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## THE CRIME OF DOMESTIC VIOLENCE AND THE CRIME OF CHILD ABUSE. LINK, PROBATION STANDARD

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### **Abstract**

*The significant increase in the number of crimes of domestic violence, maltreatment of a child, particularly and unfortunately in general and especially during the SARSCOV-2 pandemic, affecting one in three women in the European Union (Explanatory Memorandum to the Proposal for a Directive of the European Parliament and of the Council on combating violence against women and domestic violence, COM (2022) 105 final<sup>1</sup>, requires these types of crimes to be tackled from different perspectives. The same is true of child abuse offences, which in practice often raises the question of the standard of probation and the judge's margin of discretion. From this perspective, this study aims to analyse the link between these offences, as well as the fulfilment of the condition of proving the offence “beyond any reasonable doubt”, within the meaning of criminal procedural law and the requirements of the European Convention on Human Rights and Fundamental Freedoms, without dealing with this standard of proof in particular, the concept being the subject of future studies.*

**Key words:** domestic violence, child abuse, joint offences, probation.

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<sup>1</sup> <https://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:52022PC0105>

## INTRODUCTION

From the outset, it should be stressed that the subject of this study is part of a broad, recurrent and highly topical theme. Recent studies carried out by European bodies have shown a significant increase in violence against women and domestic violence during the SARSCOV-2 pandemic, affecting one in three women in the European Union (Explanatory Memorandum to the Proposal for a Directive of the European Parliament and of the Council on combating violence against women and domestic violence<sup>2</sup>). The Commission's report pointed out that when analysing types of violence, statistics showed that at European level, one in five women has been a victim of domestic violence, which is considered by experts to be a form of torture (*Coomaraswamy, V., Radika*, apud ABA- CEELI USAID Final Report “Domestic Violence in Romania: Legislation and the Judicial System“, 2007, p. 5).

Although there are other widely recognized international instruments, such as, for example, the Istanbul Convention<sup>3</sup>, as well as Directives protecting victims of violent crimes (for example, Directive 2011/92 of the European Parliament and of the Council on combating the sexual abuse of children and child pornography and replacing Council Framework Decision 2004/68/JHA - <https://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:32011L0093>; Directive 2012/29 of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime and replacing Framework Decision 2001/220/JHA<sup>4</sup>) transposed into the national legislation of the Member States, there has been an excessive increase in crime in this sector.

Thus, in 2022, there was a noticeable growth in crime, 13.4% compared to 2021, according to statistics provided by the Romanian Police<sup>5</sup>: there was an increase in the number of domestic violence offences (including the crimes of assault or other violence, bodily harm and threat, from 44,522 to 50,531), but a decrease in the number of offences of ill-treatment of minors (from 441 to 396).

In practice, the question often arises as to how to distinguish the offence of domestic violence from other offences, such as maltreatment of minors, which are closely linked.

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<sup>2</sup> COM(2022) 105 final, <https://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:52022PC0105>

<sup>3</sup> Council of Europe Convention on preventing and combating violence against women and domestic violence, CETS No 210; COM(2016) 111, <https://rm.coe.int/168046253e>

<sup>4</sup> <https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:32012L0029>

<sup>5</sup> <https://www.politiaromana.ro/ro/stiri/violenta-domestica-in-atentia-politistilor> 1671870616

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### 1. THE RELATIONSHIP BETWEEN DOMESTIC VIOLENCE OFFENCES AND MALTREATMENT OF MINORS

The two offences analyzed are regulated in Title I of the Criminal Code, with the denomination “Offences against the person”, but in separate chapters: the offence of domestic violence is included in Chapter III, “Offences committed against a family member”, in art. 199 with the marginal denomination “Domestic violence”, while the offence of ill-treatment of a minor is provided for in Chapter II, “Offences against bodily integrity and health” in art. 197 of the Criminal Code.

Without wishing to analyze the essential characteristics of these offences, we shall confine ourselves to a few general observations which are necessary for this study.

