

Mandates of the Special Rapporteur on violence against women and girls, its causes and consequences; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material; the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity; the Special Rapporteur on trafficking in persons, especially women and children and the Working Group on discrimination against women and girls

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20 October 2022

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on violence against women and girls, its causes and consequences; Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material; Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity; Special Rapporteur on trafficking in persons, especially women and children and Working Group on discrimination against women and girls, pursuant to Human Rights Council resolutions 50/7, 42/16, 43/22, 41/18, 44/4 and 50/18.

In this connection, we would like to bring to the attention of your Excellencies' Governments information we have received concerning **the draft proposal for a Directive of the European Parliament and of the Council on combating violence against women and domestic violence**.

The proposal, based on a combined legal basis of Article 82(2) and Article 83(1) of the Treaty on the functioning of the European Union, was published by the European Commission on 8 March 2022. The Directive is intended to provide a comprehensive framework to effectively combat violence against women and domestic violence throughout the European Union.

In providing our comments, we are guided by the international human rights standards that govern the prevention and response to violence against women and girls, most notably the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child, which have been ratified by all members of the EU, as well as other international treaties and customary law principles. We welcome the fact that the draft Directive has not only referenced the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) as an important tool for preventing gender-based violence, protecting victims of violence and punishing perpetrators, but that it also seeks to work in parallel with it and to "support the Convention's implementation". We however express our concern regarding the fact that while the European Union signed the Convention in June 2017 accession to it remains pending. In order to strengthen the complementary implementation of the Directive with existing relevant legal frameworks, we join the European Parliament

Permanent Delegation of the European Union

(2019/2166(INI) and other actors, including the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), in urging the EU to finalize formal accession to the Istanbul Convention.

We consider it positive that the draft Directive acknowledges that violence against women is a violation of human rights. However, in view of the subject matter at hand, and the fact that women and girls have a right to live free from violence and that this violence results in multiple and intersecting violations of their fundamental rights, we would recommend that the directive be firmly anchored in the international and regional human rights principles that underpin this work.

Prevention of violence

We welcome the fact that the draft Directive comprises a strong focus on prevention by dedicating its entire Chapter 5 to the issue. In light of increasing online violence that women and girls are subjected to, we also welcome the fact that it proposes criminalizing certain forms of cyber violence.

However, we express our concern about the absence of an explicit mention of the responsibility of States to exercise due diligence to not only prevent, but also implement comprehensive awareness-raising programs and investigate and punish acts of violence against women, whether those acts are perpetrated by the State or by private actors, in accordance with Article 4 (c & d) of the United Nations Declaration on the Elimination of Violence Against Women. We would like to remind your Excellencies that States may be in violation of international human rights law when they fail to exercise their due diligence to adequately prevent acts of violence against women. As the CEDAW Committee established in its General Recommendation No. 19, “under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation”. The Committee also recognizes that any form of violence against women and girls constitutes a type of discrimination and a violation of their fundamental rights with regards to the Convention (CEDAW/C/BFA/CO/4-5). While we welcome the steps taken to dedicate an entire chapter to preventive measures, which are very important to halt violence against women and girls, we recommend that more specific measures be highlighted and defined in this chapter to strengthen the effectiveness of the Directive.

Furthermore, while we note with satisfaction that the draft Directive provides standards in the areas of prevention, prosecution, protection as well as legislative and policy interventions, we are concerned that the Directive does not emphasize all these subjects to the same extent. In line with the CEDAW requirement that States take a comprehensive approach to preventing and ending violence, we recommend that the Directive give equal attention to all these aspects, rather than giving preferential attention to the prosecution and criminal track as is the case in the current draft. While having an adequate criminal framework is necessary to end the impunity surrounding crimes of violence against women and children, it is not itself sufficient but requires an all-society and multi-sectoral approach to be able to end violence against women and children. In line with an all-society approach, we recommend that the Directive include a greater emphasis than that which is included in article 41 and Chapter 5 of the current draft on working with women’s organizations and involving them in all processes leading up to the adoption of the Directive as well as its implementation and

monitoring.

Related to the afore-mentioned point, it would be important for the Directive not to limit the start of the “individual assessment” to the first contact with the competent authorities as it is indicated in article 18. We would like to recall that many victims do not wish or do not have the means to reach out to the police or approach law enforcement or agents of the State for many legitimate reasons, including lack of protection for women who report gender-based violence; fear of re-victimization and retaliation; lack of female police investigators and social workers; inadequate access to shelters for victims/survivors of violence; and lack of legal aid and support services, among others. Therefore, we recommend that assessments carried out by NGOs or civil society, or other non-State service providers be recognized from the beginning of the first contact.

