draft act and supporting data/information.<sup>153</sup> To guarantee effective participation, consultation mechanisms must allow for input at an early stage and throughout the process,<sup>154</sup> meaning not only when the draft is being prepared by relevant ministries but also when it is discussed before Parliament (e.g., through the organization of public hearings). Public consultations constitute a means of open and democratic governance; they lead to higher transparency and accountability of public institutions, and help ensure that potential controversies are identified before a law is adopted.<sup>155</sup> Discussions held in this manner that allow for an open and inclusive debate will increase all stakeholders’ understanding of the various factors involved and enhance confidence in the adopted legislation. Ultimately, this also tends to improve the implementation of laws once adopted.
148. **In light of the above, the Ukrainian legislator is therefore encouraged to ensure that the future amendments to the laws reviewed is subject to further inclusive, extensive and effective consultations, according to the principles stated above, at all stages of the law-making process.**

*[End of text]*

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<sup>151</sup> See e.g., OSCE/ODIHR, Report on the Assessment of the Assessment of the Legislative Process in the Republic of Armenia (October 2014), pars 47-48, <<http://www.legislationline.org/documents/id/19365>>.

<sup>152</sup> See e.g., Recommendations on Enhancing the Participation of Associations in Public Decision-Making Processes (from the participants to the Civil Society Forum organized by the OSCE/ODIHR on the margins of the 2015 Supplementary Human Dimension Meeting on Freedoms of Peaceful Assembly and Association), Vienna 15-16 April 2015, <<http://www.osce.org/odihr/183991>>.

<sup>153</sup> See e.g., OSCE/ODIHR, Opinion on the Draft Law of Ukraine “On Public Consultations”, 1 September 2016, pars 40-41, <<http://www.legislationline.org/documents/id/20027>>.

<sup>154</sup> See e.g., OSCE/ODIHR, Guidelines on the Protection of Human Rights Defenders (2014), Section II, Sub-Section G on the Right to participate in public affairs, <<http://www.osce.org/odihr/119633>>.

<sup>155</sup> Ibid.