Some authors have expressed opinions of great scientific value to the effect that the offence of ill-treatment of a minor falls outside the scope of homogeneity of offences against bodily integrity and health on the grounds that the latter “punishes actual and effective results on the person’s bodily integrity and health”, while the offence of ill-treatment of a minor “punishes the potential damage to these values in a dynamic sense” (*S. Bogdan, D.A. Șerban, 2020, pp. 162-163*).

In the same sense, it has been stated that bringing the offence of ill-treatment of a minor “from the sphere of offences that harm relations relating to social coexistence to the sphere of offences that harm the physical integrity and health of the person, was motivated by the legal object, by the fact that, in reality, the offence endangers, first of all, the physical integrity or health of the person and only subsidiarily family relations or social coexistence” (*V. Cioclei, 2020, p. 87*).

The typical requirement of the offence of maltreatment of a minor is fulfilled when the physical, intellectual or moral development of the minor is put in serious danger by measures or treatment of any kind, by parents or any person who has the minor in their care - Art. 197 of the Criminal Code. Doctrine has stressed that *verbum regens* is achieved through any actions or inactions that seriously endanger the child's development, and if these ill-treatments are accompanied by physical violence, bodily harm or unlawful deprivation of liberty, there is concurrence of offences (*V. Cioclei, 2020, p. 88; S. Bogdan, D.A. Șerban, 2020, pp. 164-165*).

Doctrine has rightly stressed the legitimacy of the solution of the ideal concurrence of offences offered by the Supreme Court in Decision no. 37/2008 delivered in the appeal in the interest of the law, which remains valid, the essential argument being the heterogeneous nature of the special legal object (*S. Bogdan, D.A. Șerban, 2020, p. 165*). Thus, the court ruled in the above mentioned decision that in the case of the offence of ill-treatment of a minor “the main special legal object is constituted by the social relations relating to the family and the protection within it of the minor whose training, education and physical and moral

growth are closely linked to and conditioned by the care, responsibility and affection of the persons obliged to do so”.

The same author pointed out that the argument offered by the Supreme Court remains valid only in the hypothesis where the act of ill-treatment of the minor is committed “through typical acts protecting other social values, such as the physical freedom of the minor, in which case the typical act is deprivation of liberty, or the mental freedom of the minor, in which case the typical act would be the crime of threat” (*ibid.*).

However, the author has stated that “the repositioning of the offence may call into question the fairness of the solution of concurrence in the hypothesis where the ill-treatment is composed of acts of hitting or bodily harm to the minor” (*S. Bogdan, D.A. Șerban, 2020, p. 165*). The author stated that “the appearance of overlapping social values protected by the two types of acts is removed by the specific way in which the offence of ill-treatment protects the physical integrity and health of the minor”. In this hypothesis, what is penalized, in his view, is the real and concrete possibility of the occurrence over time of consequences on the physical, intellectual or moral development of the minor which could be irreversible (*ibid.*).

The argument brought forward by the author is considering that by retaining the concurrent offence, the principle of *non bis in idem* would not be violated, since both offences value the occurrence of consequences likely to harm the child “on different levels, present (for the offence of battery or other violence or bodily harm) and future (the offence of maltreatment of a minor)” (*S. Bogdan, D.A. Șerban, 2020, p. 166*).

The author also expressed the view, which we share, that in this case absorption cannot operate, in the sense that the offence of maltreatment that would absorb the offence of assault or other violence or bodily harm, on the grounds that the essential requirement for absorption is not met, namely the act of execution of the offence of maltreatment consisting of measures or treatment of any kind. Consequently, taking into account other considerations, such as the subjective nature of the offences, the time of their commission, the differences in the penalty regime, justifies the legitimacy of the Supreme Court's decision to establish the concurrence of offences (*S. Bogdan, D.A. Șerban, 2020, p. 166*).