Binding nature of the Directive

We welcome the move of the Commission to create a dedicated, harmonized, and binding EU-wide legal instrument to prevent violence against women and children that are in line with international standards. We consider it positive that the proposed Directive provides a comprehensive definition of violence, as it identifies violence against women as “gender-based violence directed against a woman because she is a woman or that affects women disproportionately”. We also note with satisfaction that it “includes all acts of gender-based violence that result in or are likely to result in physical, sexual, psychological, or economic harm or suffering, including threats of such acts”.

In light of the current digital transformation and fast pace in which technology is evolving, it is also commendable that the report encourages a strong and global response from all Member States to cyber violence, a recent phenomenon which was not specifically mentioned during the establishment of the Istanbul Convention. Finally, we welcome the strong emphasis on domestic violence, recalling the fact that more than 1 in 5 women have suffered domestic violence within the EU.

Psychological and emotional violence

While we welcome the mention of psychological harm as an aggravating circumstance in Article 13, the reference to psychological injury in cyber harassment cases and the psychological and physical trauma that is often caused by domestic violence, we are concerned that the Directive lacks emphasis on the psychological violence associated with violence against women and girls and the psychological consequences, which are often the less visible forms of violence. In that sense, we recommend highlighting in a specific part any kind of psychological and emotional abuse or violence that may be perpetrated against women and girls. Intimidation, threats, destruction of property, verbal abuse, forced isolation, are examples of such psychological and emotional violence. The European Parliament (2019/2166(INI)) stressed on several occasions the psychological harm and long-term mental health impacts of gender-based violence in its Recommendation of 6 October 2021. Additionally, the Committee on the Elimination of Discrimination against Women recognizes psychological violence and establishes in its article 2 (a, b & c) that violence against women comprises but is not limited to psychological violence occurring in the family, within the general community, and perpetrated or condoned by the State. It should also be noted that according to the Committee on the Rights of

the Child and the Committee on the Elimination of Discrimination against Women, children that witness acts of family violence, or are exposed to it are subjects of both a form of neglect and psychological violence. We wish to remind your Excellencies that States Parties, in accordance with the Convention on the Rights of the Child, shall take any appropriate measures to promote physical and psychological recovery of a child victim of any form of violence or abuse.

Prohibited grounds for discrimination and reference to particular identities

Whereas the draft Directive lists grounds of discrimination that intersect with violence against women and domestic violence and exacerbate it, the draft, however, does not explicitly include gender identity or sex characteristics. UN Special Procedures Mandate Holders have consistently concluded that the status of these grounds under international human rights law warrants recognition in their own right.¹

The Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity has concluded that in the two decades since the passage of the Rome Statute, “an array of international human rights instruments helps to entrench calls for non-violence and the principle of non-discrimination in international law, with due respect for sexual orientation *and* gender identity.”² Key relevant developments include the recognition of sexual orientation and gender identity by the European Court of Human Rights,³ and by the European Union.⁴

Sex characteristics, each person’s physical features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, hormones, and secondary physical features emerging from puberty are also a significant ground for persecution. As noted by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, “children who are born with atypical sex characteristics are often subject to irreversible sex assignment, involuntary sterilization, involuntary genital normalizing surgery [...] leaving them with permanent, irreversible infertility and causing severe mental suffering.”⁵

Finally, we note in reference to “non-binary [...] women” that the term could be perceived as problematic by non-binary persons, whose self-identification derives from a rejection of the male-female binary.⁶ We are however fully aware of the need to ensure protection of non-binary persons assigned female at birth, who are often victims of human rights violations as a result of gender stereotyping, and other gender-related factors. We therefore suggest the inclusive expression “lesbian, bisexual, trans and other gender diverse, intersex and queer (LBTIQ) women.”

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https://ec.europa.eu/info/sites/default/files/legal_gender_recognition_in_the_eu_the_journeys_of_trans_people_towards_full_equality_sept_en.pdf; p. vii.

¹ <https://www.ohchr.org/en/special-procedures/sr-violence-against-women/femicide-watch-initiative> A/HRC/35/36, par. 20 (emphasis added).

² Id. Citing European Convention on Human Rights, Art. 14. Council of Europe, 1950. See also https://www.echr.coe.int/Documents/FS_Gender_identity_eng.pdf.

³ Id. Citing Charter of Fundamental Rights of the European Union, Art. 21(1). European Union, 2000; See also https://ec.europa.eu/info/sites/default/files/legal_gender_recognition_in_the_eu_the_journeys_of_trans_people_towards_full_equality_sept_en.pdf.