## **2. PERSON IN WHOSE CARE THE MINOR IS PLACED**

The law imposes the condition that the active subject of the offence of maltreatment of a minor must be a parent or a person in whose care the minor is. Consequently, the absence of such a person entails the non-existence of the offence. While no comments are necessary as regards the status of parent, as regards the person in whose care the minor is, we consider that it is not necessary for this legal relationship to be established by an act or decision of any authority, since the requirement of the law is also met if the minor is actually in the care of

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another person for the purpose of upbringing and education. However, the de facto entrustment of a minor to another person for the purpose of prostitution does not meet the legal requirement, and the act must be classified in a different legal context, depending on the factual situation. The Supreme Court has ruled in this regard<sup>6</sup>. Thus, the Supreme Court ruled that the prerequisite for this offence is either the existence of a parental relationship or a relationship deriving from a special task relating to the upbringing and education of a minor, which is a legal entitlement. If this condition is missing, the offence will not constitute the offence of maltreatment of a minor, but possibly another offence such as assault or other violence, bodily harm, unlawful deprivation of liberty. Consequently, the act of the defendant who maltreated the victim, who had been entrusted to him by her father to bring her to Italy in order to make her work, hitting her with his hands, feet and fists, repeatedly insulting her, forcing her to work at the market and taking her earnings; forcing her to have sexual intercourse, acts committed on Italian territory, abusing her mental inferiority (she was in Italy, far from her own family, without knowing anyone and entrusted to him by her own father), does not constitute the offence of ill-treatment of a minor, but of assault or other violence and sexual intercourse with a minor, as provided for in Article 6(1) of the Italian Criminal Code. 193 and 200 of the Criminal Code respectively.

### 3. REQUIREMENT OF SERIOUS JEOPARDY TO THE MINOR'S PHYSICAL, INTELLECTUAL AND MORAL DEVELOPMENT

This condition of the typicality of the act requires the possible or potential occurrence of serious harm to the child's physical, intellectual and moral development. The legislator does not define the concept of "serious jeopardy", so in practice there may be difficulties in meeting the requirement of dangerous prosecution of this offence.

In this regard, we agree with the opinion expressed in the doctrine (*S. Bogdan, D.A. Șerban, 2020, p.164*) which criticized the ambiguity of the phrase from the perspective of the principle of legality of the incrimination, with the clarification that although the Constitutional Court has shown great reluctance to consider compliance with the principle of foreseeability of the text in conditions where the wording is ambiguous, we believe that the fulfilment of the requirement is left to the light and wisdom of the judge who, within the margin of appreciation of the evidence, will assess to what extent the requirement of the law is met.

Thus, by criminal decision no. 860/2017 delivered by the Court of Appeal of Brasov (unpublished), the appeal filed by the Public Prosecutor's Office was admitted and the defendant was convicted for the offence of maltreatment of the minor, although the first instance had ordered acquittal.

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<sup>6</sup> Criminal Decision No 657/2018, ÎCCJ, <https://www.universuljuridic.ro /infractiunea-de-rele-tratamente-aplicate-minorului-respingerea-contestatatiei-ca-nefondata-vc-p-ncpp/>

Thus, the trial court found that the requirement of endangering the child's development was not met, that the evidence did not reveal any abnormality related to the child's development, but on the contrary, that the defendant had adequately taken care of his upbringing, that they had a close relationship. Also, the fact that the father took him off when he came home sweaty did not mean the opposite, he took him to kindergarten, to school, he stayed with him, they played, they went out to the park, he did not beat him, the child was happy, well cared for and clean. Basically, the defendant was taking care of the child's upbringing, even though the mother was abroad because she was in a relationship with another man and wanted a divorce. In these circumstances, being troubled by the idea of divorce, the defendant started consuming alcohol together with antidepressant medication and minimally involved the child in emotional blackmail of the mother whom he wanted to persuade to give up the extramarital relationship, return to the country and restart living together. The forensic expert report established that the defendant had a personality disorder of the impulsive unstable type and ethyl abuse, but retained the mental capacity to critically assess the consequences and content of his actions.

Contrary to the first instance, the Court of Appeal found that the moral development of the minor, namely the development of his mental faculties, was seriously endangered by his father, who, through the actions of shooting on 27 October 2016, of the child - aged 6 years and 10 months - with a cord around his neck, while blackmailing the mother to return to the country because otherwise he would hang the child, actions which take the form of physical and emotional abuse and fall within the scope of psychological and physical violence as regulated in art. 4 of Law No. 217/2003, an act that meets the requirement of typicality of the offence of maltreatment of minors, provided for in Article 197 of the Criminal Code, given that the actions were not repeated, being a single criminal activity, committed in a single circumstance. The judicial supervisory court also found that the contents of the audio files showed that: The defendant, who lived alone with the minor, tells his wife that if she does not return home, he will not find them, that he has a knife handy and not to notify the family or the police, that when the door is broken down they will both die and two corpses will be found, he threatens to slit his wrists, there are references to slitting his throat and a slaughter, that he'll come out ugly, with TV, with blood, with his head cut off, with his hands, he refers to the noose hanging on the wall, which they both hang from. In one of the conversations the defendant tells his wife that he puts the noose on and they both hang themselves, that he has two ropes ready. At the same time, he tells his son that they are going to play a game with the rope, and that he will send the photograph to his mother, he refers to cutting the child to pieces if she comes with her boyfriend, that he will cut the child to pieces just to see her suffer, that he has the knife and the noose in his hand, that he's cutting up the child and sending her pictures, that he swears he'll pull the rope out and if she doesn't

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come back, the child will be cut to pieces, pieces, that he's cutting up her child that night, asks her if she wants to start working and if she wants to do the murder now. It is clear from the recording how the child witnessed this discussion, with the defendant addressing in a high and extremely raised tone telling her that “this minute I'm cutting your child, I'm going to get the rope out, wait I'll send them on Facebook”, that he is playing with the child and tying the rope, the child even continuing this discussion with his mother on the phone. Therefore, the court found that the moral development of the minor, namely the development of his mental faculties, was seriously endangered by his father, the defendant X., by the actions of photographing the minor aged 6 years and 10 months, with a cord around his neck, while blackmailing the child's mother to return to the country because otherwise he would hang the child, actions that take the form of physical and emotional abuse and that fall under psychological and physical violence as regulated in Article 4 of Law No. 217/2003.

On the contrary, it was held that the requirement of typicity of the crime is not met in the hypothesis where the child was diagnosed with a genetic disease, inherited on the paternal line, which results in the production of multiple fractures, the child having been monitored and medically investigated on several occasions<sup>7</sup>. Therefore, the child's health problems were not caused by measures or treatments of the maternal grandparents that endangered the child's development, but by the disease from which his father suffered, namely Lobstein's disease (an autosomal dominant connective tissue disorder manifested by multiple fractures, blue sclera and late-onset hypoacusis); the child's father had fractures in childhood, blue sclera (the disease of the bones of glass and hypoacusis. This disease is genetic and as further evidence, the father's own brother suffered from the same condition. Consequently, the court found that the fact that the minor was classified as severely disabled was not due to physical or emotional abuse of the minor, but to his medically proven illness.

**4. THE LIMITING NATURE OF THE EVIDENCE IN THE CASE OF OFFENCES OF  
DOMESTIC VIOLENCE AND MALTREATMENT OF THE MINOR. MARGIN OF  
APPRECIATION OF THE COURT**

Given the specific nature of these crimes, the fact that they are usually committed in the privacy of the home, without the presence of other persons who could be witnesses, and that there is rarely direct evidence (except for forensic documents), both doctrine and judicial practice, have agreed that the standard of probation is lower than in the case of other offences (although there may be those who would understand the concept of “standard of probation” in an unduly limited manner, with particular reference to the concept enshrined in the probation system

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<sup>7</sup> Criminal sentence no. 2774/2010 of the Iasi District Court  
<http://www.rolii.ro/hotarari/589f143ae49009a01e00007f>

{and probation services} characteristic of restorative justice, we point out that this concept, specific to the adversarial law system and adopted in the continental system, including in the Romanian system in the provision enshrined in Art. 100 para. 2 and art. 103 of the Criminal Procedure Code, considers the probatory value and strength of certain evidence, means of proof and evidence procedures in the sense conferred by art. 6 par. 3 of the ECHR on the fairness of proceedings). This is also because, as a rule, the accused person does not recognize the crime or naturally tries to minimize both the crime and its consequences, to seek justifications for criminal behavior, which is an absolutely normal tendency and stems from the inherent self-preservation instinct of each person and is an intrinsic part of the right of defense (these aspects will be the subject of a future study).