⁴ A/HRC/22/53; par. 77.

⁵ See https://ec.europa.eu/info/sites/default/files/legal_gender_recognition_in_the_eu_the_journeys_of_trans_people_towards_full_equality_sept_en.pdf; p. vii.

Collection of data

In their 2014 Joint General Recommendation/General Comment No. 31 and No. 18 on harmful practices, the CEDAW Committee and the CRC Committee stressed that the collection, analysis, and evaluation of both qualitative and quantitative data was a crucial step in the development of appropriate response to harmful practices and violence. Even though relevant data helps understand and identify policy effectiveness, it remains limited over time and geographical area which results in a limited capacity to provide adequate response to violence. We therefore welcome the initiative included within the draft Directive to improve the collection of data on violence against women and girls.

In this regard, the CEDAW Committee and the CRC Committee have recommended that States strengthen their efforts in the collection of both qualitative and quantitative data on harmful practices (CEDAW/C/GC/31-CRC/C/GC/18). We therefore note that there should be an explicit mention of the need to collect relevant disaggregated data on femicide and the gender-related killings of women and girls. The mandate of the Special Rapporteur on violence against women (A/HRC/32/42) has also recommended the establishment of a “femicide watch” or a “gender-related killing of women watch”, where data on the number of femicides or gender-related killing of women would be reported and published annually, alongside information regarding the prosecution and punishment of perpetrators. The recommendation also includes a call on Member States of the EU to establish a femicide watch, femicide review panels, or observatories on violence against women at the national and/or regional level. These should be established as interdisciplinary bodies that include legal professionals, ombudspersons, and civil society organizations’ members, as well as be connected to existing mechanisms on the prevention of violence against women.⁷

Marginalized women and residency status

In its Resolution of 6 October 2021, the European Parliament expressed concern about the disparities between Member States in their response to violence against women and girls. In particular, it notes that there needs to be adequate and equal measures to prevent, protect, and prosecute gender-based violence irrespective of the victim’s geographical location and residence status. In this regard, we recommend that the Directive reflects a broader sensitivity to the barriers that many groups of women and girls living in the EU may experience in coming forward to report incidents of violence against them, or their exposure to them, and to seek specialized protection and assistance. These include, but are not limited to, refugee and migrant women, stateless women, women belonging to racial and ethnic minorities – amongst others.

With respect to non-national women and children who may become victims of violence, we welcome the fact that article 16 of the draft Directive aims to remove obstacles for reporting, including undocumented persons and persons with uncertain residence status. However, we regret the specification that “in no way does this last aspect introduce under this Directive a right to a residence status for persons reporting violence”. We therefore wish to recall Article 59 of the Istanbul Convention on residence status and stress that parties shall take all necessary measures to ensure that victims of domestic or intimate partner violence are granted an autonomous residence

⁷ <https://www.ohchr.org/en/special-procedures/sr-violence-against-women/femicide-watch-initiative>

permit. In this regard, we recommend that the wording used in the Directive mirror that of Article 59 of the Istanbul Convention, thus safeguarding the ability of a victim of violence whose residence status depends on the spouse to obtain an autonomous residence status from her spouse in the event of the dissolution of the marriage or the relationship, in particular given that many countries for whom this Directive applies, are also members of the Istanbul Convention.

Intimate partner violence in custody

We would like to bring to your Excellences' attention the guidance provided by the European Parliament Resolution of 6 October 2021 on the impact of intimate partner violence and custody rights on women and children. The European Parliament stressed that intimate partners often use litigation to heighten their control and power over victims, but also to extend the intimidation and feeling of fear. Manipulative and abusive behaviors of the violent parent, as well as threat to harm or take the child are also common practices used to threaten and harm the mother. In this regard, we are concerned about the lack of explicit reference to custody issues in the Directive's definition of intimate partner violence. The Working Group on discrimination against women and girls has noted (A/HRC/41/33) that many women experience violence at the hands of family members, caregivers, partners, friends and acquaintances. Domestic and community violence often manifests in the form of home confinement, in which women are prohibited from leaving the home or coerced to remain in a certain location. Kidnapping or abduction also result in severe restriction of their freedom of movement. Sexual violence and sexual harassment are sometimes used as a tool to intimidate and restrict women's access to public spaces and pressure them to stay confined in private/family contexts.