Therefore, in the case of these offences, the standard of proof is lower than the standard normally required in criminal proceedings, as the existence of indirect evidence is sufficient, corroborated by other evidence or clues that can outline the state of facts (criminal sentence no. 223/2017 of the Făgăraș Court, unpublished). In this judgment, the court found that when the injured person returned home from work, the defendant accused her of having a relationship with another man and reproached her about her work schedule, in which context they had an adversarial discussion, and the defendant hit her in the face and ribs, causing traumatic injuries that required 11-12 days of medical care to heal.

Thus, the court considered that particular importance in such a case, which involves aggression against a person in a state of obvious vulnerability to the aggressor, with a significant psychological history between the parties involved, must be given to the statement of the injured person. This is because these offences involve specific evidence, material evidence sometimes being non-existent, and the testimony of witnesses being, as a rule, indirect evidence - they relate aspects that they have heard from the victim. In such cases, when the defendant denies, even if only in part, his involvement in the crime, the statements of the victim must be considered in relation to the rest of the evidence and clues that may lead to the conclusion that the facts presented by the victim are not a fabrication or an attempt at revenge. Accordingly, the court found that the statements of the injured person had a stronger probative value than the defendant's statement denying that he had committed the crime. The credibility of the victim's statements can also be deduced from the fact that she left the common residence and from the testimony of the witnesses who saw the injured person come to work with a crooked nose and bruises on her face. The forensic certificate confirmed that the injured person had traumatic injuries and a deformed nasal pyramid, which required 11-12 days of medical care to heal.

Consequently, given that such acts are usually committed in the home of the persons involved, it is clear that direct evidence are scarce and that the judge is entitled to a margin of appreciation in their evaluation, under Article 103 of the Criminal Procedure Code. It is well known that the perpetrators do not mainly



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admit to committing these acts, so the main challenge for the court is to establish the truth on the basis of the main statements - those of the injured party and the accused. Of course, the principles of the criminal trial must be respected, in which respect for the presumption of innocence is one of the most important, and which complements the fairness of the proceedings as a whole, as stated in Article 6(6) of the Criminal Procedure Code. 2 of the ECHR, but also Art. 48 para. 1 of the Charter of Fundamental Rights of the European Union. It should also be noted that the Romanian legislator has also transposed Directive (E.U.) 2016/343 of the E.P. and of the Council on the strengthening of certain aspects of the presumption of innocence and the right to be present at trial in criminal proceedings<sup>8</sup>, as part of the enshrinement of procedural rights proposed to guarantee the right to a fair trial<sup>9</sup> in the provision enshrined in Art. 4 of the Criminal Procedure Code.

The resolution was included in the Stockholm Programme and the European Council underlined the non-exhaustive nature of the roadmap, inviting to study, analyze and assess the need to address other issues such as the presumption of innocence (*M. Bitanga, S. Franguloiu, F. Sanchez-Hermosilla, 2018, p. 34*).

In order to increase the guarantees of a state of facts based on a fully proven legal state, in relation to the content of the Constitutional Court Decision no. 2/2017, if the prosecutor discovers facts or circumstances that were not known during the resolution of the case and that prove the unreasonableness of the acquittal decision, he shall issue an ordinance, according to the provisions of art. 286 of Criminal Procedure Code, which will be attached to the request for review formulated in favor of the convicted person, and will be submitted to the competent court (*M. Pătrăuș, D.-D. Pătrăuș, 2017*).

Given the obligation of the court to apply both decisions rendered by European courts (ECtHR and ECJ) and legislation (European and national), it remains for the judge to evaluate and assess the evidence to what extent it has the ability to overturn the presumption of innocence. We allow ourselves to state that in the case of these offences, the judge's margin of appreciation is more permissive than the normal standard, "beyond reasonable doubt" (Art. 396(2) with special reference to Art. 103 of the Criminal Procedure Code), it being known that the rule is that a conviction cannot be ordered solely on the basis of indirect evidence. Both in doctrine and in practice there has been much debate as to whether this indirect evidence is sufficient to establish the judicial truth. The view has been expressed in the literature, and accepted by most authors, that it is possible to base a conviction on evidence, but only as an exception. This is

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<sup>8</sup> Published in OJ L 65/1 of 11 March 2016, <https://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:32016L0343>

<sup>9</sup> Recital 3 of the EU Council Resolution of 30 November 2009 <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:295:0001:0003:ro:PDF>

because, in such a case, the evidence must be very carefully and thoroughly checked by the court and is subject to clear and strict rules. In this respect, the doctrine has shown that: “First of all, a single piece of indirect evidence proves a single fact, but this fact can only be in a casual relationship with the main fact; for example, the enmity between the victim and the defendant, taken in isolation, cannot convince that the defendant committed the murder; therefore, in evidence with indirect evidence, several pieces of indirect evidence are always necessary. Secondly, what matters is not so much the number of indirect evidence as the totality of the indirect evidence, each piece of indirect evidence being part of a chain of indirect evidence, so that the removal of a single piece of indirect evidence as inaccurate entails the disintegration of the chain of indirect evidence. Thirdly, it is not necessary that the totality of the circumstantial evidence leads to a single conclusion as to the existence of the main fact (X killed Y). When the conclusion is an alternative one (Y was killed either by X or by Z), the circumstantial evidence cannot lead to a conviction and the evidence must be continued until only one version remains.” (*Gr. Theodoru, 2013, p. 291*). It has also been expressed in the doctrine the opinion, of great scientific value, still being valid today, that regarding the mediated evidence “the following rule can be formulated: the degree of veracity and conclusiveness of the mediated evidence is inversely proportional to its distance from the object of the evidence; the greater the distance, the lower the conclusiveness of the evidence”. (*V. Dongoroz, S. Kahane, G. Antoniu, C. Bulai, N. Iliescu, R. Stănoiu, 2003, p. 174*).

It is established in the jurisprudence that the absence of a report of a contravention cannot constitute proof of the guilt of the two accused police officers, for the same reason as stated above, considering that negative facts/actions cannot constitute evidence or proof in support of a criminal charge.

In addition, the evidence and the method of proof consisting of the transcript of the interception of the conversation between two persons with reference to another person is not sufficient if it is not corroborated with other evidence, because a single piece of evidence cannot be able to support a conviction, and the mere suspicion that the conversations outline is not sufficient to order a conviction<sup>10</sup>.

## CONCLUSION

*In the matter of the offences analyzed, domestic violence and maltreatment of minors, as previously stated, the standard of probation suffers an exception to the common rule, precisely because of the fact that such acts occur in privacy, without the presence of witnesses who can directly perceive the events that take*

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<sup>10</sup> S.p. no. 61/ F/ 21 July 2009 of the Court of Appeal Brașov, def. by decision no. 3516 of 8 October 2010 of the Court of Cassation and Justice, not published.

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*place, sometimes the injured person does not even want to report what happened (either out of fear of the aggressor, out of feelings of shame) so that it is difficult to achieve the standard imposed by the criminal procedure law. These circumstances make the judge's margin of appreciation wider than in other cases.*

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10. [https://www.just.ro/DMSWS/api/v1/download/by\\_token2/43c39ec2a1438c3a9383f6be2809d5ec3b261c3a82cc39bc3a0c3aa2a46e032b14c2b12e6259e2809aca9212d](https://www.just.ro/DMSWS/api/v1/download/by_token2/43c39ec2a1438c3a9383f6be2809d5ec3b261c3a82cc39bc3a0c3aa2a46e032b14c2b12e6259e2809aca9212d)



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