Furthermore, we would like to refer to paragraph 11 of the Parliament Resolution of 6 October 2021 and recall that "failing to address intimate partner violence in custody rights and visitation decisions is a violation by neglect of the human rights to life, to a life without violence against a parent or close person" and that it is in practice to be considered as a violation of human rights. The Parliament also stressed that the protection of women and children and their best interests must be a priority in the establishment of custody arrangements. Therefore, there needs to be further investigation and consideration of the history of domestic and intimate partner violence in courts' decisions regarding custody and visitation rights. The Working Group on discrimination against women and girls recommended in this regard to eliminate laws and practices that perpetuate discrimination within the family and the community, and institute and intensify efforts to ensure the awareness and accountability of family and community members.

Learning from COVID-19 pandemic

We welcome the fact that the Directive has institutionalized the lessons learnt from the COVID-19 pandemic and its impact on increasing acts of violence against women and children, particularly domestic and intimate partner violence. As the mandate of the Special Rapporteur on violence against women noted (A/75/144) the COVID-19 pandemic, and its lockdown measures, exposed pre-existing gaps and shortcomings in the prevention of violence against women and girls, while measures to combat the pandemic have mostly been gender-blind with many States failing to consider measures to combat gender-based violence against women as essential and as basic human rights that should not be restricted. A combination of such factors

resulted in lockdown measures imposed to contain the COVID-19 pandemic negatively affecting women and increasing their risk of exposure to gender-based violence, especially domestic violence, as well as limiting access to protection measures and essential services, including reproductive health services.

The European Parliament reiterated (2019/2166(INI)) the fact that the COVID-19 crisis has shed light on the improper implementation of legal instruments to protect and prevent violence against women and girls. In this regard, we welcome the requirement outlined in article 49 that specialist support services, including shelters and rape crisis centers be considered essential during crises and states of emergency, including during health crises.

The Working Group on discrimination against women and girls pointed out (A/HRC/47/38) that during the COVID-19 pandemic, delivery of a broad range of essential sexual and reproductive health services and goods has been suspended or postponed, including: contraceptive information and services; safe abortion services and post-abortion care; mammograms, cervical cancer detection and testing and treatment for HIV and other sexually transmitted infections; support services for women and girls subjected to female genital mutilation; and fertility treatments. Among promising practice on how to address wide-ranging violations of the sexual and reproductive health rights of women and girls in various situations of crisis, such as COVID-19 pandemic is to conduct independent investigations by national and specially appointed commissions that offer clear guidance on reparations and structural reforms.

The Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health also stressed (A/76/172) that “[t]he COVID-19 pandemic further thwarted the realization of sexual and reproductive health rights” and that “[i]n some parts of the world, health-care facilities [were] reported to have reduced or interrupted their provision of sexual and reproductive health-rights related services”. She further added that this “affected patients’ ability to protect their sexual and reproductive health, avoid unwanted pregnancies and prevent or manage HIV and other sexually transmitted infections” and stressed that “persons already marginalized in society were often left out and experienced the worst harms, in particular persons in a persistent state of crisis owing to poverty or ongoing discrimination on multiple grounds including of race, ethnicity and other historical factors”.

Child Protection

While we welcome the mention in Article 36 that targeted actions should be addressed to groups at risk, including children, we regret the absence of explicit preventive measures directed to the protection of children. We would like to recall Article 19 of the Convention on the Rights of the Child, which provides that States Parties shall take all appropriate legislative, administrative, social and educational measures, as well as all forms of prevention to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

Furthermore, while the recognition by the Directive of the rights of the child in relation to Article 24 of the Charter, and the mention of support and safety of children

in Articles 33 and 34 of the Directive is welcomed, we regret that no dedicated Article provides effective measures to protect children from violence. In line with the European Parliament Recommendation (2019/2166(INI)), we would like to recall that the best interest of the child shall be the primary concern of States Parties. In addition, we would like to stress that domestic violence is incompatible with the best interest of the child, should the child be a witness or a victim of such violence.

The Istanbul Convention is the only legally binding instrument on violence against women that has an explicit provision on child custody in such situations. Its article 31 requires States to “take the necessary legislative or other measures to ensure that, in the determination of custody and visitation rights of children, incidents of violence covered by the scope of this Convention are taken into account” and that “the exercise of any visitation or custody rights does not jeopardize the rights and safety of the victim or children”. The expert body monitoring the implementation of the Convention’s standards (GREVIO), has found evidence of gender bias towards women in custody decisions and lack of attention paid by courts to patterns of abuse by fathers in all 10 States parties monitored so far.

Abuse of the term “Parental Alienation” and of similar concepts and terms invoked to deny child custody to the mother and grant it to a father accused of domestic violence in a manner that totally disregards the possible risks for the child must be discouraged. Accusations of parental alienation by abusive fathers against mothers must be considered as a continuation of power and control by state agencies and actors, including those deciding on child custody.⁸ In this regard, we call upon your Excellencies to provide explicit preventive measures devoted to the protection of the child.

While we welcome the inclusion of an obligation to provide law enforcement and judicial authorities with guidelines to ensure that victims are treated appropriately, we would like to recall the recommendation made by the European Parliament⁹, other experts and civil society organizations requesting that the Directive explicitly require training for law enforcement, the judiciary, women and children at risk, or their families. Such training should also cover the victim-centered and child centered approaches in their totality.

Likewise, guidelines should also explicitly be provided to those coming into contact with women and children regarding the abuse of pseudo-concepts such as parental alienation and similar concepts. The abuse of these afore-mentioned concepts must be explicitly outlawed in the Directive first, since they have been often used by abusive parents, usually abusive fathers against mothers, in order to deny mothers contact or custody, leading to the perpetuation of psychological and physical violence against the mother and the child.¹⁰

Furthermore, while online spaces offer a myriad of opportunities for children, they also present new risks and threats. Criminal behavior facilitated by new technologies includes online child abuse material and online sexual exploitation of

⁸ https://www.ohchr.org/sites/default/files/Documents/Issues/Women/SR/StatementVAW_Custody.pdf

⁹ On the 6 of October 2021, and in its resolution (2019/2166 (INI)), the European Parliament strongly recommended the establishment of specialized courts or section “as well as appropriate laws, training, procedures and guidelines for all professionals dealing with victims of intimate partner violence.”

See statement by the EDVAW Platform entitled: *Intimate partner violence against women is an essential factor in the determination of child custody, say women’s rights experts*
https://www.ohchr.org/sites/default/files/Documents/Issues/Women/SR/StatementVAW_Custody.pdf

children, live streaming of child abuse and the online solicitation of children. In addition to introducing measures to address child sexual abuse online, legal-normative frameworks should incorporate provisions to strengthen capacity-building and specialist training of relevant professionals to identify and address the crimes of sale and sexual exploitation of children facilitated online, and foster child-sensitive approaches when dealing with child victims and survivors. Access to remedy of child victims should be safeguarded, including through assistance to seek prompt and appropriate reparation for the harm suffered. Steps should be taken to strengthen data collection and research to identify child victims and potential victims of online sexual abuse and exploitation, taking into account all forms of sexual exploitation and gender and age profiles of victims and offenders. It is important to ensure that children and youth are involved to ensure the incorporation of their ideas and knowledge on exploitative behaviors, reporting suspicious behavior, and taking their proposals into consideration in prevention and protection strategies.

Gender Stereotyping

Finally, the last central point of concern that we would like to address is that of gender stereotyping. The right of women and girls to equality in the family has been recognized in international human rights law and guaranteed in most modern legal regimes, which have reformed family law systems to enshrine gender equality. In some countries, progress has been made in challenging gender stereotypes and the unequal roles and responsibilities attributed to women and men in the family. A considerable number of countries have developed laws criminalizing domestic violence and providing protection for victims (A/HRC/29/40). Families and communities perpetuate gender stereotypes that undervalue girls and deprive them of agency and opportunities. The Working Group on discrimination against women and girls recommended to institute measures to combat discriminatory social norms and harmful stereotypes about women's and girls' bodies, roles and capabilities (A/HRC/38/46).

In addition, the Committee on the Rights of Persons with Disabilities established in its General Comment No. 3 on women and girls with disabilities that gender stereotypes are harmful, discriminative, and hinder women from the full realization of their professional and personal fulfilment. Additionally, available evidence shows that gendered stereotyping can act as a serious impediment to women and children accessing effective prevention, protection, and response mechanisms. Article 5 of the CEDAW Convention urges States Parties to take all appropriate measures to achieve through social and cultural changes the elimination of any prejudice or practice based on gender stereotypes and the idea that either of the sexes is inferior or superior to the other. In this regard, we recommend the implementation of a section in the Directive that would address the issue of gender stereotyping among the judiciary, law enforcement, social workers and others coming into contact with women and children that are at risk of violence or surviving it. We believe that it would strengthen the prevention and response mechanisms available for women and children against gender-based violence.

In conclusion, we call upon your Excellencies' Governments to take the necessary measures to carefully review the draft Directive in light of the international human rights standards that govern the prevention and response to violence against women and girls, most notably the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child, which

have been ratified by all member States of the EU as along with other international treaties and customary law principles.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency's Government will be made public via the communications reporting [website](#) after 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

Please accept, Excellency, the assurances of our highest consideration.

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